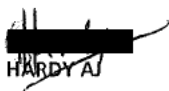


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2020/27885

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.


HARDY AJ

23 MAY 2023 31 OCTOBER 2024

In the matter between:

MAIFADI, ANTONY

Applicant

and

DOS ANJOS PEDRO, ADILIA N.O.

Respondent

JUDGMENT

APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

HARDY AJ:

1. I handed down a judgment on 26 May 2022 in which I granted an order dismissing with costs the application brought by the Applicant. I did not find that the contract entered into between him and the Deceased/Seller was void at the outset; or voidable by the Applicant and cancelled on 24 July 2020; or that the Applicant was entitled to a refund of so much of the purchase price for the immovable property that he had already paid between entering into the contract on 18 November 2016 and its purported cancellation on 24 July 2020.
2. On 17 June 2022, the Applicant filed his application for leave to appeal all aspects of my judgment and final order.
3. The application for leave to appeal was filed timeously.
4. The application for leave to appeal was heard on 16 September 2022.

APPEAL GROUNDS SET OUT BY APPLICANT IN HIS APPLICATION FOR LEAVE
TO APPEAL

5. The grounds of appeal, in summary, raised by the Applicant is that I erred in the following manner:
 - a. by not finding that the Applicant had established a case entitling him to the orders being sought by him;
 - b. by accepting the answering affidavit when accepting that the deponent had no factual knowledge of the matter;

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- c. by finding that the property sold to the Applicant is not what is described in the title deed when there is clearly an encroachment;
- d. by applying *pacta sunt servanda* without modification;
- e. by finding that the founding affidavit did not explain why the Applicant signed a contract which express terms contradicted the claimed extra-contractual misrepresentation;
- f. by finding the information provided by Mr Kwak to be inadmissible hearsay;
- g. by invoking section 2 of the Alienation of Land Act 68 of 1981;
- h. by finding that the Seller had no knowledge of the encroachment when there is evidence of him consenting to Mr Kwak encroaching on the property;
- i. by not finding that the Seller was in breach of the contract;
- j. by failing to recognise that the Seller had a duty to remove the encroachment.

APPLICABLE LAW

6. Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal the judgment may only be given if the judge who handed down the judgment, which is being sought to be appealed, is of the opinion that the appeal would have a reasonable prospect of success or that there some other compelling reason why the appeal should be heard.

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CONSIDERATION OF APPEAL GROUNDS SET OUT BY THE APPLICANT IN HIS
APPLICATION FOR LEAVE TO APPEAL

First ground: the Applicant had established a case entitling him to the orders being sought by him

7. I found that the Applicant did not establish in his founding affidavit (or its annexures) on a balance of probabilities that the Seller bore any knowledge of the factual situation of the encroachment on the immovable property forming the subject of the sale. In the absence of such knowledge, the Seller (or his agent) could not (fraudulently) mispresent such knowledge to the Applicant.
8. The Applicant relied on inadmissible hearsay to attempt to impute such knowledge to the Seller. No application was brought to accept the hearsay on any basis. The Applicant attached WhatsApp messages between him and Mr Kwak to his founding affidavit. These could only prove the extent of the discussion between him and Mr Kwak – not that Mr Kwak was telling the truth about having the Seller's consent to encroach on the immovable property. Proving the veracity of Mr Kwak's statement would require him to have deposed to an affidavit (which was not done) or to have provided the written agreement he referred to (also not done).
9. Even if the Applicant had been able to establish such knowledge and its subsequent misrepresentation, he was still not able to show that it had impacted the entering into and/or the terms of the contract – the immovable property sold was as described in the title deed without any obligation to point out its boundaries and not as the Applicant assumed on viewing it.

10. This ground of appeal has no reasonable prospect of success on appeal.

Second ground: accepting the answering affidavit when accepting that the deponent had no factual knowledge of the matter

11. I found that the answering affidavit did not contain any factual averments (no facts fell within the personal knowledge of the deponent) that were not already contained in the founding affidavit and its annexures. The answering affidavit contained legal argument based on the already undisputed facts set out in the affidavit. To this extent, I regarded it as a notice setting out legal points as provided for in Uniform Rule of Court 6 (no such notice having been filed separately). I then considered the legal points raised when hearing argument and deciding the matter. I thus did not accept the answering affidavit in the traditional sense – to use it to make findings of fact.

12. This ground of appeal thus has no reasonable prospect of success on appeal.

Third ground - finding that the property sold to the Applicant is not what is described in the title deed when there is clearly an encroachment; ninth ground – finding that there was no breach of contract

13. On the contrary, I found that the property sold to the Applicant is exactly what is described in the title deed. I suspect the Applicant's true complaint is that the assumptions he made about the boundaries of the property when viewed by him did not match the description of the property in its title deed and that he is aggrieved that I have not determined the matter in his favour on this basis.

14. My judgment has clearly set out that the contract was for the sale of the immovable property as it is described in the title deed without any obligation on

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the Seller to point these out to the Applicant and for the Applicant to satisfy himself as to the extent of the property. Thus, any incorrect understanding about the extent of the property is the Applicant's own doing and the Seller can thus not be in breach of the agreement because of the property description.

15. This ground of appeal thus has no reasonable prospect of success on appeal.

Fourth ground - applying *pacta sunt servanda* without modification

16. The Applicant expanded on this ground in his heads of argument setting out that the Constitutional Court has decided that even contracts which had been freely and voluntarily entered into would not be enforced if to do so would be unfair or unreasonable.

17. The Applicant then alleges that I held no enquiry into whether the contract was freely and voluntarily entered into. There has never been any direct allegation or even suggestion to the contrary contained in the papers. This point was never argued before me at the hearing.

18. I did not find anything unfair or unreasonable flowing from the enforcement of the contract that would entitle either of the parties to refuse to enforce its terms. The written contract was clear in its terms as to what the Seller was selling to the Applicant – who got exactly what he was entitled to in terms of the contract. The Applicant's own incorrect assumptions – which fly in the face of the express wording of the contract – do not make the enforcement of the contract unfair or unreasonable.

19. This ground of appeal thus has no reasonable prospect of success on appeal.

Fifth ground - finding that the founding affidavit did not explain why the Applicant signed a contract which express terms contradicted the claimed extra-contractual misrepresentation

20. This cannot be an error when the founding affidavit simply does not contain any allegations explaining why the Applicant signed a contract (excluding any prior representations) which terms expressly contradicted the alleged extra-contractual misrepresentation (which was found on a balance of probabilities to not have been made).

21. This ground of appeal thus has no reasonable prospect of success on appeal.

Sixth ground - finding the information provided by Mr Kwak to be inadmissible hearsay;
eighth ground - finding that the Seller had no knowledge of the encroachment when there is evidence of him consenting to Mr Kwak encroaching on the property

22. In my judgment, I accepted the Applicant's statement that Mr Kwak had provided information about the encroachment to him. I could do so on the basis that Mr Kwak had sent a direct message to the Applicant and that the Applicant then deposed to receiving this message under oath (without any contradiction of that receipt as the Respondent could not possibly have any knowledge of the messages exchanged between the Applicant and Mr Kwak).

23. This is insufficient to prove the truth of the content of the message from Mr Kwak as the Applicant would have no personal knowledge of the correctness of its contents. The truth of the content (alleged to be that the Seller and Mr Kwak had agreed in writing to the encroachment) could only be proved by Mr Kwak testifying/deposing to an affidavit in circumstances where the Seller was deceased and producing their written agreement or explaining its absence (as

it amounted to the Seller giving land to Mr Kwak, it would have to be reduced to writing at some point).

24. No explanation was ever placed before me as to why Mr Kwak did not provide an affidavit confirming the contents of his message; and thus, no basis for admitting the correctness of the content of his message was placed before the court.

25. As the content of this message was the only (inadmissible) evidence used to infer that the Seller had knowledge of the encroachment, I could not find on the evidence properly before me that the Seller had any knowledge of the encroachment (and thus that his failure to disclose it amounted to a misrepresentation as alleged by the Applicant).

26. This ground of appeal thus has no reasonable prospect of success on appeal.

Seventh ground - invoking section 2 of the Alienation of Land Act 68 of 1981

27. The Applicant claims that he did not invoke this statute in his application; it is irrelevant to the facts of this matter and that I have thus erred by relying on it.

28. The effect of this statute is that all transactions to alienate any of the immovable property in issue would have to be reduced to writing. The size of the immovable property (and possible alteration thereof by encroachment) is central to the Applicant's claims. The statute thus remains relevant even if not referred to by the Applicant.

29. I had already accepted in my judgment that the immovable property actually sold to the Applicant and the immovable property contracted for between the Seller and Applicant were exactly the same as it relied on a title deed description and never a physical view of the property.

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30. However, as a belts-and-braces approach to reiterate that the property description in the sale contract between the Seller and Applicant was indeed correct, I considered the impact of the allegation that Mr Kwak and the Seller had entered into a written agreement (rejected as hearsay evidence) and concluded that in terms of the statute and absent the written agreement alleged, no portion of the immovable property could or would have been transferred to Mr Kwak by the Seller (by agreeing to or accepting Mr Kwak's encroachment on the Seller's property). The Applicant got exactly what he contracted for – no portion of the property was excluded by the encroachment.

31. This ground of appeal thus has no reasonable prospect of success on appeal.

Tenth ground - failing to recognise that the Seller had a duty to remove the encroachment

32. I found that the Applicant continued to meet all his obligations to the Seller (and the Seller's estate after his executor decided to proceed with the sale) in terms of the sale agreement for a period of eighteen months after the Applicant was fully aware of the encroachment. This finding was made on undisputed facts presented to the court by the Applicant regarding the findings of his quantity surveyor and architect, the timing of such findings, and the proofs of payment attached to his founding affidavit.

33. It appears that the Applicant took no issue with the encroachment until trying to find a way out of the sale nearly four years after concluding it – in circumstances where it has not been established that the Seller was even aware of the encroachment; the contract does not provide for the removal of any

encroachment; and the Applicant would always be entitled to remove same once he became the registered owner of the immovable property.

34. This ground of appeal thus has no reasonable prospect of success on appeal.

COSTS

35. Neither party raised any specific argument regarding the costs of the application for leave to appeal when oral argument in the application was heard.

36. I am not aware of any reason why the general rule that the costs should follow the result of the application should not apply in the present application.

CONCLUSION

37. I cannot conclude that any of the grounds of appeal raised by the Applicant have a reasonable prospect of succeeding on appeal.

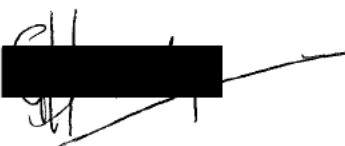
38. I am not aware of any other compelling reason why the appeal sought by the Applicant should be heard.

39. Accordingly, must thus refuse the Applicant's application for leave to appeal with costs.

ORDER

40. I accordingly grant an order the following terms:

- 1) The Applicant's application for leave to appeal the judgment in this matter handed down on 26 May 2022 is refused.
- 2) The costs of the application for leave to appeal are to be paid by the Applicant.



G B HARDY
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date of hearing 16 September 2022

Date of judgment 23 May 2023 31 October 2024

Appearances:

Appearance for Plaintiff Attorney M B Mhango

Attorney for Plaintiff Bazuka and Company Inc.

bazukam@bazukalaw.co.za

Appearance for Defendant Advocate P Cirone

Attorney for Defendant Carvahlo Inc.

mario@carvahlo-inc.co.za

POSTSCRIPT

It has come to the attention of Hardy AJ on 30 October 2024 that this judgment was not uploaded to CaseLines on 23 May 2023. It will only be uploaded to CaseLines on 31 October 2024. Accordingly, the judgment will be deemed to have been handed down on Thursday, 31 October 2024 at 10:00.