IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/5384

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

14 October 2022

In the matter between:

ZAIBIONEZA AHMAD	Applicant
And	
AMAR MAZARI	First Respondent
THE SHERIFF OF THE HIGH COURT, KEMPTON PARK	Second Respondent
MARTO LAFITTE & ASSOCIATES INC	Third Respondent
THE REGISTRAR OF DEEDS	Fourth Respondent

JUDGMENT

VILJOEN AJ

[1] In this application, the applicant seeks an order directing the first respondent to sign all documents necessary to effect the transfer of certain immovable property to the applicant, and some ancillary relief.

[2] The relief sought in the original notice of motion was expanded in an amended notice of motion, served on the first respondent on 14 June 2014. The amendment purported to introduce further relief and, additionally, purported to join the Sheriff as the second respondent. The object of the amendment was to provide a direction to the Sheriff to sign the relevant transfer documents if the first respondent fails to do so.

[3] There is some controversy as to the propriety of the amended notice of motion. It must be mentioned that there was no application for the joinder of the Sheriff to the proceedings nor were the provisions of Rule 28 followed in amending the relief sought. The amendment and the joinder of the Sheriff, therefore, are irregular.

[4] Nevertheless, it does not appear to me that any prejudice resulted from the amendment considering the limited scope thereof and the fact that it did not change the essential question raised in the application.

[5] As regards the Sheriff, I am of the view that entrusting the execution of an order of the court to the Sheriff falls within the ambit of the Sheriff's ordinary functions. Moreover, the amended notice of motion was served on the Sheriff who took no issue.

[6] The applicant's claim is premised on an agreement, styled "*Alienation Agreement*", concluded between the applicant and the first respondent on 7 August 2015.

[7] The alienation agreement was, on the first respondent's version, preceded by several other agreements relating to the sale of the property in question. Since the alienation agreement replaced whatever earlier agreements might have existed, I need not consider those any further.

[8] In terms of the alienation agreement, the first respondent sold to the applicant the property known as Erf [....], Rhodesfield Township, Registration Division IR, Province of Gauteng.

[9] The agreed purchase price is R950,000.00. The applicant acknowledges that only upon payment of the full purchase price would she become entitled to transfer of the property. In the founding affidavit, she makes the following allegations regarding her performance of the terms of the alienation agreement:

> 9.1. In paragraph 15: "*I confirm that I have signed and complied with all my obligations to effect transfer of the property in my name, by the second respondent.*"
>
> 9.2. In paragraph 19: "*I confirm that the full purchase price was paid in ful*l."
>
> 9.3. In paragraph 20: "*I confirm that the occupational rent is paid up to date*."

[10] The first respondent's answering affidavit denies that the applicant paid either occupational rental or the agreed purchase price. The first respondent alleges, further, that based on the applicant's breach of contract he cancelled the alienation agreement by written notice on 19 March 2019.

[11] The applicant argues that the first respondent's sole defence to the claim is that the alienation agreement had been cancelled. Her focus in reply is thus on discrediting the purported cancellation as "*a fabrication*". In argument, the applicant contended that the resultant dispute of fact was neither real and genuine nor *bona fide* and that I should reject the first respondent's version.

[12] In the alternative, it was argued that I should refer the matter to oral evidence. There was some ambivalence in the argument as to the exact question to be referred to oral evidence: i.e., the cancellation of the alienation agreement or the payment of the purchase price.

[13] The cancellation of the alienation agreement is somewhat of a red herring. Whilst the lawful cancellation of the agreement certainly would prevent specific performance thereof, the applicant's cause of action is only complete upon payment of the purchase price in full. Proof of the fact of payment is thus crucial to the applicant's success.[1]

[14] Surprisingly given the first respondent's direct challenge, the applicant makes no attempt to adduce further evidence to rebut the first respondent's denial that the purchase price had been paid in full. Exceptions exist to the general rule against the amplification of a case in reply, if indeed the applicant was taken by surprise by the denial of payment. The applicant also did not seek the supplementation of her founding papers with detailed evidence of the payments she alleges to have made.

[15] Herein lies the applicant's fundamental difficulty.

[16] In motion proceedings, affidavits serve the dual purpose of encompassing both pleadings and evidence. It is required of an applicant to set out the facts necessary to establish a *prima facie* case in the founding papers in as complete a way as the circumstances demand.[2]

[17] Thus, if the present applicant's papers fail to set out as fully as the circumstances demand the facts underpinning her cause of action, more specifically payment of the purchase price, then the applicant risks a finding that no *prima facie* case is made out.

[18] In general, bald allegations of fact place an applicant at risk since she will usually not be allowed to set out a more comprehensive case in reply.[3] As was evident from the argument on behalf of the applicant, she was fully cognisant of the requirement to make out a complete case in the founding papers.

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1 *Wolpert v Steenkamp* 1917 AD 493
2 *SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC) at [9]
3 *Enyuka Prop Holdings (Pty) Ltd v Delport Van Den Berg Inc* 2019 JDR 1043 (GP) at [32]

[19] I have referred above to the allegations in the founding papers relating to payment. They are plainly rather bald, to say the least, and more akin to allegations one expects in particulars of claim than the comprehensive factual exposition required in a founding affidavit. It bears repetition that establishing compliance with her payment obligations is vital to the applicant's case.

[20] The founding affidavit makes it clear that the matter is of some import to the applicant, as well it should be. The purchase price of R950,000.00 that is at stake is not a trivial amount.

[21] The payment arrangements for the balance of the purchase price span 48 months and are in part conditional upon *inter alia* the installation of a pre-paid electricity meter. The applicant should be expected to have anticipated that considering the number of instalments and the period over which they were payable, a careful exposition of the times, manner and amount paid would be necessary; even more so in the face of a pointed challenge to the bare averment of payment.

[22] From the answering affidavit, a wider context appears. The parties between 2010 and 2015 concluded a series of agreements for the purchase of the property in question. Each of these, according to the first respondent, failed due to non-payment by the applicant.

[23] Within this context, the applicant ought reasonably to have applied herself with far greater rigour and attention to detail to the drafting of her founding papers, specifically concerning her payment history.[4]

[24] I cannot conclude that the applicant's affidavits read as a whole make out a case that the applicant paid the full purchase price. That being the case, the matter cannot be decided in the applicant's favour on her papers. I stress that this is no final finding on the merits of the applicant's claim.

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[4] C.f. *Democratic Alliance v Kouga Municipality and others* [2014] 1 All SA 281 (SCA) at [21]

[25] In these circumstances, a referral of the question of payment to oral evidence is inappropriate. The procedure of referring a dispute to oral evidence is not intended as a mechanism through which an applicant can supplement an ambiguous or uncertain case or affidavits that do not make out a cause of action.[5]

[26] In the above premises, I make the following order:

The application is dismissed with costs.

H M VILJOEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing: 10 October 2022

Date of judgment: 14 October 2022

Appearances:

Attorneys for the applicant: JOUBERT SCHOLTZ INC

Counsel for the applicant: ADV D DE KOCK

Attorneys for the first respondent: SHUMANI F SILAMULELA ATTORNEYS

Counsel for the Respondent: MR S F SILAMULELA

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5 *Minister of Land Affairs and Agriculture and others v D&F Wevell Trust and others* 2008 (2) SA 184 (SCA) at [58]