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

Case Number: 10296/2022
REPORTABLE

OF INTEREST TO OTHER JUDGES

17.07.23

In the matter between:

TALACAR HOLDINGS (PTY) LTD Applicant

and

CHRISTOPHER HOWE COLE Respondent

JUDGMENT

Mia, J

[1] This is an application by Talacar Holdings (Pty) Ltd for relief in the following terms:

"1. Ordering specific performance against the respondent in respect of the sale agreement concluded between the parties on 16 November 2021 for the sale and purchase of certain immovable property known as erf […] portion 2 and erf […] portion 5 and erf […] portion 2 with title deed numbers T15509/1999 and T22179/1999 and T15448/2000 respectively, and which immovable property is situated at […]., Sandhurst (the immoveable property);

2. Ordering and directing the respondent:

2.1 To immediately take all steps necessary to cause a bank guarantee to be issued from a recognised financial institution in favour of the applicant in the amount of R135 000 000, (one hundred and thirty-five million rands) alternatively, such other undertaking acceptable to the applicant;

2.2 To deliver such guarantee/s or undertakings as set out in prayer (i) to the applicant's conveyancer within 14 days of this court order.

2.3 To provide all information and sign all necessary transfer documents within 5(five) business days after being called upon by the applicant conveyances to do so, failing which the Sheriff of the High Court is authorised to do so.

2.4 To pay all necessary costs and charges of and incidental to the transfer of the property, including:

2.4.1 Such administrative amounts as may be necessary to obtain a rate(s) and or levy/levies clearance certificate to facilitate transfer of the property.

2.4.2 Value added tax levied in terms of the Value Added Tax Act, 1991 all transfer duty levied in terms of the Transfer Duties Act, 1949 whichever may be applicable as contemplated in clause 10 of the sale agreement.

2.4.3 the legal costs charged by the applicant's conveyancers.

2.4.4 the cost of registering any mortgage bond.

3. Ordering and directing the respondent to pay the cost of this application on the scale as between attorney and own client;

4. further and or alternative relief."

The respondent opposes the application.

[2] The applicant is Talacar Holdings (Pty) Ltd, the seller of the property in issue. It was previously known as Ben Nevis Holdings, a private company duly registered and incorporated in terms of the company laws of South Africa, with its place of business situated at 34 Coronation Road in Sandhurst, Johannesburg. The respondent is Mr Christopher Howe Cole (the purchaser), a major male businessman, residing in the United States of America (USA). The respondent is represented by Smiedt and Associates attorneys situated at 15 on Orange, Orange St., Cape Town.

[3] The parties entered into a written agreement. In terms of clause 19.2 of the agreement, the parties agreed that such agreement will be governed by and interpreted in accordance with the laws of South Africa. The agreement was concluded in Johannesburg, which is within the jurisdiction of this court. In addition to the above, the property is situated within the jurisdiction of this court. This matter is appropriately before this court.

[4] On 20 October 2021, the director of the applicant, Mr David Cunningham King, requested an agent of Pam Golding Properties, Ms Anastasia Rossen, to place the property on the market. On 23 October 2021, it was agreed that the property would be marketed at a price of R 150 000 000 (one hundred and fifty million rand). On 15 November 2021, Ms Rossen showed Mr Cole the property. On 16 November 2021, Mr. Cole, assisted by Ms Rossen, concluded an offer to purchase (OTP), which was presented to Mr King in his representative capacity as director of the applicant. On 16 November 2021, the OTP was signed by Mr King and returned on 17 November 2021. The applicant accepted the offer to purchase in the amount of R135 000 000. This concluded the sale of the property. The respondent then requested a further viewing of the property. This was arranged for 18 November 2021, and representatives of the respondent were accompanied by experts to check for any defects as provided in clause 20 of the OTP.

[5] Mr Ian Greyling, a structural engineer, was on site for an inspection on the mandate of the respondent, confirmed to Ms Rossen's assistant Anthony; in the presence of Mr Gert Van Zyl, a valuer; verbally; and after the inspection, that there were no structural defects. The two valuers who were present could

not ascertain any defects either. Thus, clause 20.2, which provided for the respondent's experts to inspect the property for structural defects, was complied with. Consequently, the respondent expressed his intention, to Ms Rossen, to continue with the purchase.

[6] The respondent, however, failed to take all steps necessary to furnish the bank guarantee and to transfer the property into his name and subsequently communicated to the applicant that he could not continue with the agreement due to "imperfections" after conducting due diligence. The applicant believes these "imperfections" are artificial and contrived, as the respondent did not indicate what specific structural defects or other defects were present until they were raised in the opposing affidavit. The applicant notes that these imperfections conflict with the "voetstoots" clause in the agreement. They are false and uncorroborated, as the respondent failed to provide any evidence to support his contentions after personally viewing and inspecting the property with acquaintances and after receiving feedback from his expert.

[7] The applicant raised three points *in limine,* which are the central issues for determination in this matter, and may be dispositive of the application. They are:

a. Whether the respondent's affidavit should be accepted as evidence without an Apostille certificate;

b. Whether the respondent's non-performance is justified; and

c. Whether the respondent's alleged cancellation of the agreement in terms of clause 20.2 was valid?

Points in limine

Whether the respondent's affidavit should be accepted as evidence without an Apostille certificate?

[8] The respondent is domiciled in Arizona in the USA. He signed the answering affidavit whilst in Arizona. The applicant contends that the answering affidavit does not meet the formal requirements for an affidavit in terms of Rule 63 of

the Uniform Rules of Court (of the Division of the High Court, Gauteng, South Africa) as it is not properly endorsed. Alternatively, the respondent was required to have the affidavit authenticated through an Apostille by the relevant authority in terms of the Apostille Convention because South Africa and the USA are both signatories to the Apostille Convention, which facilitates the use of foreign public documents such as affidavits.

Apostille Convention

[9] The Apostille Convention is an international treaty which seeks to simplify the process of authenticating public documents for use in foreign countries. It eliminates the need for expensive and lengthy procedures. It introduced a standardised certificate called the Apostille which is attached to the document that verifies the authenticity of the public document. When a document is apostilled, Article 4 of the Apostille Convention requires that:

> "The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "allonge"; it shall be in the form of the model annexed to the present Convention. It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 October 1961)" shall be in the French language."

[10] Article 1 of the Apostille Convention provides:

> "The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State. For the purposes of the present Convention, the following are deemed to be public documents:
>
> a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");
>
> b) administrative documents;

c) notarial acts;

d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

[11] The Rules of the High Court provide:

"authentication' means, when applied to a document, the verification of any signature thereon.

(2) Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office

(a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or

(b) of a consul-general, consul, vice-consul or consular agent of the United Kingdom or any other person acting in any of the aforementioned capacities or a pro-consul of the United Kingdom;

(c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or

(d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraph (a), (b) or (c) or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country;

(e) of a notary public in the United Kingdom of Great Britain and Northern Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland; or

(f) of a commissioned officer of the South African Defence Force as defined in section one of the Defence Act, 1957 (Act 44 of 1957), in the case of a document executed by any person on active service.

(2A) Notwithstanding anything in this rule contained, any document authenticated in accordance with the provisions of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents shall be deemed to be sufficiently authenticated for the purpose of use in the Republic where such document emanates from a country that is a party to the Convention.

(3) If any person authenticating a document in terms of subrule (2) has no seal of office, he shall certify thereon under his signature to that effect.

(4) Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document."

[12] In his answering affidavit, the respondent alleges that he signed the answering affidavit. The applicant does not dispute the veracity of the signature, only the authenticity of the affidavit. This averment defies logic because the authentication was signed by a notary as the commissioner of oaths. The notary has indicated her name, the office she holds and her business address. Thus, confirming that the affidavit was signed before the notary.

[13] The Apostille handbook[1] assists in the application of the Apostille Convention.[2] The Apostille Convention list four categories of documents for the purpose of certainty, which fall under the category of public documents which are required to be authenticated by an apostille. They are set out in Article 1 of the Convention as listed above. The law of the state of origin determines whether a document is a public document for the purposes of the Apostille Convention and requires an Apostille certificate.

[14] The Apostille Convention provides that the law of destination determines what legal effect to give to a purported public document. The affidavit the respondent relies upon has been authenticated by a notary. The purpose of the Apostille

[1] *The Apostille Handbook* A handbook on the practical application of the Apostille Convention https://www.hcch.net/en/publications-and-studies/details4/?pid=5888
[2] *Nimpuno v Ismail Ayob and Partners and Others: In re: Ismail Ayob and Partners v Nimpuno* [2022] ZAGPJHC 855 (2 November 2022)

Convention is intended to simplify the authentication requirement. Both the USA and South Africa are signatories to the Apostille Convention. The law of origin, in this case, the USA, will determine whether the document is a public document and requires a certificate. No evidence was placed before this court regarding this aspect. There is no suggestion that the signature of either the respondent or the notary is not authentic.

[15] An affidavit is certified by a commissioner of oaths bearing a particular position of trust. There is no suggestion that either the respondent or the commissioner of oath have any reason to mislead this court or that the affidavit placed before this court is not authentic or that the content is not the version relied upon by the respondent. I am satisfied that the affidavit meets the requirements for acceptance as an affidavit. I am satisfied that the notary's stamp and details are sufficiently explained and reflect a properly signed and authenticated affidavit in terms of Rule 63. The applicant fails on the first point *in limine*. The content, as indicated, is to be considered separately.

Whether the respondent's non-performance is justified: Claim for Specific Performance

[16] The applicant seeks specific performance of the agreement of sale of the property and must thus prove:

a. the terms of the agreement;

b. Compliance with the following obligations

i. acceptance of the offer;

ii. tender to perform;

iii. non-performance by the other party; and

iv. an election to claim specific performance.

[17] The applicant signed the OTP for the property at the respondent's offered price of R 135 000 000. The respondent requested a further opportunity to inspect the property, which the applicant afforded to the respondent. In this, the applicant contends that it accepted the respondent's offer and complied with the respondent's request to inspect the property in terms of clause 20. The respondent, after indicating his intention to continue with the agreement, was required to furnish a bank guarantee within 7 days after the conclusion of the inspection in terms of clause 20 of the agreement. Upon the conclusion of the further inspection, the respondent indicated an intention to continue with the purchase of sale. The payment did not follow upon the conclusion thereof. Instead, on 25 November 2021, the respondent communicated that the agreement was cancelled at his instance.

[18] The respondent maintains he was entitled to cancel based on clause 20.2 of the agreement despite the structural engineer not finding any structural defects or other defects. The respondent indicates in his answering affidavit that the reason he cancelled was as a result of due diligence. He lists cracks that were noticed in the walls despite no report furnished reflecting defects. The respondent, through his attorneys, indicated that they informed the applicant that the respondent held the sole discretion to cancel the agreement based on the agreement.

[19] The respondent states that he has no personal knowledge of South Africa, Johannesburg, and its property market. He indicates that he had to rely on the views of others for information on the property market. However, it is evident from the founding and answering affidavits that the respondent visited the property accompanied by acquaintances and then sent several experts to examine the property for structural defects and general defects. None were reported during or after the inspection. The respondent's right to conduct the inspection and cancel due to defects is included in clause 20 of the agreement. Clause 20.2 provides:

> "20.2 The Purchaser at his own expense will conduct an inspection of the home within (14) fourteen days of acceptance of the offer should there be structural

defects or defects that are unacceptable to the purchaser then the purchaser can at his discretion elect to cancel this agreement"

[20] The respondent's defence is that the agreement is void because there is no agreement for want of consensus on the material terms. He put in the OTP and decided on the price, which the seller accepted. In his view, the "voetstoots" clause is overridden by clause 20, which permits him to cancel at his discretion in the event there are any defects that are unacceptable to him.

[21] According to the respondent, the applicant accepted his termination, and the parties entered into negotiations to conclude an agreement on new terms for a lower price. The applicant denies this and replies that the respondent attempted to strong-arm him into accepting a lower price. The lower price which the respondent sought to offer, according to the applicant, was informed by his need to spend money on the property to address the issues which he regarded as defects. In paragraph [44] of the answering affidavit, the respondent states:

> "…I did not have a problem with paying a fair price as long as that would allow me to cover the additional expenses to address what I concluded was unacceptable to me."

[22] Having regard to the answering affidavit where the respondent indicates his reasons for cancellation, namely, the defects are the cracks in the wall, the need for installation of new paving in the driveway, the installation of a lift to access all three levels of the house, he required a wider driveway or a second driveway, and he required a ramp to link the front door to the garage. These changes would ensure that the property was changed to a state acceptable to him.

Whether the respondent's alleged cancellation of the agreement in terms of clause 20.2 was valid?

[23] Christie and Bradfield[3] opine that the law on cancellation of a contract currently, invalidates a contract where the discretion is given to one party to fix

[3] *R H Christie & G B Bradfield Christie's* The Law of Contract in South Africa (7th ed) p 117-118

the price in a sale contract or the lease in a rental agreement. What it means, they contend, is that neither party may insist on fixing the price exclusively. Where the agreement was signed and agreed upon and there was consensus, the agreement is valid.

[24] The authors[4] note that in *NBS Boland Bank Ltd v Oneberg River Drive CC*[5]*,* the court indicated that the rule that a sale or lease is invalid if the price or rent is to be determined by one of the parties, was due for reconsideration. This view was followed in *Engen Petroleum Ltd v Kommandonek (Pty) Ltd*[6], where the court upheld a lease which entitled the tenant to vary the lease on reasonable grounds to make the continuation of its business economically feasible. The consideration upheld by the court in *Kommandonek*, was based on objectively ascertainable criteria. This development was welcomed by the authors[7]. Similarly, on these facts, whilst the respondent has inserted clause 20, which redounds to his benefit, the criteria which he has set must be judged on the basis of objective criteria. On an application of the court's reasoning in *Kommandonek,* to the present matter, the stipulation in clause 20, relied upon by the respondent to permit him to perform only if he wishes to, cannot be valid.

[25] That is not the end of the enquiry. Taken to its logical conclusion, it means, if clause 20, was not excised and was permitted to remain, then it should be considered based on objective criteria; which is tantamount to a re-consideration of some kind. In line with this reconsideration, it means a court is required, based on objective criteria, to make a determination as to whether there were defects present. On this basis, the respondent is correct that he was entitled to view the property and to elect to cancel it in terms of clause 20.2. Clause 20 makes provision for cancellation at his discretion in the event of objectively determined defects. From a study of the affidavits (the founding and answering affidavits), and all the facts considered objectively, there were no real defects. The changes the respondent sought to introduce at a later stage, cannot be translated into material defects which vitiate the agreement

[4] *Christie and Bradfield*, p 118
[5] 1999(4) SA 183 SCA 935B; [1999] 4 All SA 928 SCA
[6] 2001(2) SA 170(W); [2001] All SA 636
[7] Footnote 4.

and would entitle the respondent to resile from the sale agreement and cancel it. The cracks alleged to have been noticed in the walls were not mentioned until the answering affidavit was filed. They were not structural and were never pointed out to the applicant or its representative at the relevant times before or shortly after the purchase agreement was signed. Unsurprisingly no report was furnished by any person who had observed such cracks. The respondent does not indicate where he observed the cracks in the walls. The requirement of new paving is also a cosmetic preference, as the experts did not point this out as an aspect requiring attention. He required a wider driveway or a second driveway and an elevator to access all three levels of the house. The respondent also required a ramp to link the front door to the garage. All these aspects are cosmetic, decorative specific changes to the property to meet his personal preferences. These would have been apparent to the respondent when he placed the initial offer.

[26] In any event, the alleged “defects” mentioned in the respondent’s answering affidavit do not reflect on the value of the property and the value of properties in the area. The truth of the matter is that the respondent sought a reduction in the purchase price to accommodate the price of improvements to meet his additional personal preferences. Thus, he sought to foist a price reduction on the applicant. On the facts, the respondent was aware that he could not withdraw the offer to make a lower offer without the consequences of repudiation or cancellation.

[27] Furthermore, clause 4 of the agreement provides that the property is sold *voetstoots.* Having regard to the cosmetic nature of the changes the respondent raised as defects, it is unreasonable for the respondent to cancel the agreement. This is so as there was no objectively identified defect by the respondent or any of the experts. The aspects raised by the respondent are artificial and indicate a personal or cosmetic preference rather than a defect and do not warrant cancellation. The sale was subject to a *voetstoots* clause which would cover minor imperfections such as cracks on the walls if there were any. Clause 20.2, when read together with the *voetstoots* clause, takes cognisance of the law applicable in South Africa. The agreement provides that

the agreement be governed in all respects in terms of the law of South Africa. On this basis, the respondent's alleged cancellation of the agreement in terms of clause 20.2 cannot stand nor can it ever be valid.

[28] Having said so, for the sake of completeness, I consider whether the applicant is entitled to specific performance. The applicant seeks specific performance rather than cancelling the contract and suing for contractual damages. The respondent should allege and prove facts to enable the court to exercise its discretion in his favour.[8] In motion proceedings where final relief is sought, factual disputes are resolved on the papers by accepting facts put up by the applicant which are common cause and are not denied by the respondent as well as facts placed in dispute by the respondent. Where a respondent's version contains bald denials, fictitious disputes of fact or is palpably implausible, the court is justified in rejecting them. The Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[9], said on dealing with disputes of fact in motion proceedings:

> "Recognising that 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 or 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 (3) SA 623 (A) at 634E-635C [also reported at [1984] 2 All SA 366 (A) - Ed]. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.
>
> 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

[8] Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) 398 (A).
[9] *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] 2 All SA 512 SCA at para 12-13

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 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."

[29] In relation to resolving the meaning of the words used in the agreement, the decision *of Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] is on point. Commenting on the *Endumeni* case, the Court said in T*shwane City v Blair Atholl*[11]

> "It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in Natal Joint Municipal Fund v Endumeni Municipality 2012(4) SA 593 SCA; [2012] 2 All SA 262, stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an unbusinesslike result. These factors have to be considered holistically, akin to the unitary approach."

[30] The agreement records that the property is sold *voetstoots*. The applicant warranted that there were no latent defects. The answering affidavit attested to by the respondent does not indicate that there is any tangible, extrinsic, objective or expert evidence relied upon to prove any defect. The corroborating affidavit does not assist with regard to the defences raised by the respondent. The alleged defects listed by the respondent are aesthetic in

[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA).
[11] *Tshwane City v Blair Atholl* 2019(3) SA 398 SCA.

so far as they relate to changes to be effected and for the convenience of the respondent and to meet the requirements of the respondent.

[31] When the respondent sought to cancel the agreement, the applicant indicated it regarded the agreement as binding. The applicant did not consider and agree to a lower purchase price. The respondent's cancellation was regarded as a repudiation and not accepted. The applicant maintains that the agreement is binding on the parties. The agreement permits the applicant to elect to claim specific performance with the alternative of damages. The applicant has elected to claim specific performance. The respondent's defences are truly contrived and have no basis, thus, offering no real dispute of fact.

[32] In conclusion, for the reasons I have indicated in the above paragraphs, the point *in limine* raised fails. The application by the applicant ought to succeed.

[33] On the issue of costs, the respondent made no submission nor any case to allow this court not to follow the general rule on costs. Moreover, the applicant sought costs on a punitive scale for the manner in which the respondent conducted his defence on issues that were never canvassed with the applicant when the parties communicated on the matter that could be resolved if not settled. Thus, punitive costs is justified for this court to show its displeasure with the manner in which the respondent conducted his defence, in an unfair manner, prejudicial to the applicant.

Order

[34] In the result, the application is upheld, and an order is granted in terms of paragraphs 1, 2.1, 2.2, 2.3 and 3 of the notice of motion which read as follows:

1. An order for specific performance is granted against the respondent in respect of the sale agreement concluded between the parties on 16 November 2021 for the sale and purchase of certain immovable property known as erf […] portion 2 and erf […] portion 5 and erf […] portion 2 with title deed numbers T15509/1999 and T22179/1999 and

T15448/2000 respectively, and which immovable property is situated at[…]., Sandhurst (the immoveable property);

2. The respondent is ordered:-

   2.1 To immediately take all steps necessary to cause a bank guarantee to be issued from a recognised financial institution in favour of the applicant in the amount of R135 000 000, (one hundred and thirty-five million rands) alternatively, such other undertaking acceptable to the applicant;

   2.2 To deliver such guarantee/s or undertakings as set out in prayer (i) to the applicant's conveyancer within 14 days of this court order.

   2.3 To provide all information and sign all necessary transfer documents within 5(five) business days after being called upon by the applicant conveyances to do so, failing which the Sheriff of the High Court is authorised to do so.

3. The respondent to pay the cost of this application on the scale as between attorney and client.

S MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:	K Trisk SC & B Brammer instructed by Di Siena Attorneys
For the Respondent:	H Epstein SC & S Tshikila instructed by Smiedt & Associates
Heard:	19 October 2022
Delivered:	17 July 2023