

Verslagwaardig:	JA/NEE
Sirkuleer onder Regters:	JA/NEE
Sirkuleer onder Landdroste:	JA/NEE

**IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
IN THE HIGH COURT OF SOUTH AFRICA
(Noord-Kaapse Afdeling / Northern Cape Division)**

Case No: 1261/01
Date Heard: 23 May 2003
Date Delivered:

In the case between:

AFRIKA CINDI

APPLICANT

And

KEBARENG MODESTA CINDI

RESPONDENT

JUDGMENT

TLALETSI, AJ
INTRODUCTION AND RULE NISI

1. *This is the return date of the **rule nisi** issued by my brother*

Olivier AJ in Chambers on the 7th March 2003. The relief sought by the applicant is more or less to the following effect.

1.1 That the respondent be ordered and instructed within 14 days:-

1.1.1 to deliver and submit at Messrs. Haarhoffs Inc,
being Attorneys of Kimberley, the Certificate of

Registered Grant of Leasehold no: TL 88/1987 ("Deed of Grant"), in respect of Erf 8512 Galeshewe, district Kimberley, Northern Cape Province, Measuring 394 (Three Nine Four) Square meters and also known as 1838 Tayala Street, Galeshewe, Kimberley;

- 1.1.2 to sign all the necessary documents in terms of the Deeds Registries Act, Act no. 47 of 1937, at Messrs. Haarhoffs Inc., for the transfer of ownership of the aforesaid property into the names of the applicant.
 - 1.1.3 that in the event of the Deed of Grant being misplaced or destroyed to sign all necessary documents for an application in terms of Regulation 68(1) or any other document prescribed in terms of the Deeds Registries Act, at the aforesaid Messrs. Haarhoffs Inc, for the transfer of ownership into the names of the applicant;
- 1.2 That in the event of the respondent neglecting and or refusing to comply with the aforesaid Order, that the Sheriff for the district of Kimberley, be authorized and ordered:-
- 1.2.1 To depose to an affidavit in order to meet the requirements set out in Regulation 68(1) of the

Regulations issued in terms of the Deeds Registries Act, for the purpose of obtaining a copy of the Deed of Grant in respect of the property;

- 1.2.2 To sign all the necessary documents which were to be signed by the respondent in respect of the transfer of ownership of the property into the name of the applicant;
- 1.3 That the Registrar of Deeds for the Northern Cape Province, Kimberley, be authorized and directed in the event para 1.1.3 being applicable:-
 - 1.3.1 To issue a certified copy of the Deed of Grant on the strength of the aforesaid affidavit by the Sheriff;
 - 1.3.2 To transfer ownership of the property into the name of the applicant, on the strength of the documents signed by the Sheriff.
- 1.4 That the respondent be ordered to pay the costs of this application.
- 1.5 That the respondent's application for the declaration of annexure AC 1 annexed to the applicant's founding affidavit as well as the order for costs be dismissed with costs.

BACKGROUND AND SALE AGREEMENT

2. *The parties' marriage was dissolved on the 6th October 1989 in the High Court. Out of the parties' marriage relationship four children were born. Custody of two of the four, who were still minors, was awarded to Mrs Cindi. She was further awarded the immovable property which is the subject matter of these proceedings as her sole and exclusive property.*
3. During March 2001 Mrs Cindi had accumulated arrears with the Local Municipality in the amount estimated at R29 000,00 in respect of rates and services pertaining to the property. "Annexure AC1" to the founding affidavit is the Sale Agreement of the parties.
4. The salient terms of the Sale Agreement are to the following effect:
 - 4.1 Mrs Cindi sold to Mr Cindi the property discribed as 1838 Tayala Street, Galeshewe, Kimberley;
 - 4.2 The purchase price was fixed at the amount of R30 000,00. As part payment R8 000,00 was payable on the 13 March 2001 in order to stop the sale in execution which was scheduled for 15 March 2001. The balance was to be paid as arranged with the Municipality;

- 4.3 The transfer costs were to be at the expence of Mr Cindi;
- 4.4 Mrs Cindi was to vacate the property on or before the end of March 2001 whereafter Mr Cindi would take occupation of the property;
- 5. The Sale Agreement has been signed by both parties and bears the date of 13 March 2001. On the face of it the Sale Agreement seem to comply with the provisions of Section 2 of Alienation of Land Act 68 of 1981.
- 6. In addition to the Sale Agreement Mrs Cindi signed Annexure AC3 being an Affidavit declaring her Marital Status ("Marital Status Affidavit") as well as Annexure AC4 being an affidavit declaring that her estate is not under provisional or final sequestration ("Solvency Affidavit").

GRIEVANCES AND COUNTERAPPLICATION

- 7. Mrs Cindi has challenged the validity of the Sale Agreement and has brought a Counterapplication based on three grievances. These are:
 - 7.1 that she was unduly influenced into entering into the Sale Agreement;
 - 7.2 that she entered into the Sale Agreement as a result of the fraudulent misrepresentation on the part of Mr Cindi

and those who assisted him;

- 7.3 that she was not conversant in the Afrikaans language in which the Sale Agreement was recorded and that the contents of the document were not explained to her. She therefore did not know that she was signing a Sale Agreement.

WAS MRS CINDI UNDULY INFLUENCED INTO ENTERING INTO THE SALE AGREEMENT (Point 7.1 above)?

8. In order for Mrs Cindi to succeed in her application to declare the Sale Agreement null and void on the basis that she was unduly influenced, she has to prove on a balance of probabilities that:-

- 8.1 Mr Cindi exercised an influence over her;
- 8.2 that this influence weakened her power of resistance such that her will became pliable; and
- 8.3 *Mr Cindi exercised this influence over her in an unscrupulous manner in order to induce her to consent to a transaction which is to her detriment, and which with her normal free will, would not have concluded. See: **Patel vs Grobbelaar** 1974(1) SA 532(A) at 534 A; **Savvides vs Savvides and Others** 1986(2) SA 325(T) at 329F.*

9. *Mrs Cindi states that during December 2000 her ex-husband started to frequent her home and suggested that they should reconcile. He promised that he will take care of her and the children. To use her words, "due to his charm I regained a little bit of trust in him". During January 2001, she continues, the applicant informed her that her house was about to be auctioned. At that stage she was not aware of the pending sale in execution. She says her ex-husband undertook to pay the outstanding amount. She agreed. According to her, she accumulated the arrears with the Municipality due to some financial hardships, to which he (Mr Cindi) contributed by not complying with his maintenance obligations. She had endeavoured to recover maintenance arrears against him without success, despite the fact that he was well-off and a person of considerable means.*
10. Mr Cindi has denied the accusations against him. He states that the only talk of reconciliation took place later during the festive season and was initiated by Mrs Cindi. He turned down the attempt at reconciliation.
11. Clement Themba Cindi, the parties' son states that he became aware of the sale in execution scheduled for the 15 March 2001 after his mother showed him, in the presence of his brother and sister, a notice sent per registered post. She is also said to have specifically told them that she was as a result moving to their grandmother at

1729 Montshiwa Street, Galeshewe, and that they should go and stay with their father. Clement further intimated that he personally showed his mother a publication of the intended sale in the local newspaper, the Diamond Field Advertiser.

12. The manner in which Mr Cindi is said to have exercised undue influence over Mrs Cindi is not spelled out by Mrs Cindi in the papers. Except for the suggestion relating to the reconciliation, nothing more is said about their relationship. According to Mrs Cindi, she signed annexure AC1 during or about August 2001 when she was approached by a certain Mr. Stanley Mlingo. He would have told her that Mr Cindi wants her to sign documents at his (Mr Cindi) attorney's offices because he had paid the arrears due to the Municipality. As she did not know where these offices were, she was accompanied by Mr. Mlingo. Mr Mlingo denies this version. He intimates that he is Mrs Cindi's cousin and that he accompanied Mrs Cindi to the attorney's offices in order for her to sign the transfer documents and for him to sign the documents finalizing the Sale Agreement between himself and Mr Cindi which was discussed in her presence. He further states that she knew where these offices were. Mr Cindi lends support for this fact by stating that they attended the divorce settlement negotiations at the same attorney's offices when they were Mrs Cindi's attorneys of record.

13. ***Ex facie*** the Sale Agreement it was signed at Kimberley on the 13 March 2001 and not in August 2001 as Mrs Cindi has stated. The Marital Status Affidavit as well as the Solvency Affidavit were signed on the 1 August 2001. This date coincides with the date on which Mrs Cindi and Mr Mlingo attended at the applicant's attorneys to sign documents.

FRAUDULENT MISREPRESENTATION ON THE PART OF MR CINDI AND THOSE WHO ASSISTED HIM (Par 7.2)

14. In order for Mrs Cindi to succeed with this attack, she has to prove and disclose the contents of the representation; that when making the representation Mr Cindi knew that it was untrue or had no genuine belief that it was true; that he intended that the representation should be acted upon by her; and that she was in fact induced to act upon it. See: **Ruto Flour Mills (Pty) Ltd v Moriates** 1957(3) SA 113(T) at 116 A – B and **Service v Pondart-Diana** 1964(3) SA 277(D) at 279 A – C. An allegation is made by Mrs Cindi that her ex-husband's conduct is fraudulent. Allegations of fraud must be substantiated. See: **Nedperm Bank Ltd v Verbri Projects CC** 1993(3) SA 214(W) at 220 B – C:

“At the outset one has to observe that it is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of

fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up speculative propositions or to raise submissions or to advance arguments on probabilities which might indicate a fraud.”

15. Mrs Cindi states that she asked a Mr Morton of Mr Cindi's attorneys if her signing of the documents will not cause problems. He assured her that she need not read them as they merely reflect that she does not owe any more money. She then signed but never realised that she signed a Contract of Sale. Mr Morton denies that the Sale Agreement was signed in his presence. He also says the witnesses to the contract are not members of his staff.

16. Mr van Vuuren argued that Mrs Cindi could not have sold her property for R30 000,00 to Mr Cindi if the latter disclosed that he already had a buyer, Mr Mlingo, who is prepared to pay R85 000,00 for the home. This according to him suggests that she was being cheated or exploited by her ex-husband. According to Mr Mlingo, the sale of the house to him was discussed with Mrs Cindi. He says that she told him that she agreed to the sale to him (Mr Mlingo) as he is related to her but should it have been somebody else she would have refused. Clement said that he was also present during the discussion relating to the sale of the property to Mr Mlingo. According to him it was further agreed that the children will stay with Mr

Mlingo and that Mr Cindi undertook to pay an amount of R600,00 per month per child to Mr Mlingo for this purpose.

THE NON-EXPLANATION OF THE SALE AGREEMENT AND THE AFRIKAANS ISSUE(Point 7.3 above)

17. Mrs Cindi's version is that Mr Morton gave her a bundle of documents which were written in Afrikaans. She requested that the documents be translated into English because she did not understand Afrikaans. Her request was refused and the contents of these documents were not explained to her. Amongst these documents, she continues, was the Sale Agreement. She was advised by Mr Morton that all the parties have signed "the document" and she must just attach her signature. This issue also somewhat overlaps with the alleged fraudulent misrepresentation already discussed.

18. Both Mr Cindi and Mr Mlingo dispute Mrs Cindi's claim that she cannot read Afrikaans. Mr Mlingo further denies that any request was made by Mrs Cindi for the documents to be translated into English. Mrs Cindi in her replying affidavit states that her mother tongue is Setswana and although she can speak and understand a little Afrikaans, she is more proficient in English. She says further that she only attended school until standard 3 and cannot read very well.

19. *It is a trite principle of our law that when a person is asked to put his/her signature to a document, he/she cannot fail to realise that he/she is called upon to signify, by doing so, his/her assent to whatever words appear above his/her signature. He/*

*she is bound by the terms thereof unless there is proof of misrepresentation made as to the terms contained in the document by the other party to the contract. See: **George v Fairmead** (Pty) Ltd 1958(2) SA 465 (AD) at 472 A – B; **Sun Couriers v Kimberley Diamond Wholesalers** [2001] 2 ALL SA 646 (NC) at 652 G – H.*

20. *None of the parties argued that there is a material dispute of fact which cannot be decided on the papers. Both counsel submitted that the dispute can be decided on the papers and that there was no need to refer the matter for oral evidence. The Appellate Division in **Plascon-Evans Paints vs Van Riebeeck Paints** 1984(3) SA 623(A) at 634 H – 635 C per Corbett, JA; held:*

*“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or **bona fide** dispute of fact (see in this regard **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949(3) SA 1155 (T) at 1163 – 5; **Da Mata v Otto NO** 1972(3) SA 858 (A) at 882 D – H). In such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-*

*examination under Rule 6(5)(g) of the Uniform Rules of Court (cf **Petersen v Cuthbert & Co Ltd** 1945 AD 420 at 428; **Room Hire case supra** at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg **Rikhote v East Rand Administration Board and Another** 1983(4) SA 278 (W) at 283 E – H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...”*

21. It is true that there are several aspects in Mrs Cindi's affidavits which she could have dealt with more comprehensively. There are also aspects in the affidavits which raise a measure of scepticism. However that is not the test. I cannot say with relative conviction that Mrs Cindi's allegations or denials of Mr Cindi's averments are so far-fetched or clearly untenable that I am justified in rejecting them merely on the papers, as pointed out above. Some of the reasons follow in the next subparagraphs and points to the weaknesses in Mr Cindi's case:

- 21.1 The parties are not strangers. They were married to each other and have four children. There was a Deed of Settlement during their divorce which awarded custody of the children to Mrs Cindi. The controversial contract therefore affect the welfare and well being of their

children. The Deed of Settlement relating to the divorce should have been annexed to enable the Court to determine whether the Sale Agreement is not in conflict with its terms;

21.2 Mr Mlingo has an interest in the outcome of the case. As a result of his statements, his involvement in this matter and the references to him by both parties, not only should his contract to purchase Mrs Cindi's house from Mr Cindi have been annexed to the papers but he ought to have been cited as a party;

21.3 Clement alleges that Mrs Cindi received a Notice of Sale of the house sent per registered post. No documentary proof of such item is attached. This proof is very easy to obtain;

21.4 The greed for money by Mr Cindi is totally misplaced and inexplicable. For merely facilitating the sale of the house, he is prepared to pocket a profit of R55 000,00. See paragraph 16 above. He is prepared to exploit the misery of his former wife and his own children. It is against the divorce settlement and public policy for Mr Cindi to cause his children to stay neither with himself nor Mrs Cindi (their mother) but with a third party (Mr Mlingo) and pay maintenance to the latter. This agreement between Mr Mlingo and Mr Cindi that Mr Cindi would therefore pay maintenance of R600,00 per child per month for all the

children cannot be countenanced. This makes the production of the Sale agreement for R85 000,00 between these two men and the divorce Deed of Settlement even more relevant.

22. I am accordingly of the view that there is a material dispute of fact in the application and counterapplication which cannot be resolved on the papers. It would involve too much costs to dismiss these applications. I choose to refer them for the hearing of oral evidence on an early date to be arranged with the Registrar.

23. The parties and their attorneys are advised to settle this matter out of Court. The Registrar is directed to request the Legal Aid Board (Mrs Cindi is on legal aid) and the maintenance officer to assist Mrs Cindi to recover any arrear maintenance (see paragraph 9 above).

ORDER

The following Order is made:

1. That the application by Mr Cindi and the counterapplication by Mrs Cindi are referred for the hearing of oral evidence on a (promoted) date to be arranged with the Registrar of this Court;
2. That the evidence to be led will be that of the parties, all deponents to affidavits as they stand at this juncture, the witnesses who signed the disputed Sale Agreement between the parties and any witness whose evidence the parties deem necessary;
3. That discovery of documents deemed relevant and necessary

for the determination of these applications shall be made in terms of the Rules of Court. Amongst such documents shall be those referred to in paragraph 21 of this judgment;

4. *The applications referred to in paragraph 1 of this Order are postponed **sine die** pending the determination of their outcome;*

5. That the costs of the applications shall be costs for the decision by the Court which hears the oral evidence;

6. The Registrar of this Court is directed to request the Legal Aid Board and the Maintenance officer to assist Mrs Cindi to recover any arrear maintenance reference to which has been made in paragraph 9 of the judgment.

L P TLALETSI

ACTING JUDGE

**ADV J SCHREUDER FOR APPLICANT : INSTRUCTED BY
MESSRS HAARHOFFS**

**MR D JANSE VAN VUUREN FOR RESPONDENTS: INSTRUCTED
BY MESSRS D JANSE VAN VUUREN ATTORNEYS**