REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/10308

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

5/5/17
Date:

WR MOKHARI

In the matter between:

PETER GLEN RICHARDSON	First Applicant
TRACY HEATHER RICHARDSON NO	Second Applicant
VAUGHN CRAIG CHURCHILL NO	Third Applicant
PERRYN HEATHER RICHARDSON NO	Fourth Applicant

and

NELSON MARCIANO REISINHO FERNANDES	First Respondent
REGALIS PROPVEST 11 (PTY) LTD	Second Respondent
DSNP GROUP HOLDINGS (PTY) LTD	Third Respondent
MARK SHANE GROENEWALD FERNANDS NO	Fourth Respondent

ISABEL MARIA CASEIRO FERNANDES NO Fifth Respondent

VICTOR MANUEL DOMINGUES NO Sixth Respondent

JUDGMENT

Mokhari AJ:

1. The applicant seeks in terms of the amended notice of motion orders in terms of Prayers 1 to 5 and a cost order in Prayer 6. However, during argument, counsel for the applicant submitted that for purposes of this application and for the relief sought on motion proceedings, he does not seek any relief sought in Prayers 1, 2 and 3 because having regard to the dispute of fact the applicant would not pass the test of how disputes of fact are to be resolved in terms of the test set in Plascon Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A). It was submitted on behalf of the applicant that the only relief sought for present purposes is one contained in Prayers 4 and 5. In Prayer 4 the relief sought is that the second respondent is liable to make payment to the first applicant in the amount of R3 785 000.00. In Prayer 5 the order sought is that the second respondent is liable to make payment to the first applicant of interest on the above amount at the rate of 9% per annum calculated from 31 December 2014.

2. Prayers 1 to 3 which are not proceeded with, sought payment from the second respondent to the first applicant in the sum of R55 000.00 per month for the months of August 2014 to the date of judgment; that the respondents consent

to a mortgage bond being registered over the immovable properties owned by the second respondent. Prayer 3, simply states that in the event of the respondents failing to comply with Prayer 2 within 7 days, of any written demand, that the first applicant be authorized to sign all documentation on behalf of the respondents to give effect to Prayer 2.

3. The application is opposed by the respondents. A request was made during argument by counsel for the applicant that should I find that an order cannot be made on papers as they stand, because of disputes of fact which cannot be resolved on paper, I should refer the matter to oral evidence or to trial. The request to refer the matter to oral evidence or trial is opposed by the respondent.

4. In persisting with Prayers 4 and 5 of the notice of motion, the applicant contends that they are entitled to restitution. The respondents objection to such a relief is that no case for restitution has been made out in the founding affidavit and no mention of restitution is made in the founding affidavit. The applicants' response to the aforesaid contention by the respondent is that indeed no case for restitution is foreshadowed in the founding affidavit but restitution is claimed on the basis of what is alleged by the respondent in the answering affidavit. It was contended on behalf of the applicant that it is permissible for the applicant to make out a case in reply or a case founded in the answering affidavit in certain circumstances. It was submitted that the authority for that proposition is Administrator Transvaal vs Theletsane 1991 (2) SA 192 (A).

5. The allegation that the applicant seeks to rely on in the answering affidavit in order to make out a case for restitution is the last paragraph of paragraph 20.3 which reads as follows:

> *"It was originally agreed between us that all such payments were made. However, as a result of the aforementioned, I verbally cancelled the agreement on behalf of the second respondent with the first applicant, when the first applicant and I were appearing at Court, on or about December 2014; the first applicant and I were appearing at the specialized Commercial Crimes Court. The first applicant accepted such a cancellation, and informed me that we needed to stick together to fight the charges against us. When I refused to do so, and advised him that I had no intention of doing so as I had no knowledge of the fraud, nor benefitted therefrom, he began to threaten me and my family. The remaining allegations are denied for those reasons aforementioned."*

6. Whilst the applicant seeks to rely on the respondents allegation in paragraph 20.3 of the answering affidavit as reproduced above, strangely, in the replying affidavit, in replying to paragraph 20 which encompasses paragraph 20.3, the applicant denied the allegations contained in that paragraph. As a result, the applicant cannot rely on an allegation that it denies in reply to make out a case which was never made in the founding affidavit. Theletsane is not authority to the proposition that an applicant is entitled to make out a case in reply or based on a case in the answering affidavit. In fact, the applicants' case fails on a simple test of Plascon Evans. However, this application falls to be dismissed purely on a basis that the relief sought is premised on a cause of action not pleaded or alleged at all in the founding affidavit nor was it alleged in the replying affidavit. No case for restitution has been made out neither has one pleaded. The application is bad in law and falls to be dismissed.

7. It follows that the applicant cannot be entitled to the relief set out in Prayers 4 and 5. The applicant also correctly abandoned Prayers 1, 2 and 3 albeit belatedly. No case is made out in the papers for those prayers. It follows that the entire application should be dismissed.

8. Regarding referral to oral evidence or trial, I was not referred to any issues which ought to be referred to oral evidence and what the nature of the dispute is or will be. A referral to oral evidence or trial is not merely there for the taking. A case ought to be made out for such a referral and satisfactory explanation provided as to why the applicant did not institute action instead of motion proceedings and whether the applicant did not foresee the possibility of dispute of fact not capable of resolution on paper.

9. In my view, this application was ill-advised, and it was premised on a cause of action not pleaded at all.

10. It follows that the application ought to be dismissed as there is nothing to refer to oral evidence. It is simply dismissed on the basis that no case has been made out in the founding or replying papers for the relief sought.

11. Accordingly, I make the following order:

    11.1 the application is dismissed with costs.

W'R MOKHARI
ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicants:

Counsel: **Adv H A Van der Merwe**

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