IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 13/28876

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE SIGNATURE

In the matter between:-

MOSHE COHEN Applicant

And

PHILIP KATISHI MALEBE First Respondent

LUCY MALEBE Second Respondent

JUDGMENT

NALANE AJ:

INTRODUCTION

[1] The Applicant seeks an order rectifying an agreement between him and the Respondents relating to a property in order to correctly describe the property. The parties are agreed that the property was misdescribed and the Erf number should have been recorded as Erf No [5……] and the Deed of Transfer as [ST2…….]

[2] Applicant further alleges that the Respondents are in breach of the agreement. He seeks relief compelling them to comply by furnishing him at their cost with an electrical compliance certificate, to sign all the documentation, do all things necessary to give effect to the agreement and transfer the property to him and to authorise the Sheriff or his deputy if needs be to sign the transfer documents on behalf of the Respondents.

[3] The Applicant further seeks the usual prayer of costs but on the scale of attorney and client.

[4] The genesis of the dispute between the parties is an agreement styled Memorandum of Agreement of Sale of Immovable Property (“the Agreement”) concluded between the Respondents as sellers and the Applicant as

Purchaser of the property. It is agreed amongst the parties that the property description in the agreement is incorrect and that the correct description should be Erf [5…..] as opposed to Erf [1…..] and the Deed of Transfer Number is "[T27…….]" as opposed to "[T27…….]". I need not concern myself with prayer 1 seeking rectification because the parties agree that the property was misdescribed in the agreement. Prayer 1 therefore should succeed.

[5] The Applicant's claim is framed simply as a breach of the agreement.

[6] The material terms of the agreement are as follows:

6.1. The purchase price of the property will be R4 million which had already been paid by the Applicant to the Respondents prior to the date of signature (see clause 2.1.1).

6.2. The balance, (if any) in cash would be secured by guarantee against registration of the property into the name of the purchaser.

6.3. The agreement is subject to a resolutive condition that the seller will repay the outstanding loan plus interest in full on or before the end of March 2009 ("the resolutive condition"). Should the loan be repaid in full, then the Agreement shall become null and void.

[7] The purpose of the application is stated simply as seeking to enforce the Agreement and to take transfer of the immovable forming the subject matter of the Agreement.

[8] The agreement has a cancellation clause which provides, *inter alia*, that should either party commit a breach of the agreement the other party shall be entitled to give notice in writing calling upon the purchaser to remedy the breach.

[9] Clause 8.1 provides that the agreement constitutes the entire contract between the parties and no other conditions, stipulations, warranties or representations whatsoever have been made by or on behalf of either party.

[10] Clause 8.2 provides that no variation of the agreement shall be of any force or effect unless reduced to writing and signed by the parties.

[11] On 13 May 2013 attorneys acting on behalf of the Applicant wrote to the Respondents advising them to attend their offices within 5 working days to sign the necessary documentation to effect registration of transfer.

[12] It is common cause that the Respondents never signed any document to effect transfer.

[13] In their answering affidavit the Respondents raised a point *in limine* that the founding affidavit served on them was not properly commissioned. The affidavit which in the court is properly commissioned and this point *in limine* is dismissed.

[14] The Respondents offer a different narrative of this matter. The First Respondent states in his answering affidavit that he met the Applicant in 2008 through his erstwhile attorney Mr Peter Sapire (“Sapire”) when the latter

introduced him to the Applicant. The Applicant denies that he met the First Respondent in 2008. He alleges that on the contrary he met him for the first time after April 2009 after the First Respondent allegedly failed to repay the R4 million contemplated in the Agreement.

[15] According to the First Respondent he has business interests which include Forward Air and Sea (Pty) Limited ("Forward"). This is a company involved in forwarding and clearing, both for import and exports. Forward was experiencing financial difficulties and Sapire collecting moneys on its behalf.

[16] The First Respondent asked Sapire for an advance of funds on the condition that once Sapire had recovered from the debtors he would deduct the moneys lent to the First Respondent and pay him the difference. Sapire offered to speak to his friend the Applicant to lend money to the First Respondent.

[17] Sapire advised the First Respondent that the Applicant had agreed to a loan in the amount of R4 million. He was under the impression that the Applicant was Sapire's friend but it turned out that the Applicant was a client of Sapire. This information was initially not disclosed to him. The Applicant denies this and states that his relationship with Sapire has always been that of an attorney and client.

[18] According to the Respondents instead of the Applicant paying him the R4 million in terms of the Agreement, he only advanced the sum of R2 900 000.00.

[19] The Respondent submits that the agreement is not a genuine purchase and sale agreement but in essence a surety agreement. The First Respondent alleges that he returned the R2 900 000.00 cheque to the Applicant.

[20] In his replying affidavit Applicant denies the First Respondent's version of events and states that he lent and advanced the First Respondent money amounting in total to R5 600 000. Applicant attaches to his replying affidavit a schedule setting out copies of cheques drawn by Afrifocus Securities (Pty) Limited ("Afrifocus ") in favour of Forward. Afrifocus is a company owned by the Applicant.

[21] The cheques allegedly drawn by Applicant in favour of First Respondent are as follows:

21.1. A cheque dated 28 August 2008 in the sum of R600 000. This date is after the date of end of March 2009 on which the R4m was supposed to be repaid.

21.2. A cheque dated 14 January 2009 for R2 900 000.00;

21.3. A cheque dated 29 May 2009 for R200 000.00. The cheque for R200 000.00 dated 29 May 2009 is dated long after the end of the March date contemplated in the resolutive condition contained in the Agreement.

[22] Another document is substantiation of the payments to the First Respondent is something that appears to be an extract from some records of a bank indicating electronic transfer of funds in the sums of R200 000.00, R1 600 000.00, and R100 000.00 paid to Forward. It is no clear where the funds came from and what they were in respect of.

[23] According to the Applicant the amount of R5 600 000 advanced to the First Respondent attracted interest at 3% per month and there is still a balance outstanding which will form the subject matter of separate legal proceedings.

[24] According to the First Respondent he never received the sum of R4m from the Applicant and only received R2 900 000 which he repaid in full. In substantiation the First Respondent attaches copies of cash cheques drawn by Forward.

[25] The Applicant refutes what the First Respondent states and alleges that there was no punctual payment even of the R2 900 000 advanced to the First Respondent. He states that only R2 498 000.00 was repaid to the Applicant over four years, and that this appears even from the documents supplied by the First Respondent.

[26] The Respondents filed a supplementary answering affidavit on the basis that the Applicant in his replying affidavit had raised certain issues which were never raised in the founding affidavit and constitute complete new evidence. The new issues are that the Applicant in his reply stated that he lent and advanced the Respondents through Afrifocus the sum of R5 600 000. In

support Applicant attached extracts of bank statements and cheques drawn by Afrifocus.

[27] The First Respondent alleges that the wrong party has been sued in that the moneys were not advanced by the Applicant personally by Afrifocus to Forward. This point can be dismissed simply. When parties in this matter lent moneys to each other, (whatever the quantum) they knew and appreciated that the moneys were to be used by the First Respondent for the purposes of his business, Forward, which had financial difficulties. It is irrelevant whether the money came from Afrifocus or whatever other source. As between the parties they acknowledge that they lent each other moneys and the dispute is whether the amount lent is R4 000 000 as alleged by the Applicant or R2 900 000 as alleged by the Respondents and whether it has been repaid.

[28] The Respondents further allege that the Agreement is not a sale agreement as indicated but a suretyship Agreement. In my view nothing turns on how the parties characterize the agreement and this point cannot succeed. What is of paramount importance are the terms and conditions of the Agreement, and not what it is called.

[29] In our law there is a rule called the parol evidence rule which is has been expressed as follows:

"*When a contract has been reduced to writing, the writing is, in general, regarded as exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or*

secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence …"[1]

[30] Whether the Agreement is a surety or a sale can only be determined with reference to the wording of the contract. The wording does not state that it is a suretyship agreement. On the contrary the agreement is styled "*Memorandum of Agreement of Sale of Immovable Property*".

[31] The Respondent also raised the defence of prescription in respect of the amounts which were allegedly advanced between 28 August 2008 and 14 September 2009. This ground cannot be sustained in that the Applicant's claim is based on a breach of the written contract and the relief sought is transfer of the property and not a claim for the separate amounts advanced. The defence based on prescription is therefore bad and is dismissed.

[32] The Respondents raised a further point that the remedy available to the Applicant was to sue them for the loan amount advanced and only in the event that they failed to pay would he be entitled to issue summons, obtain judgment and attach the immovable property in execution. The Agreement says nothing of the sort. This point is unsustainable. The Agreement simply states that the amount of R4 000 000 is acknowledged by the Respondents to have been advanced to them by the Applicant and that it was payable by the end of March 2009, failing which the property will be sold to the Applicant.

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[1] Union Government v Vianini Ferro-Concrete Pipes (Pty) Limited 1941 AD 43 at 47; Dreyer v AXZS Industries (Pty) Limited 2006 5 SA 548 (SCA) at 554 B - A; Van der Merwe et al Contract General Principles 3rd Edition p.173

[33] As counsel for the Applicant Mr Nowits correctly argued, the condition relating to repayment is a resolutive condition. A resolutive condition does not postpone the operation of the obligation: the obligation operates in full, but it may come to an end if certainty is reached, in that the condition is fulfilled or in that it fails.[2] This is in contrast to a suspensive condition which suspends or postpones the full operation of the obligation which it qualifies until certainty is reached, in that the condition is fulfilled or in that it fails.[3]

[34] The Agreement in this matter came into operation upon its signature and would only be rendered null and void in the event that the loan was repaid. If the loan is not repaid then the sale part of the agreement becomes operational.

[35] What is clear is that the Applicant lent certain sums of money to the Respondents. The moneys were lent advanced from the period 28 August 2008 up to 14 September 2009. So even after the end of March date fixed for the repayment of the R4m had passed, the Applicant continued to advance more money to the First Respondent. According to the Applicant he advanced an amount of R1 600 000.00 on 28 July 2009 and a further amount of R100 000.00 on 14 September 2009. This begs the question why the Applicant would continue lending more money to the First Respondent, if as at the end of March 2009 the First Respondent was truly in breach of the Agreement.

[36] The circumstances relating to how the moneys were lent and advanced only became clearer once the Respondents had filed their answering affidavit. In his

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[2] Van der Merwe supra p.289
[3] Van der Merwe supra

replying affidavit the Applicant provided more context and facts relating to how the amounts allegedly lent were advanced and when such advances were made.

[37] It is incumbent upon a litigant who brings an application to disclose all the relevant facts in his founding affidavit, particularly where it is anticipated that the Respondent may dispute some of the allegations in the founding affidavit. An applicant should make out his case in the founding affidavit and not in reply.[4]

[38] The First Respondent alleges that it would have been impossible for him to have agreed to repay the R4 000 000 within a space of three months and that this supports his allegation that the agreement between him and his erstwhile attorney Sapire was that the latter will recover moneys on his behalf and there would be a set off of sorts. This allegation cannot stand because the agreement on which the Applicant relies makes no reference to the role that Sapire would play in the transaction. The Agreement is simply between the Applicant and the Respondents with no reference to Sapire.

[39] It appears from the Replying Affidavit that the First Respondent provided additional security to the Applicant in respect of the R5 600 000 lent and advanced. Applicant states that he took the additional security in the form of a member's interest in another close corporation owned by the First Respondent. He was assured by the First Respondent through Sapire that there are in fact

[4] Primedia Broadcasting Ltd and Others v Speaker of the National Assembly and Others 2015 (4) SA 525 (WCC) at p 541 – 542 par 26

two units owned by the close corporation and it turned out that there was only one. It is not clear what units the Applicant refers to and what the values thereof are. It is not apparent from the papers whether the unit is a fixed property or what its nature is.

[40] It appears therefore that the Applicant has recovered at least a part of the moneys lent and advanced in the form of the member's interest in the close corporation. In addition the Applicant has been paid an amount on his own version of R2 498 000.00 which is more than half of the debt. The debt may well have been extinguished, but this is not clear from the papers.

[41] It would be unfair to order the transfer of the property from the Respondents to the Applicant, even assuming that the amount advanced is R4 000 000 under circumstances where the Applicant may have been repaid in full. Due to the paucity of facts this possibility that the Applicant's debt may have been extinguished is not unreal.

[42] On the other hand there is the allegation by the First Respondent that only R2 900 000 has been advanced.

[43] On the version of the First Respondent he has repaid R2 900 000 to the Applicant. If the First Respondent is correct then there is nothing outstanding to the Applicant. If the Applicant is correct that the amount advanced is R4 000 000, and that only R2 498 000.00 has been repaid that would leave a balance of R1 502 000.00. The agreement is silent regarding what should happen in the event that a portion only of the R4 000 000 is repaid. Does it mean that the

Respondents are still to part with their house even if they have paid more than half of the loan?

[44] It is therefore clear that there are many unanswered questions which cannot be resolved on the papers.

[45] The Applicant has urged the court to find that there are no real disputes of facts in this matter. I am not convinced that the facts are as clear as the Applicant alleges. The legal principles applicable in motion proceedings when there is a dispute of facts on the papers are well established.[5] Where in motion proceedings disputes of fact arise a final order can be granted only if the facts averred in the Applicant's affidavits, which have been admitted by the Respondents, together with the facts alleged by the latter justify such an order.[6]

[46] On the version of the Respondents they did not breach the agreement. On their version they did not receive the R4 000 000 but only R2 900 000.00 and this they have repaid in full. If the Respondents are correct, then the Applicant cannot succeed.

[47] There is an additional point raised by the Respondents that they were not placed in *mora*. The Applicant denies that the Agreement contemplates that in case of breach the Respondents must be placed in *mora*.

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[5] Plascon Evans Paint Limited v Van Riebeck Paints (Pty) Limited 1984 (3) SA 623A at 634
[6] National Director of Public Prosecutor v Zuma 2009 (2) SA 277 (SCA) at 290 par 26

[48] When a contract fixes a time for performance *mora* is said to arise from the contract itself and no demand is necessary to place the debtor in *mora* because, figuratively the fixed time makes the demand that would otherwise have to be made by the creditor.[7] When a debtor undertakes to discharge an obligation on a specified date the creditor need make no demand on the debtor who is in *mora* if he fails to pay on the appointed date.[8]

[49] In the premises I am not able to grant the relief sought by the Applicant. I enquired from both parties what I should do in the event that I am unable to resolve the disputes on paper.

[50] The First Respondent also made allegations that the reason he signed the agreement was because he was placed under duress by the Applicant and Sapire. These allegations are denied by the Applicant. When I asked Mr Malema, counsel for the First Respondent regarding what duress was placed on the Applicant it appeared that the First Respondent was under tremendous financial pressure to sign. It therefore appears to me that the duress alluded to is the financial pressure that the First Respondent was under. Respondents signed the Agreement voluntarily. First Respondent is not an unsophisticated person. He is an astute businessman who signed because he wanted money to rescue his business.

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[7] Christie *The Law of Contract in South Africa* 6th Edition p.519
[8] Laws v Rutherford 1924 AD 261 at 262

[51] The First Respondent also raised the defence that the Applicant should have registered as a creditor provider in terms of the National Credit Act[9]. There is no substance to this point. Applicant is not a credit provider as defined[10] and the Agreement does not fall within any of the defined categories of credit agreement[11].

[52] I am of the view that this matter should be referred to trial. The fundamental dispute is how much was actually advanced by the Applicant to the Respondents. Even though the agreement records that R4 000 000 was advanced the parties are agreed that at least more than half of the money loaned has been repaid. Of the balance the Applicant may have recovered either a portion or the whole by taking the security of the unit owned by a close corporation, which First Respondent ceded to him. These facts can only be properly ventilated in a trial.

[53] In the premises I grant the following order:

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[9] Act 34 of 2005

[10] **credit provider'**, in respect of a credit agreement to which this Act applies, means-
(a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
(b) the party who advances money or credit under a pawn transaction;
(c) the party who extends credit under a credit facility;
(d) the mortgagee under a mortgage agreement;
(e) the lender under a secured loan;
(f) the lessor under a lease;
(g) the party to whom an assurance or promise is made under a credit guarantee;
(h) the party who advances money or credit to another under any other credit agreement; or
(i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into;

[11] Section **8 Credit agreements**
(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-
(a) a credit facility, as described in subsection (3);
(b) a credit transaction, as described in subsection (4);
(c) a credit guarantee, as described in subsection (5); or
(d) any combination of the above.

1. The dispute between the Applicant and the Respondents is referred to trial.

2. The papers in this application shall serve as pleadings in the action.

3. The parties may supplement or amend the papers as may be necessary.

4. Costs will be in the cause.

Nalane, AJ
Acting Judge of the High Court of South Africa

Appearances:

For Applicant: Adv Nowits
Instructed by: Nowitz Attorneys

For Respondents: Adv VMJ Malema
Instructed by: Kgasago Attorneys

Date of hearing: 07 October 2015
Date of judgment: 17 November 2015