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

CASE NUMBER: 4472/19
Reportable: No
Of interest to other Judges: No
Revised: No
12/8/2022

In the matter of

MOFOKENG MOEKETSI GIFT	**APPLICANT**
And	
MANTOA PAULINE MOTLOUNG N.O	**FIRST RESPONDENT**
FEDILE EVERLYN KOKOANE	**SECOND RESPONDENT**
REGISTRAR OF DEEDS, JOHANNESBURG	**THIRD RESPONDENT**
MASTER OF THE HIGH COURT, JOHANNESBURG	**FOUTH RESPONDENT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] At the heart of this case lies the proper interpretation of the sale of immovable property where there has not been proper compliance with the Alienation of Land Act No 68 of 1981. Can informal agreements in relation to the sale of immovable property sustain an enforceable contract of sale and justifying interdictory relief and enforcement of transfer? All this when the applicant knew from the outset that there were disputes of fact before launching the application and having in fact instituted action for the very same relief.

Relief sought by the Applicant

[2] The applicant seeks the following order:

> 1. An order interdicting the first and second respondents from transferring ownership of House [....] P [....] Section, K [....] into their names or into the names of third parties, pending the hearing and finalization of this application;
>
> 2. An order declaring the sale agreement, enclosed herein as annexure "K", between the applicant and the late Dimakatso Mongabine, concluded on 30 March 2010, as a valid sale agreement.
>
> 3. An order directing the first and second respondents to sign the relevant documents to pass ownership of house [....] P [....] Section, K [....] into the name of the applicant.
>
> 4. An order that should the first and second respondents refuse, fail or neglect to sign the relevant transfer documents as in (3) above, the Sheriff of the High Court in the K [....] district be hereby authorized to sign relevant documents to pass ownership of house [....] P [....] Section, K [....] into the name of the applicant within sixty (60) days of this order.

[3] The first and second respondents have opposed the application and filed a counter application for the agreement to be declared null and void.

Parties

[4] The applicant is an adult male person residing at House [....] P [....] Section, K [....], (**"the property"**).

[5] The first respondent is Mantoa Paulina Motloung, an adult female person of P [....] Section, K [....], cited herein in her capacity as the executrix of the late Dimakatso Elizabeth Mongabine (**"the deceased"**) who passed away on 24 August 2013.

[6] The second respondent is Fedile Evelyn Kokoane, an adult female person, residing at House [....] P [....] Section, K [....], cited herein in her capacity as the co-executrix with the first respondent in the estate of the deceased.

[7] The third respondent is the Registrar of Deeds, Johannesburg, a government Department responsible for the registration of immovable properties in the Gauteng Region with their business address at Von Weilligh & Jeppe Street, Johannesburg.

[8] The fourth respondent is the Master of the High Court, a government Department responsible for the administration of estates in the Republic, with their business address at 66 Marshall Street, Johannesburg.

[9] No cost order is sought against the third and fourth respondents.

Background of relevant facts

[10] The applicant asserts that on 30 March 2010 he entered into a written sale agreement with the deceased, in terms of which she sold House [....] P [....] Section, K [....] to him, which property was and is still registered in her name.

[11] In terms of the sale agreement the property was sold to the applicant for an amount of R 30 000. They agreed the purchase price and that the applicant would repay the purchase price in monthly instalments. The deceased and witnesses effected their respective signatures on every receipt of the monthly payments made

by the applicant. It is important to note that the authenticity of the signature of the deceased and witnesses are in dispute.

[12] The applicant took occupation of the property in 2010. He only became aware that the deceased passed away, when an eviction application under case number 3809/2016 issued by the Palmridge Magistrate Court, was served on a tenant at the property on 15 June 2020.

[13] The eviction application was opposed by the applicant, and no order was granted as the application was postponed *sine die.*

[14] Once the litigation was launched and on 1 June 2016 the Master of the High Court Johannesburg appointed the first and second respondents as co-executrixes in the deceased estate.

[15] On 19 September 2016 the applicant served a Letter of Demand on the first and second respondents to effect transfer of the property into his name. The first and second respondents rejected the applicant's demand on the basis that there was no valid sale agreement in place.

[16] On 7 February 2019, almost three years after the demand the applicant launched the legal proceedings for the relief set out above.

[17] the first and second respondents opposed the relief and filed an answering affidavit.

[18] The application was set down on the unopposed roll on 27 August 2020, and Vuma J dismissed the application due to non-appearance by the applicant.

[19] On 23 September 2020 the applicant applied for rescission of the judgment granted by Vuma J, which was granted on 10 May 2021 by Wepener J.

[20] On 27 March 2019 the applicant also instituted action proceedings wherein the applicant, now the plaintiff sought the following order;

1. To direct the Executors in the Estate to attend to the transfer of the immovable property situated at house number [....], P [....] Section, K [....] to the plaintiffs, for which purpose the plaintiffs tendered the costs of transferring the Property into his name;

2. Cost on the Attorney-Client Scale.

[21] Pleadings closed and the matter is still pending awaiting a trial date.

Condonation

[22] At the commencement of the hearing the first and second respondents applied for condonation for the late filing of their answering affidavit.

[23] No objection was raised by the applicant and therefore condonation for the late filing of the answering affidavit was granted.

[24] The applicant in return requested condonation for the late filing of his replying affidavit.

[25] No objection was raised by the respondents and therefore condonation for the late filing of the replying affidavit was granted

Points in limine raised by the first and second respondents

[26] The first and second respondents raised the following points *in limine;*

1. *Non-Service*: The first and second respondents contended that they were never served with the application. It appears the documents were served at the property in dispute, which is in possession of the applicant, and he should know the respondents do not reside there. It is contended that the applicant does reside in the said property, but the property is occupied by tenants. The respondents submit that service was effected in this manner in

order for the applicant to proceed with the application on an unopposed basis. Counsel for the respondents argued that there was no proper service on the parties and the matters must be dismissed with cost on attorney and own client scale.

2. *Lis Pendens*: Counsel for the respondents stated that an application for eviction was instituted in Palmridge Magistrates' Court in 2016, however upon receiving the opposing affidavit from the applicant, based on a sale agreement, it became apparent that there is a dispute of fact relating to the sale. The parties through their legal representatives agreed that an action in the High Court must be instituted in order to deal with the factual dispute. The said action was instituted and duly served and defended. On 13 January 2020 an inquiry was made about possible dates to hold a pre-trial conference. Though this application was issued first it was never proceeded with as the parties were never served with the application and only gained knowledge of it through a third party in June 2020. Counsel for the respondents therefore submits that the actions of the applicant amount to an abuse of the Court process because the applicant chose to bring this application when another matter was pending and was ripe for trial. In addition, the parties had agreed that this matter cannot be dealt with by application proceedings as there are a clear factual dispute.

3. *Dishonest/Fraudulent conduct*: Furthermore, the applicant deposed to an affidavit in the eviction application instituted in the Palmridge Magistrate's Court wherein he indicated that this matter cannot be dealt with through application proceedings but by means of action as there were disputes of fact. Therefore, the respondents argue that the applicant having taken the position that there are disputes of fact, which could only be resolved by trial proceedings nonetheless set the application down and for this reason, this application should be dismissed with cost on attorney and own client scale.

Arguments by the applicant on points in limine raised

[27] Counsel for the applicant argued that even though service was not effected on the first and second respondents in accordance with the rules, they are aware of the application being set down for hearing and this point is flawed. In addition, the applicant submitted that the first and second respondents are legally represented and have filed opposing papers and therefore the matter should proceed.

[28] Therefore, counsel for the applicant submits that the first point *in limine* should be dismissed.

[29] The applicant argued that the second point *in limine* should be dismissed because *lis pendens* can only be relied upon if there is a pending action on the same facts before a court. They argued that this application was instituted first and therefore, these proceedings take precedence. They further contended that the issue of convenience should not be a factor to be taken into consideration when deciding on the question of *lis pendens.*

[30] Regarding the third point *in limine* relating to disputes of fact, the applicant argued that the allegations of dishonesty and fraud at the time of the conclusion of the sale agreement between the applicant and the deceased were insufficient. The applicant contended that more is required by the respondents other than an averment of dishonesty and fraud in order to succeed with their argument. The applicant argued that the third *point in limine* should be dismissed.

Counter Claim

[31] The first and second respondents requested the court to declared the sale agreement null and void. In the light of the order, I intend making and the fact that there is action pending it is unnecessary to deal with the counter claim at this stage.

Evaluation

First point in limine

[32] It is important to take cognisance of the following remarks by the court in the matter of *Viljoen v Federated Trust Ltd,*[1]

> "The Rules of Court, which constitute the procedural machinery of the Courts, are intended to expedite the business of the Courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible".

[33] Rule 4 of the Uniform Rules of Court set out the manner in which service of process of court should be directed. It is the cornerstone of our legal system that a person is entitled to notice of legal proceedings against such a person.[2] Thus, if a summons had not been served on the defendant/respondent a subsequent judgment may be set aside in terms of rule 42(1)(a). Mere knowledge of issue of summons does not constitute service and cannot relieve a plaintiff of the obligation to follow prescribed rules.

[34] However, if service of a summons was not effected according to the letter of the rule, but was still effective in that the defendant/responded received summons, and suffered no prejudice, service will be good.[3]

[35] There should not be a rigorous and formalistic approach to the rules. The court should take into account the true intention of the fairness of the rules of court and the realities of the situation.[4]

[36] It is evident that the first and second respondents are aware of the application even though service was not effected in accordance with the rules. It is clear that the

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[1] 1971 (1) SA 750 (O).

[2] *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892B – C.
[3] *Investec Property Fund Limited v Viker X (Pty) Limited* (unreported), GJ case no 2016/07492 dated 10 May 2016 (paragraphs [7]-[19].
[4] *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O); *Wiehahn Konstruksie Toerustingmaatskappy (Edms)*
Bpk v Potgieter 1974 (3) SA 191 (T*)*; and *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595.

respondents in the present matter suffer no prejudice, the first and second respondents entered an appearance to defend and it is therefore indicative of the fact that they received knowledge of the summons and were able to defend it.

[37] Furthermore, a condonation application for the late filing of their answering affidavit is before this court. The application for condonation sets out extensively the reasons why the late filing of the answering affidavit should be granted.

[38] I am of the view the first point *in limine* therefore has no basis and is purely an opportunistic objection by the first and second respondents and therefore should be dismissed.

Second point in limine

[39] It is trite law that the principle of *lis alibi pendens* has four requirements namely:

1. Pending litigations;
2. between the same parties or their privies;
3. based on the same cause of action;
4. in respect of the same subject matter.[5]

[40] In *Nestlé (South Africa) (Pty) Ltd v Mars Inc*[6] the Supreme Court of Appeal describe the features of *lis alibi pendens* as follows:

> "The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res*

[5] *Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd* (1573/10) [2012] ZANWHC 27 (29 June 2012).
[6] [2001] ZASCA 76.

judicata). The same suit, between the same parties, should be brought only once and finally."

[41] In *George Talbot Spencer and Others v Xolisa Kennedy Memani and Others*[7] Meyer AJA stated the following:

> "To refuse to allow the objection of *lis alibi pendens* simply because the plaintiffs in the action did not spell out the grounds upon which Memani and the trust rely in the dispute about which a declaration is sought would amount to an elevation of form over substance. The trial court will have to decide upon the very matters which the court a quo was asked to decide upon as far as the directorship of Memani is concerned. The pending earlier action and the later application involve the same parties..... There are compelling reasons why the *lis* which was first commenced should be the one to proceed. A decision of application will not bring finality in the litigation between the parties but merely result in a piecemeal adjudication of the issues in dispute between them..... Furthermore a weighty consideration is the one mentioned by Navsa JA in Socratous. This consideration is summarised as follows in the headnote of that judgment: 'South African courts are under severe pressure due to congested court rolls and the defence of *lis pendens* must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same based on the same cause of action and related to the same subject-matter'."

[42] In *Hassan & another v Berrange NO*,[8] Zulman JA expressed the requirements for *lis pendens* in the following terms:

> "Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause."

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[7] SCA 675/2012 at paragraphs 14 and 15.
[8] *Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) paragraph 19 – the judgment was delivered in 2006 but only reported in 2012.

[43] The applicant does not dispute that there is pending litigation between him and the respondents, which is an eviction application instituted in the Palmridge Magistrate's Court, postponed *sine die,* and the action proceedings in the High Court instituted by means of summons under case number 11313/19, issued on 27 March 2019.

[44] Furthermore, the parties through their legal representatives agreed that an action in the High Court must be instituted in order to deal with the factual disputes. The applicant instituted and duly served the action proceedings on the respondents on 27 March 2019.

[45] It is evident that the applicant proceeded with this application despite an agreement that there are disputed facts to be ventilated in action proceedings, and that such action proceedings were in fact, instituted and are pending. The said pending action entails the same parties and cause of action.

[46] I agree with Coetzee DJP in *Kerbel v Kerbel*[9] that once the requisites for a plea of *lis pendens* are established the court should be inclined to uphold it, because it is undesirable for there to be litigation in two courts over the same issue.

[47] For those reasons, I conclude that the requirements for the successful invocation of *lis pendens* are satisfied in the present case.

Third point in limine

[48] The *Plascon Evans Rule*[10] holds that when factual disputes arise in circumstances where the applicant seeks final relief, the relief should be granted in

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[9] *Kerbel v Kerbel* 1987 (1) SA 562 (W) at 567F-G.

[10] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635 the following was said;

> "It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give

favour of the applicant only if the facts alleged by the respondents in their answering affidavit, read with the facts they have admitted to, justify the order prayed for. A court must be convinced that the allegations of the respondent/s (*in casu* being the first and second respondents) are so far-fetched or clearly untenable that it is justified in rejecting them merely on the papers and without requiring oral evidence to be led.

[49] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[11] Heher JA stated;

> "recognising the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched clearly untenable that the court is justified in rejecting them merely on the papers; Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 that E – 635 C…".

Conclusion

[50] In this application there is clearly a dispute with regard to whether or not the applicant concluded a sale agreement as stipulated in terms of section 20 of the Alienation Act, Act 68 of 1981 with the deceased. What is more the authenticity of the signatures to the sale agreement are in dispute. The applicant, notwithstanding

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such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, **1949 (3) SA 1155** (T), at pp 1163-5; Da Mata v Otto, NO, **1972 (3) SA 585** (A), at p 882 D - H)."

that the himself had claimed that there were disputes of fact nonetheless proceeded to set this application down with that knowledge.

[51] In my view, the applicant has abused the court process. The disputes of fact are manifest. In addition, these are complex disputed issues involving the Alienation of Land Act which can clearly not be decided in application proceedings. The disputed facts *in casu*, cannot be decided on the papers.

[52] This is not the kind of case which should be referred for the hearing of oral evidence or to trial on the papers as they stand. I point out that in any event this was not requested. In the context of this application the applicant was well aware of the disputes and in the face of that nonetheless set the matter down. This, in my view, justifies a punitive costs order.

Order

[53] In the premises of the above the following order is made;

1. Condonation for filing the answering affidavit out of time by the first and second respondent is granted.
2. Condonation for filing the replying affidavit out of time by the applicant is granted.
3. The application is dismissed with costs on an attorney client scale.
4. No order is made on the counter claim.

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 12 August 2022.

DATE OF HEARING:	**6 June 2022**
DATE JUDGMENT DELIVERED:	**12 August 2022**

APPEARANCES:

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