

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

Reportable/Not Reportable

Case no: D7920/23

In the matter between:

LOLETTE THERESA WEBSTER

APPLICANT

and

HESTER MAGRIETHA HASTHIBEER

FIRST RESPONDENT

PIERO DOUGLAS HASTHIBEER

SECOND RESPONDENT

ETHEKWINI MUNICIPALITY

THIRD RESPONDENT

REGISTRAR OF DEEDS, KWAZULU NATAL **FOURTH RESPONDENT**

ORDER

The following is made:

1 The applicant is interdicted from alienating and encumbering the immovable property being portion 103 of ERF 4[...] Z[...] V[...] held under title deed number 8647/2017

2 The sale agreement entered into between the applicant and the respondents on 22 December 2016 in respect of portion 103 of ERF 4[...] Z[...] V[...] held under title deed number 8647/2017 is hereby set aside

3 The subsequent transfer of the above property from the respondents to the applicant is also set aside.

4 The registrar of deeds, Pietermaritzburg, is authorised to register the transfer of the abovementioned property in the names of the respondents.

5 The applicant is ordered to sign all documents necessary to give effect to this order within 10 days of being called upon to do so failing which the sheriff of the court is authorised to sign on her behalf.

6 The applicant is ordered to pay costs of the application.

7 The application for the eviction of the respondents is dismissed with costs.

JUDGMENT

Hlatshwayo AJ:

Introduction

[1] This is an application for the eviction of the first and second respondents and all persons occupying through them the property situated at [...] K[...] Close, Newlands East, Durban. The applicant has instituted these proceedings in terms of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'). In response, the first and second respondents filed a counter application in which they sought to interdict the applicant from alienating or selling the property in question and setting aside the sale and the resultant transfer of the above property to the applicant.

[2] In the alternative, the respondents seek to retain occupation of the property pending the determination of their claim for unjust enrichment emanating from the reasonable costs of repairs and maintenance of the property and the outstanding balance due in terms of the agreement of purchase and sale of the said property. Moreover, the respondents pray that the applicant's relief be stayed pending payment by the latter of the abovementioned claims.

Background

[3] The applicant and the first respondent once shared a close relationship as friends. This friendship developed to the extent that the applicant loaned significant amounts of money to the respondents who needed those funds. In November 2016 the respondents needed monies to fund the second respondent's business. The applicant was approached and she duly loaned them a sum of R80 000. However, as part of the loan parties agreed that the respondents would sell to the applicant the property the subject matter of this application for its municipal value of R380 000.

[4] It was recorded in the agreement that R80 000 was to be paid directly to the respondents and the balance of R300 000 was to be paid to the conveyancers before transfer. This agreement culminated in the transfer of the property to the applicant on 31 March 2017. The applicant however did not take occupation after the said transfer but the respondents continued their occupation of the property to date. There is some dispute between the parties about whether the respondent's occupation was regulated by a lease agreement and there is uncertainty whether such lease agreement was verbal or in writing.

[5] The applicant nonetheless alleges that the respondents breached the lease agreement by not effecting payments of rental and have failed to pay municipal bills. As a result, the applicant terminated the lease agreement and instituted these eviction proceedings.

[6] The respondent's counter-application is premised on the allegations that the intention of both parties was always that the property would be sold back to the respondents hence the conveyancer simultaneously created two agreements. This was done *in lieu* of loans advanced by the applicants to the respondents. The second agreement was aimed at buying the said property back from the applicant. It is the respondent's contention that the above amounts to simulated transactions designed to unlawfully circumvent the application of the National Credit Act 34 of 2005 ('NCA'). The respondents submit that the entire transaction and subsequent transfer must be set aside, and the property transferred back to them.

[7] The alternative relief sought by the respondents is based on the alleged claims for unjustified enrichment, maintenance, and improvements of the property. The respondent's submission is that should the applicant's relief be granted; it must be stayed pending the finalisation of the said claim.

Dispute of facts

[8] At the commencement of the hearing counsel for the applicant submitted that there exists a dispute of facts regarding the circumstances leading up to the conclusion of the purchase and sale agreement in particular the correct amounts paid to the respondents. The applicant submitted that she paid R205 000 of the balance of the purchase price leaving an amount of R95 000. This amount was set off by the R100 000 loan advance to the respondents on 14 January 2016. The respondent denies receipt of this amount. The applicant contends that this constitutes a dispute of fact not capable of being resolved on the affidavit and that oral evidence must be heard on this issue.

[9] The respondents took a view that central to this matter is the issue of simulated transactions and that the dispute regarding payment of the full purchase price is not material to the determination of the real dispute between the parties. I must mention that in the respondents' counter-application¹ it was submitted that in light of the limited documentary evidence in support of their alternative claim for unjustified enrichment, this issue be referred to oral evidence. Nonetheless, before me, counsel for the respondents contended that there is no need for oral evidence based on the issues in dispute.

[10] Rule 6(5)(g) of the Uniform Rules of Court reads as follows:

'Where an application cannot be properly decided upon on affidavit the court may dismiss the application or make such order as it deems fit with the view to ensuring that there is just and expeditious decision, in particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order that the deponent to appear personally or grant leave for such deponent or any person to be

¹ Page 23 of the Founding Affidavit at para 73.

subpoenaed to appear, be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise.'

[11] Accordingly, a court exercises judicial discretion whether it is just to dismiss the application; refer the matter to the hearing of oral evidence, or refer the dispute to trial. Such discretion must be predicated on the existence of a bona fide and material dispute of facts that is not capable of being resolved on the papers. It follows that where there are no material and genuine disputes of facts rule 6(5)(g) cannot find application.

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[12] It bears reiterating a well-established principle that a final relief in motion court proceedings may only be granted if the facts stated by the applicant together with those facts admitted in the respondent's affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted. In addition, relief must be granted where it is clear that the denial by the respondent of a fact alleged by the applicant cannot be such as to raise a real, genuine or *bona fide* dispute of fact.²

[13] In evaluating whether a genuine dispute of facts has been raised on the papers, the court does not go to the merits of the application or defence. It merely considers whether the averments, if they were established at trial, would make out a case or a defence to the applicant's claim and whether they are *bona fide* made. This will be dependent on whether the deponent has seriously and unambiguously engaged with the issues sought to be placed in dispute.³

[14] During the hearing of this matter counsel submitted on behalf of the respondents that the fundamental dispute is whether the agreement of sale was part of larger simulated agreements designed to subvert the operation of the law and that the matter does not turn on the payment or otherwise of the full purchase price. He submitted that there is no need for the matter to be referred to oral evidence. Without making a finding on the merits, both parties have not genuinely nor unambiguously

² *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 620.

³ *Repas v Repas* [2023] ZAWCHC 24 at para 12.

raised this issue of payment of the full purchase price to warrant a material dispute of fact. The applicant has put up a conveyancer's statement of account which suggested that the amount in question was deducted as arrear rental and has on the other hand alleged a set-off in lieu of a loan. The respondents alleged without more that the full purchase price was not paid even though the conveyancer's account shows some form of payment, and the said conveyancer was not cited. Considering the issues before me, I am of the view that no material dispute of fact exist that cannot be resolved on the papers.

Supplementary affidavits

[15] Both parties filed supplementary affidavits in this matter. The applicant sought leave the court to admit her supplementary answering affidavit. The applicant submitted that the reason the supplementary affidavit was filed is because her answering affidavit does not adequately address the respondent's allegations regarding how the sale was entered into and allegations of unjustified enrichment. The respondents, however, submitted that their supplementary affidavit was filed only in answer to the applicant's supplementary affidavit. The respondents again indicated that they do not rely on their supplementary affidavit in this matter and that the applicant's supplementary affidavit does not advance either party's case.

[16] Rule 6(1)(e) provides that a court may at its discretion permit the filing of further affidavits. It is trite that our law generally recognises only three sets of affidavits in motion proceedings and this general rule must be observed. The fourth set is however allowed by our courts under limited circumstances. Thus, a party who wishes to introduce an additional affidavit seeks an indulgence and our courts exercise flexibility in permitting an additional affidavit in the interest of justice and fairness to both parties.

[17] Where the affidavit is late or out of the ordinary set, a party seeking its admission must give a satisfactory explanation as to why the affidavit is late and should be accepted out of the ordinary set.⁴ In this matter, the supplementary affidavit was filled some seven months after the applicant's answering affidavit. The

⁴ See *M & G Media Ltd v President of the Republic of South Africa and Others* [2013] ZAGPPHC 35; 2013 (3) SA 591 (GNP) at 600A.

applicant does not account for this inordinate delay other than a bald allegation that she had to acquire finances, and makes no case for why the court should admit an additional affidavit.

[18] The averments regarding the sale and transfer of the property were made in the founding affidavit. When the respondent raised the issue of an outstanding amount of the purchase price, the applicant explained that it was paid in the form of a loan. The same applies to the allegations of unjust enrichment made by the respondents. The same process unfolded when the respondents repeated these allegations in their counter-application.

[19] The applicant has, in effect, had three opportunities to address these matters but still wants a forth bite at a cherry. Her supplementary affidavit does nothing to advance either case, but a mere regurgitation of her denials of the respondents' allegations. Moreover, the supplementary affidavit was filed without the authority from the court. I am therefore not satisfied that the applicant has made out a case for its admission.

Ownership of the property and simulated transactions

[20] The applicant contends that she legitimately purchased the property in question and its subsequent transfer was lawful. The applicant relies on the written sale agreement entered into between the parties on 22 December 2016. The agreement in question records the material terms of the agreement including the purchase price and how it was to be paid. Consequently, It was submitted that she is a lawful owner as envisaged by s 4 of the PIE Act. It was the applicant's case that a lease agreement was entered into between the parties regulating the respondents' occupation of the property to date. The applicant contends that the respondents breached this lease agreement by failing to pay rent and municipal expenses. As a result, she cancelled the lease and is entitled to evict the respondents from the property.

[21] The respondents' opposition and counter application is premised on their overarching submission that the purported sale transactions between the parties are in fact simulated and were designed to conceal the true nature of the transaction.

The respondents contend that the intention was to circumvent certain legal obligations. In support of their argument, the respondents outline some of the factors that point to the said simulation. It was submitted that the applicant never took occupation of the property nor did she make use of it, the purchase price was not paid in full by the applicant and there was no genuine lease agreement entered into. The common intention of the parties was that the property was to be repurchased by the respondents. In addition, two agreements were prepared by the conveyancer at the same time. The respondents submitted that all of the above clearly indicates that the initial sale was not intended to be final.

[22] The applicant on the other hand argued that the transaction was not a simulation. Parties entered into a genuine purchase and sale agreement based on the municipal value of the property. This was followed by the payment of purchase price which resulted in the transfer of the property to the applicant. The 2016 transaction and the failed 2018 resale to the respondents are different transactions and are two years apart. The later transaction failed to see the light of the day because the respondents failed to secure a bond. In addition, the applicant submitted that there is no substance to the respondents' allegations that the transaction was designed to subvert the application of the NCA as there was no interest levied against loans advanced to the respondents.

[23] A simulated transaction is an agreement that does not reflect the true intention of the parties. It has been described as a dishonest transaction because parties to the transaction do not intend it to have the legal effect it purports to convey. This means that there is an unexpressed or tacit understanding between the parties. The purpose is to deceive by concealing the real transaction.⁵ If the agreement is a sham or pretence, parties do not intend to create obligations, and their agreement is invalid.⁶ In order to determine simulation, a court must examine the substance of the transaction over its form and establish the genuineness of the agreement by considering the true intention of the parties.

⁵ *Zandberg v Van Zyl* 1910 AD 302. See also *Rock Foundation Properties CC and Another v Dosvelt Properties (Pty) Ltd and Another* [2022] ZAGPJHC 1018.

⁶ *Long Oak Ltd v Edworks (Pty) Ltd* 1994 (3) SA 370 (SE) at 375-379.

[24] In *Zandburg v Van Zyl*⁷ Innes J held that when a court is confronted with an alleged simulation the court must be satisfied that there is a real intention definitely ascertainable which differs from the simulated intention. He then concluded that:

'The facts proved in this case do not establish a genuine contract of sale between Mrs. Van Zyl and the respondent; and that they cannot be taken higher in his favour than as amounting to a pledge of the wagon to him as security for his debt. I do not apply any harsh word to the transaction; I simply say that it was in essence not a sale, but at most a pledge, and that the Court is bound to deal with it according to its substance, and not according to its form.'

[25] It is clear that in order to determine simulation, the facts of the matter must be considered and the subjective intention of the parties adjudged objectively must be assessed. The onus is on the party who asserts that the transaction is simulated to establish simulation. Ultimately the determining factor is the genuine intention of the parties. In *Roshcon (Pty) Limited v Anchor Auto Body Builders CC and Others*⁸ The Supreme Court of Appeal stated-

'Whether a particular transaction is a simulated transaction is therefore a question of its genuineness. If it is genuine the court will give effect to it, if not the court will give effect to the underlying transaction that it conceals. And whether it is genuine will depend on consideration of all facts and circumstances surrounding the transaction.'

[26] In this matter, there are a number of unusual features in the transaction that speaks louder than its expressed terms. It is common cause that a longstanding friendship existed between the applicant and the first respondent. Various loans were advanced by the applicant to the first respondent and subsequently to the second respondent. In fact, one of the loans to the second respondent was recorded in the 2016 agreement where parties agreed that it represented a partial payment of the purchase price. This alone raises red flags regarding the real intention of the sale. When the above is considered together with the applicant's assertion that the

⁷ *Zandberg* above fn5.

⁸ *Roshcon (Pty) Limited v Anchor Auto Body Builders CC and Others* [2014] ZASCA 40; [2014] 2 All SA 654 (SCA).

balance outstanding of R95 000 was set off against the January 2016 loan, a clear picture emerges that the sale of the respondent's property was a disguise for loans advanced by the applicant. The picture is then complete when the above is considered together with other facts I shall later refer to pointing to the simulation.

[27] I have referred to the balance of the purchase price in the sum of R95 000 being set off with a R100 000 loan advanced in 2016. This on its own complicates the applicant's case because the said loan predates the 2016 sale agreement but for some strange reasons was not included in the subsequent agreement. The applicant has in essence has offered conflicting explanations regarding payment of the balance of the purchase price. The second explanation is found on the statement of account compiled by the conveyancer which reflects that the said balance was deducted as outstanding rental.

[28] Another strange feature of the transaction is the sale and repurchase of the property within a short space of time. This strongly points to lack of a permanent intention to take ownership of the property and support the respondents contention that the sale was not genuine. The attempts to lease back the property to the respondents is yet another aspect that is peculiar in this matter. The applicant submitted that the property was leased back to the respondents in terms of clause E of the sale agreement and the subsequent written lease agreement which was lost. The existence of a lease agreement is disputed by the respondents. It must be borne in mind that the alleged lease agreement is the foundation of the applicant's relief and claim for eviction of the respondents. I am not satisfied that the applicant has demonstrated the existence of a lease agreement between the parties. This is despite clause E of the sale agreement which in my view does no more than merely provide for a lease agreement to be entered in order to regulate the respondent's continued occupation of the property. The applicant's inability to provide evidence of rental payments by the respondents, or to specify how payments were made, further indicates that no lease agreement was entered into. In the end, this demonstrates that the applicant never took occupation of the property nor did she conduct any meaningful investment with the property.

[29] The transaction is further compounded by the purchase price in the sum of R380 00 which is a municipal value of the property. There were no attempts to obtain an independent valuation of the property and agree on a fair market value of the property. There is merit to the respondent's submission that parties intended to sell the property back to the respondents as demonstrated by two failed attempts in 2018 and in 2021. The transaction clearly does not make commercial sense and this is another strong evidence indicating that the initial 2016 transaction was not a true sale but was disguised as such to conceal the true transaction being a loan agreement between them.

The National Credit Act

[30] The respondents also contend that the transaction was disguised as a sale, instead of a loan, to circumvent the application of the NCA. As a result, the NCA has been contravened in several respects. It was submitted that the transaction offends s 40 which obliges the applicant to register as a credit provider, s 101 relating to the disclosure of costs of credit and interest, s 89 and 90 dealing with unlawful credit agreements, s 92 which compels pre-agreement disclosure and s 80 that requires an affordability assessment be conducted before credit is advanced. It was submitted that the loan includes deferred payment thus attracting the NCA. The respondents contends that the applicant has attempted to circumvent the application of the NCA and the simulated agreement must be set aside.

[31] Section 8 of the NCA deals with the definition of a credit agreement as, *inter alia*, a credit transaction. It in turn refers to the definition of a credit transaction in s 4 as applicable. That section reads as follows:

'(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

(2) For greater certainty in applying subsection (1)-

...

(iii) a credit agreement between natural persons who are in a familial relationship and-

(aa) are co-dependent on each other; or

(bb) one is dependent upon the other; and

(iv) any other arrangement-

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.'

[32] An arm's length transaction has been described by our courts to mean that each party is independent and seeks the utmost possible advantage from the transaction.⁹ *Allied Steelrode (Pty) Ltd v Dreyer and Another*¹⁰. The Supreme Court of Appeal held the following when dealing with facts which were to a large extent similar to this matter: 'What is apparent from evidence is that the first respondent, Mr Rippon and Mr. Chaddha had developed a friendship. They formed a close bond in personal matters outside the realms of business. The loan was offered as a gesture of friendship. It was not customary for the applicant to lend money and this was a one-time occurrence. No interest levied on the loan at all and the AOD in the event of mora, given these facts, in my view, the parties were not dealing at arm's length as provided for in s4(2)(b)(iii). There was no evidence that the appellant sought to obtain the utmost advantage from the transaction. The agreement lacked the character of a credit agreement.'

[33] Similar to *Allied Steelrode*,¹¹ the parties in this matter had formed a friendship. It is a result of the bond they had created that loans were advanced to the

⁹ *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A).

¹⁰ *Allied Steelrode (Pty) Ltd v Dreyer and Another* [2023] ZASCA 181 at para 25 ('Allied Steelrode').

¹¹ *Ibid.*

respondents. The relaxed terms with no apparent specific repayment obligations demonstrate that the loans were a gesture of friendship. There is no evidence that the applicant sought to obtain the utmost benefit from the loan transaction. The fact that no interest was levied against these loans points to the contrary and strongly shows lack of an arm's length agreement between the parties. I therefore find that the loan transaction between the parties does not amount to a credit transaction as contemplated in the NCA and the respondent's submissions that the transaction was entered between the parties to subvert the operation of the NCA has no merit.

[34] I turn now to the respondent's alternative contention that, should the applicant's relief be granted, they have a right of retention of the property due to significant improvements made to the property. The respondents rely on repairs and renovations they have made to the house. The respondents vaguely set out the alleged improvements and the amounts actually expended by them effecting the improvements. The respondents themselves states that they are not in the position to support amounts claimed and merely claim approximate amounts of damages. The respondents thus failed to make out a case for the relief sought.

[35] I however find that the sale transaction between the parties was dishonest and intended to disguise the loan arrangement between them. Therefore, the court cannot uphold the applicant's claim of ownership arising from the sale, but must give effect to the true transaction. Accordingly, I intend to grant the counter application setting aside the 2016 sale agreement and the subsequent transfer of the said property. The application for the eviction of the respondents must fail.

Order

[36] In the circumstances, the following order is made:

1 The applicant is interdicted from alienating, and encumbering the immovable property being portion 103 of ERF 4[...] Z[...] V[...] held under title deed number 8647/2017

2 The sale agreement entered into between the applicant and the respondents on 22 December 2016 in respect of portion 103 of ERF 4[...] Z[...] V[...] held under title deed number 8647/2017 is hereby set aside

3 The subsequent transfer of the above property from the respondents to the applicant is also set aside.

4 The registrar of deeds, Pietermaritzburg, is authorised to register the transfer of the abovementioned property in the names of the respondents.

5 The applicant is ordered to sign all documents necessary to give effect to this order failing which the sheriff of the court is authorised to sign on her behalf.

6 The applicant is ordered to pay costs of the application.

7 The application for the eviction of the respondent

S. Hlatshwayo
Acting Judge of the High Court
Kwazulu-Natal Division, Durban

Appearances:

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