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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 28732/2017

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

DATE

SIGNATURE

In the matter between:

BADELA: SIBONGILE MURIEL

obo

ESTATE LATE CHRISTIAN MALILA NDOU

Applicant

And

DAVID SEAN HARDING

First Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Second Respondent

SHERIFF BOKSBURG

Third Respondent

MASTER OF THE HIGH COURT,

JUDGMENT

BOKABA AJ

1. This is an application for an order that the sale of land agreement in respect of a property described as [...] L. Street, Boksburg entered into between the late Christian Malila Ndou and the respondent is valid, and that the first respondent be directed and ordered to sign all necessary transfer documents in order to effect transfer of the property described as Erf [...] Boksburg South into the Estate of the Late Christian Malila Ndou. Further that in the event of the first respondent failing to effect such transfer, then the Sheriff of the Court in whose area of jurisdiction the property is situated be directed and ordered to sign all necessary transfer documents in order to effect transfer of the property.
2. The applicant is the surviving spouse and the executor of the Estate of the Late Christian Malila Ndou with whom she was married in community of property at the time of his death on 12 January 2014.
3. The claim for the transfer of the property is based on a written sale and rental agreement which was concluded between the Late Mr

Ndou and the first respondent on 1 March 2002. The purchase price and the rental were to be paid in monthly instalments over a period of 12 months commencing 1 March 2002 and ending 28 February 2003. Some of the material terms of the agreement have been captured as follows:

- 3.1. The property has been sold by the seller to the purchase for R200 000 (two hundred thousand rand) that will be paid in instalments each month within a period of one (1) year, incurring an agreed interest of 7.5% for the total amount. Therefore the purchase price at the end of one (1) year period (28 February 2008) will be R215 000 (two hundred and fifteen thousand rand). This agreement will commence as at 1 March 2002.
- 3.2. A reduced rental has been agreed upon. This amount is R2 500 (two thousand five hundred rand) per month. The original rental would have been approximately R3 500 (three thousand five hundred rand) if this sale agreement had not been entered into.
- 3.3. Payments over and above the monthly rental will be paid to the seller each month - ranging between R15 000 (fifteen thousand rand) and R20 000 (twenty thousand rand), the full payment of R215 000 (two hundred and fifteen thousand

rand) excluding rental payments must be paid to the seller before the 1st March 2003. The seller reserves the right to accept the lesser amounts of purchase payments from the purchaser on a monthly basis, as long as the full amount of R215 000 (two hundred and fifteen thousand rand) is paid within the year period as mentioned above.

3.4. Should the purchaser default, the seller is under no obligation to refund any sums of money to the purchaser whatsoever. However, negotiation into this matter may be considered, without prejudice to the seller's initial rights.

3.5. Transfer of the property will be at the purchaser's expense and may only materialise once the purchaser has paid all outstanding payments to the seller as agreed herein.

4. The sale and purchase of the property was confirmed by the first respondent in a letter dated 27 November 2002 which reads as follows –

"To whom it may concern

*RE: PURCHASE OF PROPERTY – [...] L. STREET,
BOKSBURG 1460*

Dear Sir/Madam,

This letter, signed by the current registered owner of the abovementioned property, serves to confirm that Mr Christian Malila Ndou (ID ...) has purchased and paid in full for the property in question. A cash deal was negotiated and all funds were paid directly to me.

Transfer of the property will be concluded in the near future.

For any queries in relation to the above, please contact me on 082 [...] or office number 011 [...].

Yours faithfully

David Sean Harding (...)"

5. I return later to the purpose for which, it is claimed, the letter was written. Suffice for current purposes to state that the following issues are common cause: that

- 5.1. the sale and rental agreement between the Late Christian Malila Ndou and the first respondent was concluded on 1 March 2002;

- 5.2. instalments and rental payments were made in terms of the agreement for the purchase and rental of the property;
 - 5.3. the terms of the letter addressed by the first respondent dated 27 November 2002.
6. What is in dispute is the total amount paid by the Late Mr Ndou to the first respondent in respect of the agreement of sale and rental; the truthfulness of the contents of the letter admittedly written by the first respondent on 27 November 2002; and whether the agreement of sale and rental concluded between the Late Mr Ndou and the first respondent was subsequently orally terminated or cancelled by the first respondent.
7. The first respondent's defence has three components to it, namely;
 - 7.1. first, that there exists a dispute of fact on the papers that the applicant ought to have known or knew about and accordingly the application should be dismissed, in the alternative, the matter be referred to trial;
 - 7.2. second, that the sale agreement concluded between the deceased and the first respondent in respect of the immovable property was verbally cancelled pursuant to an agreement concluded between the first respondent and the

deceased whereby the deceased purchased from the first respondent certain equipment to the value of R82 000 (eighty two thousand rand); and

7.3. third, that the letter written by the deceased and dated 27 November 2002 referred to above confirming payment of the full purchase by the deceased was written by the first respondent at the request of the deceased in order to confirm the deceased's credit worthiness to people with whom he was doing business and that the letter was given to him for that purpose and that purpose only.

8. The first respondent asserts in his answering affidavit that there is a dispute of fact arising between the parties as evidenced by the first respondent's attorney's letters addressed to the applicant on 20 June 2017. The relevant parts of the letter read as follows:

"3. At the meeting you produced four copies of four receipts, three of which correspond by date with three cheques, these dated the 4th March, 27th March and 30th April 2002. The three receipts are each for R2 500.00 less than a cheque bearing the same date. This is simply because the rental factor was deducted from the cheque payment in each instance. Your attempted explanation at the meeting that the receipts

were for cash monies received and the cheques were proof of additional payment is a poor fabrication and we deplore your attempt at deceit.

...

5. *Our client and the deceased did other business in terms of which our client sold to the deceased who purchased:*

- 5.1 *20 x generators at R2 500.00 each;*

- 5.2 *2 x compressors at R2 500.00 each;*

- 5.3 *30 bicycles at R900.00 each.*

6. *It was agreed between our client and the deceased, at some point in time, our client is a little hazy about the date, to cancel the sale and appropriate the monies paid in payment of future rentals and the goods sold as referred to in the preceding paragraph. The deceased remained in occupation and continued to use the property as offices for his various business ventures."*

9. Counsel for the first respondent submitted that there are three issues on which the dispute of fact arises, namely,
 - 9.1. whether the written agreement of sale and rental was orally cancelled;
 - 9.2. second, whether the full balance of the sale transaction was paid and whether there was another agreement in terms of which the deceased purchased from the first respondent certain items as specified; and
 - 9.3. third, the purpose for which the letter signed by the first respondent dated 27 November 2002 confirming payment of the full purchase price, was written.
10. It was contended in this regard that the first respondent has seriously and unambiguously addressed the disputed facts by setting up a completely different version to that of the applicant. To bolster the argument it was further submitted on behalf of the first respondent that the applicant's most important witness is deceased and that the applicant was neither privy nor a party to the oral agreement of cancellation of the written agreement of sale and rental.
11. On those basis, the first respondent contends that the application should be dismissed, alternatively, that the matter be referred to trial.

12. The proper enquiry to determine the existence of a dispute of fact in motion proceedings was laid down in the *Room Hire*¹ decision. The Court held that a dispute of fact arises where the respondent denies all the material allegations made by the applicant and produces positive evidence to the contrary.²
13. The respondent must raise a “*real, genuine, or bona fide dispute of fact*”.³ It is insufficient for the respondent to simply make a bare denial:

“[13] *A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess*

¹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

² *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.

³ *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 I.

knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. ...”⁴

14. A dispute of fact will accordingly arise in this matter where the first respondent has denied the material allegations made by the applicant and the first respondent has produced positive evidence to the contrary. It is insufficient for the first respondent to make a bare or ambiguous denial. He must provide an answer or countervailing evidence.

15. On all of the three issues on which the first respondent claims that disputes of fact arise, the first respondent is required to adduce sufficient evidence on affidavit which provides a prima facie case. These are crucial issues which the first respondent cannot just be nonchalant about in his answering affidavit and simply refer to a letter written by his attorney on 20 June 2017 as support for his claim. All the facts around the oral cancellation and sale of other items lie purely within the knowledge of the first respondent which he cannot be hazy about.

⁴ *Wightman t/a JW Construction v Headfour (Pty) Limited and Another* 2008 (3) SA 371 (SCA), at para 13.

16. In this regard, it is settled law that a party wishing to rely on an oral agreement, is required to show when, where and how the acceptance of the terms of the agreement was expressed by each of the parties to the agreement and must clearly establish the terms and contents of such agreement.⁵
17. I am in no way suggesting that the first respondent bears the onus in these proceedings. All I am restating is that the first respondent should, at the very least, provide some prima facie evidence of matters that are peculiarly within his own knowledge. This the first respondent has failed to do.
18. To the extent that the first respondent wishes to rely on an oral agreement, the first respondent was required to produced positive evidence of such an agreement that would at least establish the existence of such an agreement were the matter to be referred to trial.
19. However, the first respondent's answering affidavit is lacking in material detail on the issues around the cancellation and purchase of other items by the deceased. The first respondent does not provide any details as to when or where the written sale and rental agreement was orally cancelled. Nor does he provide any detail as to when, where and how the alleged items were sold and delivered including the issue of whether or not invoices are available in respect of the

⁵ *Rooyendal (Pty) Limited v The Minister of Land Affairs* [2015] ZASCA 108 para 13.

sale of goods transaction. It cannot therefore be concluded that the first respondent has raised a bona fide defence or has raised a bona fide dispute of fact.⁶

20. There is substantial and cogent evidence set out by the applicant in the founding affidavit which is either undisputed or admitted by the first respondent. First, the written sale and rental agreement is admitted in toto by the first respondent. The first respondent has also admitted that a bulk of the purchase price, interest and rental monies due in terms of the written sale and rental agreement were in fact paid to him by the deceased. Third, on 27 November 2002 the first respondent issued a letter confirming that the deceased had purchased and paid in full for the property that was sold in terms of the written sale and rental agreement and that the transfer of the property was imminent. It is not sufficient to simply claim that that letter was written for a different purpose.
21. In this regard, it is well established that relief may be granted in motion proceedings in certain circumstances where factual disputes are alleged:

“26. Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the

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See - *Naidoo and Another v Sunker and Another* (126/11) [2011] ZASCA 216.

*circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent ... , together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*⁷

22. The first respondent's claims in his answering affidavit are bare and do not come close to challenging the assertions made by the applicant or to rebut the cogent evidence in the applicant's affidavit regarding the written sale agreement and confirmation thereof by the first respondent. The allegations made by the first respondent are bare and far-fetched on all of the issues on which the first respondent claims that a dispute of fact has arisen. It is not sufficient for the first respondent to simply deny assertions made in the founding affidavit and to faintly allege that the written sale and rental agreement was

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National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 26.

orally cancelled or another sale of goods transaction was concluded between the first respondent and the deceased or that the letter of confirmation of the written sale agreement was written for a different purpose.

23. What is clear though, is that there was a written sale and rental agreement in respect of the property, substantial payment was made by the deceased following on that transaction and that there is confirmation by the first respondent himself that there had been payment of the full purchase price for the property. There is no cogent evidence to dispel these facts. The only dispute, insofar as I can discern, is whether the remaining amount is R12 500 (twelve thousand five hundred rand) as alleged by the first respondent or R5 000 (five thousand) as stated by the applicant, which appears to be in respect of the rental.
24. I must also mention that counsel for the first respondent asked me to infer that the goods were indeed sold during or about mid 2004 and also infer that there was oral cancellation of the written sale and rental agreement. I was also urged to find that the applicant was neither privy nor a party to the oral agreement of cancellation and cannot give any evidence to the contrary. All of that said, it is still not good enough to amount to a genuine dispute of fact and less so constitute sufficient evidence which provides a prima facie case. It is not sufficient for the first respondent to just cast aside the deed of sale

and rental, which is clearly admitted by the first respondent and the letter confirming the sale transaction and full payment following a transaction, and faintly claim that there was an oral cancellation and that the letter which is in clear terms, was after the fact and belatedly for another supposed purpose. For the first respondent to go as far as to state that the deceased is no longer alive to contest or dispute the first respondent's claim is to be clever and opportunistic after the event.

25. In sum, the allegations made by the first respondent in his answering affidavit do not diminish or challenge the substance and import of the deed of sale and rental and the first respondent's own letter confirming full payment. At best, the first respondent's allegations only constitute a vague claim that does not raise a genuine dispute of fact justifying the dismissal or even referral of the matter for trial. Significantly, the first respondent has confirmed the sale of land as a cash transaction.

26. Ordinarily, in sale of land transactions the legislature has provided for some protection to purchasers in instalment sale of land transactions exceeding a period of one year. These include the protections set out in section 19 of the Alienation of Land Act, 68 of 1981.⁸

⁸ Section 19 of the ALA limits the remedies available to a seller by reason of any breach of contract on the part of a purchaser, including *inter alia* the right to enforce

27. In this context, the purpose of this statute has been described by the Constitutional Court as follows:

“41. The purpose of the ALA is to regulate the alienation of land in certain circumstances, and also to fulfil the need for protection of vulnerable purchasers and imbuing good faith and fairness into contractual relationships relating to land. The ALA sets out requirements for, amongst others, the cancellation of credit agreements for the sale of land through instalment sale agreements. Section 19 limits the seller’s right to take immediate and unilateral action by providing for certain steps to be taken before it can cancel an agreement concluded with a purchaser.”⁹

28. While the agreement in this matter does not amount to a “contract” as defined in the ALA, this does not derogate from the requirement in section 2 of the ALA requiring that the alienation of land be in writing, and the aforesaid statutory purpose that such a requirement gives effect to. I am satisfied that the agreement sought to be declared valid meets, substantially, this requirement of the ALA. Moreover, I am persuaded that the declaration sought in the present case would

acceleration of payment; to terminate the contract; or to institute an action for damages.

⁹ *Amardien v Registrar of Deeds* 2019 (3) SA 341 (CC) para 41.

protect vulnerable purchasers and give effect to the principles of fairness, being the stated purpose of the ALA.

29. There is one last point, it is that the first respondent also stated that the applicant has made claims of dishonesty against him and that this is another reason why the matter should be referred to trial. I find that accusations of dishonesty have been made by both the applicant and the first respondent. These allegations do not take the matter any further.

30. In conclusion, I make the following order:

30.1. The written agreement of sale entered into between the deceased, Christian Malila Ndou and the first respondent on 1 March 2002 is declared valid.

30.2. The first respondent is directed and ordered to sign all necessary transfer documents in order to effect transfer of the property described as Erf [...] Boksburg South and physically known as number [...] L. Street, Boksburg, Gauteng Province into the estate of the Late Christian Malila Ndou within fourteen (14) days of this order.

30.3. In the event that the first respondent fails to comply with prayer 2 above, then the Sheriff of Court in whose area of

jurisdiction the property is situated is hereby directed and ordered to sign all necessary transfer documents in order to effect transfer of the property described as Erf [...] Boksburg South and physically known as number [...] L. Street, Boksburg, Gauteng Province into the estate of the Late Christian Malila Ndou within fourteen (14) of being called to do so by the applicant or her legal representatives.

- 30.4. The first respondent is ordered to pay the costs of this application.

TJB BOKABA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR APPLICANT: ADV LANDMAN-LOUW

INSTRUCTED BY: MOLEPO INC. ATTORNEYS

FOR RESPONDENTS: ADV BRITZ

INSTRUCTED BY: MANFRED JACOBS ATTORNEYS