REPUBLIC OP SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 33801/2001

DATE: 20 AUGUST 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

IGNATIUS STEPHAHUS JOHANNES SMIT **APPLICANT**

and

BAREND PETRUS PRETORIUS **FIRST RESPONDENT**

MATHILDA LYDIA PRETORIUS **SECOND RESPONDENT**

THE REGISTRAR OF DEEDS **THIRD RESPONDENT**

THE DEPARTMENT OF AGRICULTURE **FOURTH RESPONDENT**

THE SHERIFF OF THE HIGH COURT LETABA **FIFTH RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] In this application the applicant seeks an order to compel the first and second respondents to sign all the necessary transfer documents and to take all the necessary steps to cause the transfer of a property known as

portion [...] of the farm C[...] , registration division LT, Transvaal. In the event that the first and second respondents fail to comply with the court order as granted, the fifth respondent, be authorised to sign all the documents which the first and second respondents should have signed and to take all the necessary steps to see to it that the abovementioned property is transferred into the name of the applicant.

[2] The applicant alleges in his papers that on 29 August 1997 he entered into a written agreement of sale with the first and second respondents in terms of which the first and second respondents sold the property described in paragraph [1] of this judgment, to him. He paid the purchase price but the property was never transferred into his name. He has thus approached this court to compel the respondents to transfer the property to him.

[3] The first and second respondents, who are husband and wife married in community of property, deny having signed an agreement of sale with the applicant in respect of that property. They also allege that even if it can be found that they signed the agreement the claim has in any way prescribed. In his heads of argument the respondents' counsel raised further issues on the law in relation to the validity of the purported agreement, which I shall deal with later in this judgment.

[4] The third, fourth and fifth respondents are not opposing the applications and no order of costs is sought against them. For convenience, I shall refer to the first and second respondents jointly simply as the respondents.

[5] I was informed at the hearing of this application that the matter was initially heard before van der Merwe J, as he then was, and because of the factual disputes emanating from the application, two issues were referred for oral evidence in terms of uniform rule 6 (5) (g). This court is, therefore, seized with the two issues referred for oral evidence, namely

> 5.1 Whether Mr and Mrs Pretorius signed the written sale agreement appended to the notice of motion as annexure “ISI5”; and
>
> 5.2 Whether, if found that they indeed signed the agreement as aforementioned, Mr Smit’s claim against them has prescribed

I will therefore examine these two issues in the light of the evidence adduced, both i*riva voce* before me and on affidavit and consider all the submissions made by the parties.

[6] The parties had at the pre-trial conference agreed that the applicant bore the *onus* to begin at the hearing and to prove his case and that the respondents bore the *onus* to prove the allegation that their signatures on the purported agreement were falsified. The issue of who bore the *onus* to begin was raised again at the

commencement of the hearing. After argument and the respondents having conceded that they bore the *onusto* begin, I granted an order that they start.

[7] At the end of the hearing, counsel were not able to address me in argument due to time limitations. I however ordered that they provide me with heads of argument which they have done. I am thankful for the extensive manner in which both counsel dealt with the issues in their respective heads of argument.

[8] The applicant's case as set out in his founding affidavit is that, during 1996, he became interested in the immovable property known as C[...] No [...] which was adjacent to his own property. He knew that the property was registered in the names of the respondents. The second respondent is his sister and the first respondent his brother in-law. He approached the respondents with an offer to purchase the said property. The first respondent informed him that there is an outstanding mortgage bond debt over the property in favour of the Department of Agriculture (the Department), which was at the time known as "Landbouhredit", and which debt, if he (the applicant) could pay, would serve as the purchase price of the property.

[9] The applicant approached his then attorney, Mr Nico Hurter (Hurter), to assist him with the purchase of the property. Hurter made an offer to the Department to settle the bond of the property in question in the amount of R45 000 in full and final settlement of the debt owing on the property. The said offer was accepted by the Department in terms of a letter sent to Hurter attached in the papers as annexure "1514". Once the offer had been accepted, the applicant approached the respondents again and they entered into a written agreement of sale attached in the papers as annexure "ISIS". On 27 January 1998 the applicant paid the amount of R45 000 to the Department in settlement of the bond owed over the property. Immediately thereafter the applicant proceeded with the process of transferring the property into his name. The process was, however, delayed because the Department had misplaced the original title deed of the property. The process of acquiring a copy of the title deed from the Deeds Office was delayed further by the respondents' refusal to sign the documents required for such acquisition, which resulted in the applicant approaching the court for the relief sought in the current application.

[10] The respondents, in the answering affidavit deposed to by the first respondent, concede that the applicant had shown interest in the property and had in 1997 approached them with an offer to purchase, but deny ever having entered into a written agreement of sale with the applicant in respect of the property C[...] No [...] on 27 August 1997 or at any other date. They deny specifically that they signed an agreement of sale with the applicant. The signatures and initials appearing on the purported agreement is, according to them, not theirs. They, in fact, contend that they never saw the agreement the applicant alleges they have signed. They had knowledge that an amount of R138 000 was outstanding on the bond account they had with the Department. The first respondent requested Hurter to negotiate with the Department for settlement of the amount in full and final payment of R45 000 and which settlement offer was accepted by the Department The

negotiations were not at the behest of the applicant as he (the applicant) alleges. The applicant was informed by the first respondent about this arrangement. They deny further that the amount of R45 000 the applicant alleges to have paid to the Department in *lieu* of the bond debt, if paid, was paid in terms of an agreement of sale entered into between them.

[11] The respondents later filed a supplementary affidavit which raised a defence of prescription. According to the respondents the applicant alleges that the purported agreement was signed on 29 August 1997. However, the date that appears on the purported agreement is 28 January 1998 being a date one day after the applicant had allegedly paid the amount of R45 000 to the Department, which date was according to the applicant, unilaterally inserted by him. The contention by the respondents is that since the application was issued on 21 December 2001, the applicant's claim had prescribed by then.

[12] I shall in this judgment, first, determine whether or not there was any agreement between the parties for the sale of the immovable property in question; and whether or not that agreement complied with the requirements for the sale of immovable property; and if I find that there was such an agreement, I shall then determine the points of law on its validity as raised by the respondents.

[13] There were many issues raised at the hearing of the oral evidence by the parties in respect of the issues referred for oral evidence, but I shall refer to only those that are relevant for purposes of this judgment.

[14] The respondents were the first to adduce evidence as I had ordered. To prove the disputed signatures and initials, they relied on the expert evidence of Mr F J Fourie (Fourie), a handwriting expert. The qualifications of the expert witness were not in dispute. I shall therefore not go into the details thereof. Prior to the hearing, the respondents filed a report of the findings of the said expert. Specimen signatures of the respondents together with a copy of the agreement in issue, the original being not available, were sent to him to investigate and determine whether the author of the specimen signatures provided to him and the author of the signatures and initials on the document in issue were the same. His findings, as perthe report, were that the author of the specimen signatures probably signed the contested signatures and initials. However, he submitted that certainty could only be made when using the original document. Two pages, pages 5 and 6, of the agreement were sent by fax to him during the investigations. His findings, in respect of the two pages, are that page 5 appears to be a copy of page 6. The difference being that the date of signatures is not reflected on page 5 and the initials appended on page 6 appears to have been inserted at a later time and are not the same as the ones on page 5.

[15] A supplementary report was later filed wherein Fourie stated why it was necessary to be provided with the original agreement His reasons were the following:

"1. Die oorspronblibe boopooreenboms word vir die volgende ondersoeb benodig,

1.1 'n Merbbare versbil bom tussen die sferyf instrument waarmee die parawe van die versbillende bladsye en die' waarmee die handtebening geteben was voor.

1.2 Die oorplasing van 'n handtebening van een na 'n ander document is moontlib sonder dat daar enige eiensbappe daarvan op 'n afdrub getoon word.

1.3 Alleenlib met ondersoeb van die oorspronblibe dobument ban voorafgaande bepaal word."

[16] Fourie's evidence in court, is that he could not rely on the findings made on the basis of a copy of the agreement and that more conclusive findings were possible only if he could be provided with the original sale agreement. According to him it is possible for a signature to be transferred from one document to another. This however, he could determine only if the investigation is based on the original document. He is also of the opinion that it is probable that the signatures on the two pages, page 5 and 6, faxed to him as explained earlier in this judgment might have been transferred. But because the documents provided to him were faxed copies he did not find any signs of such transfer. He still could not entirely exclude such transfer.

[17] All in all, his evidence is that as per the documents provided to him he cannot say for certain that the respondents signed the agreement. There are probabilities that they signed and yet there are probabilities that the signatures and initials may have been transferred onto the page of the agreement.

[18] The submission by the applicant's counsel is that from the evidence adduced by the respondents' expert witness, it was proved that the respondents in all probabilities signed the agreement in question.

[19] It is trite law that a court is not bound by expert evidence. It is the court that ultimately assesses the cogency of the expert's evidence in the contextual matrix of the case with which he or she is seized. In a case where expert evidence has been introduced, presiding officers are therefore challenged to find means of assessing the inferential force or weight of all the evidence before it. As it currently stands, the admissibility of expert evidence hinges on fairly simple rules of evidence that affords presiding officers broad discretionary powers.

[20] On that ground, I am not persuaded that Fourie's evidence proves that the signatures and initials are those of the respondents. Fourie was explicit during his evidence in court that, in the absence of the original agreement, it could not be said for sure that the respondents are the ones who signed the agreement. Although in his report and also under cross examination he conceded that there are probabilities that the respondents may have signed the agreement, this, in my view, is mired by his evidence that there is also a probability that the signatures were transferred to the document. I am on that basis alone not inclined to accept his testimony

on this point.

[21] The evidence of the first respondent adduced in court, confirmed his evidence in the answering affidavit that he did not sign the agreement and that the signature on the agreement, alleged to be his, was not appended by him. The applicant came to the farm and requested that the respondents give him three months option to get a loan. He was approached by Hurter who told him that he (the first respondent) owed the Department. He came to know Hurter through his wife (the second respondent) who was taking care of Hurter's child. One time they got to talk about the first respondent's failure to continue to farm. He informed Hurter that he has an outstanding bond debt with the Department. Hurter undertook to enquire about the debt and to assist him to get it written off. After some times, Hurter informed him that the Department has agreed he (first respondent) settle the debt by paying R45 000. Hurter told him that if someone could pay the R45 000 the Department would write off the amount of R138 000, which was owed at the time. He agreed with Hurter that he will look for someone who will be willing to pay the R45 000. Hurter later told him that the applicant paid the R45 000 and brought some papers which he said he (the first respondent) must sign, but he refused to sign them. He made enquiries with the Department and leamt that when he sold his other farm in 1992 the proceeds thereof were used to settle all his debts with the Department - this included the bond over the property in question. He phoned the applicant and informed him that Hurter was trying to defraud them and he should not deal with him. Hurter sent him a copy of an unsigned agreement but he did not sign it.

[22] When asked where Hurter could have found his signature, his response was that he had signed several documents with Hurter. For instance, Hurter assisted him with a sequestration application; a sale agreement which he concluded with Heyns; and in registering a close corporation. In all these incidents he had to sign documents.

The agreement, it is alleged he signed, is full of mistakes in that: his name is not written in full and his identity number is not mentioned; the second respondent's name and identity number are not reflected on the agreement and her initials are wrongly written; the date on the agreement is different from the one the applicant alleges they signed the agreement; there is his daughter's signature and initials on the agreement yet she was not there.

[23] The second respondent was adamant in her evidence that her husband and her did not enter into an agreement with the applicant. She vehemently, in particular, denies ever signing any agreement with the applicant. Her name and identity number are not stated in the agreement. The identity number of the first respondent is also not stated. Her initials on the purported agreement are not correctly stated - her initials are "MLP" and the initials in the agreement are stated as "MP".

[24] In rebuttal of the respondents' testimony, the applicant testified and confirmed that he entered into a

written agreement of sale with the respondents. He signed the agreement as the purchaser and the respondents signed as sellers. They signed the agreement at the farm of the respondents which is situated between Naboomspruit and Mokopane. He was in the company of his daughter who was on his way to Pretoria for a medical check-up, when they visited the farm. On their arrival at that farm, the first respondent was not present, but he arrived later and the three of them signed the agreement. The agreement was signed on 29 August 1997 but the date inserted in the agreement is 28 January 1998. At the time the agreement was signed the date was inadvertedly not inserted and he instructed Hurter to insert the date of 28 January 1998 being the date one day after he paid the amount of R45 000 to the Department. He denied the respondents' version put to him that the respondents' signatures on the agreement were falsified. His attorney, Hurter, received a letter from the Department which accepted the discounted price of R45 000 and he paid the amount. He was given a receipt as proof of payment. The payment of the amount of R45 000 was meant to be the full purchase price of the property as agreed between the parties. The original agreement was handed to the Department and it was misplaced there. Even though the second respondent's name does not appear on the agreement, he did sign the agreement.

[25] The applicant's evidence to the effect that the respondents signed the agreement is corroborated by that of his daughter, Mrs Helena Lombard, who filed an affidavit in support of the applicant's evidence to that effect. She also testified in court and confirmed that she was present and saw the respondents sign the agreement. In her affidavit she mentioned only the first respondent but in her evidence in court she said both the respondents were present and both signed the agreement. She conceded that it was a mistake not to have referred to the second respondent in the affidavit Although there is basically nothing wrong with Mrs Lombard's evidence I found it inadmissible in that her affidavit was not deposed to before a commissioner of oaths.

[26] Her evidence is that she had been summoned to the office of her father's attorney to sign the affidavit She signed the purported affidavit without reading it; hence she did not notice that the second respondent was not included. But this is the least of her problems. Her evidence does not show that she took an oath before signing the affidavit Her testimony is that she signed the affidavit in the office of her father's attorney and that when she signed there were only three people in the office, namely, her father, the attorney and herself. She did not appear before a commissioner of oaths and as such did not know the commissioner of oaths who attested the affidavit.

[27] In terms of regulation 3.1 of the Regulations Covering the Administration of Oaths or Affirmation GN R1258 dated 21 July 1972, an affidavit must be signed by the deponent in the presence of a commissioner of oaths. Non-compliance with the provisions of regulation 3 does not *per se* render a purported affidavit void, for that provision is not peremptory, but directory. The court has discretion to regard a declaration that does

not comply with regulation 3 as worthless, or to recognise it as an affidavit. It also has discretion, in a suitable case, to allow evidence to be produced on the question whether in reality the provisions were satisfied or not, before a decision is arrived at on the information so produced. See *S v Msibi*[1] and *Cape Sheet MetaI Works (Pty) Ltd v JJ Catitz Builder (Pty) Ltd*[2].

[28] The purported affidavit having not been deposed to before a commissioner of oaths, i find myself constrained to can accept it as an affidavit in support of the applicant's evidence. There is no evidence that was tendered to explain the reason why the affidavit was not signed before a commissioner of oaths or why the commissioner signed after the deponent had already signed. It is therefore my view that the evidence is not admissible and cannot be considered. Mrs Lombard's testimony in court is not admissible as well, since I have declared her affidavit inadmissible.

[29] It is said that in fact-finding, a court which is confronted with two incompatible assertions and is unable to decide which of them is true, will base its decision on the more probable one.[3] Because of the differing versions proffered by the first respondent in his evidence, I find myself constrained to accept the applicant痴 version as more probable than that of the respondents.

[30] One of the first respondent's version is that he was not aware that his debt with the Department in respect of California No 7 was settled. He thought that an amount of R138 000 was outstanding. He then requested Hurter to assist him to negotiate settlement with the Department. Hurter told him that the Department agreed that the debt be settled by paying R45 000. However, when he went to enquire for himself with the Department, he was informed by a Mrs Steyn that the debt had long been settled from the proceeds of farm No 5, which he sold in 1992. His other version is that he was approached by Hurter who told him that he (the first respondent) owed the Department. Vet another version is that Hurter is the one who offered to negotiate settlement with the Department. It is clear that this evidence is contradictory as the applicant's counsel suggests In his heads of argument What is further disconcerting is the fact that there is no affidavit or evidence from Hurter supporting any one of the first respondent's versions. Instead, Hurter has provided an affidavit supporting the evidence of the applicant There is also no evidence, documentary or otherwise, supporting or corroborating the first respondent's evidence in respect of the information he was provided at the Department when he made enquiries about the debt owed to the farm California No 7. His explanation that he was required by the Department to pay an amount of R150, when he wanted to be provided with proof of payment of his account, appears far- fetched to me. I have therefore to conclude that the signatures and initials on the agreement are those of the respondents.

[31] It is trite that once the defendant痴 signature is proved or admitted the plaintiff has discharged his or her burden, and the burden is then on the defendant to prove fraud, misrepresentation or whatever defence he or

she might have. See *Mans v Union Meat Co* [4].

[32] In this instance, the first respondent during his evidence before me, sought to raise a defence of fraud. He wanted to rely on the probabilities raised in the evidence of Fourie that the signatures and initials may have been transferred to the purported agreement However, this is not the case pleaded in his papers. It is trite that a party must stand by his or her pleadings. I can as a result not entertain this defence.

[33] Even though I have made a finding that the signatures and initials appended to the agreement are those of the respondents, the issue of the validity of the agreement still requires further consideration. One of the points of law raised by the respondents' counsel in his heads of argument pertaining to the validity of the agreement is that the agreement does not comply with the requirement of s 6 (1) *(a)* the Alienation of Land Act No 68 of 1981 (the Alienation of Land Act) due to failure to state the particulars of the second respondent in the agreement

[34] The formalities for the sale of immovable property are set out in the Alienation of Land Act. The sections of that Act relevant for purposes of this judgment are the following:

> **2 Formalities in respect of alienation of land**
>
> "(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.
>
> (**2**)..."
>
> **6 Contents of contract**
>
> "(1) A contract shall contain-
>
> ***(a)*** the names of the purchaser and the seller and their residential or business addresses in the Republic;
>
> *(b)..."*

[35] It is common cause that the respondents are married to each other in community of property. It is indisputable that the property in question is registered in both their names and as such forms part of the estate in community of property. It is also not in dispute that the first respondent has been identified in the agreement and is therefore a party to the agreement. What, is in issue, which requires this court's determination is whether the second respondent is a party to the agreement.

[36] It is my view that, the purported agreement does not comply with the formalities set out in s 2(1) read with s 6 (1) *(a)* of the Alienation of Land Act. The identity of the parties to an agreement is one of the essential terms of an agreement in terms of the Alienation of Land Act. An agreement should as a result contain a sufficient description of the parties to that agreement. The complaint by the respondents' counsel Is that the non-disclosure of the identity of the second respondent in the agreement invalidates the agreement in that it makes it not to comply with the formalities required in terms of the Alienation of Land Act. And he is correct.

[37] A sale of immovable property, as is the case in this instance, is subject to the formalities in terms of the Alienation of Land Act. Some of the formalities which are relevant for purposes of this judgment are in terms of s 2 (1) in that the agreement must be in writing and signed by the parties; and s 6 which relates to the material terms which an agreement 都hall・ contain. Subsection 6 (1) *(a)* stipulates that the contract must contain the description of the parties. Non-compliance of these sections is said to be visited with nullity. That means that an essential term of an agreement, like, the parties, must be defined with sufficient precision to enable them to be identified. See *Johnson v Leaf*[5] and *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another*[6]

[38] The general rule is that formal validity must be determined from the document itself. It is, thus, well established that in order to comply with the provisions of section 2(1) of the Act the essential terms of the sale including the identity of the parties must appear *ex facie* the written document embodying the agreement. It has been held that extrinsic evidence may not be used to introduce an additional party to an agreement when that party is unidentified in the agreement. Parol evidence is, therefore, not admissible in so far as the identity of the parties is concerned. See *Mineworkers・ Union v Cooks*[7] and *Johnson v Leal*.[8]

[39] In this instance, it is indisputable that the particulars of the second respondent are not stated in the agreement. Even, *ex facie,* it is apparent that the agreement does not comply with the formal requirements of the Alienation of Land Act. This is so because, just at face value, it is clear that the identity of the second respondent does not appear in the agreement. The applicant's evidence with which he sought to establish the identity of the second respondent as a party to the agreement cannot be admitted into evidence, because it is inadmissible.

[40] In support of his assertion that the agreement between the parties is valid even though the identity of the second respondent is not disclosed in the agreement, the applicant痴 counsel referred in his heads of argument to a passage in the book of R H Christie: *The Law of Contract in South Africa* [9]. In that passage, the learned writer, in his discussion of 鍍he parties" to the agreement, states that parol evidence is not admissible in so far as the identity of the parties is concerned. But qualifies this by stating that where the contract leaves

no doubt as to what was agreed upon, oral evidence may be required to prove who the party is that signed the agreement.

[41] I do not agree with this qualification by Christie. He makes the qualification without citing any relevant case law. This qualification militates against the legislature's intention and the strict approach adopted by the Supreme Court of Appeal which seeks to obviate disputes about the terms of agreements, exclude possibility of fraud and perjury and avoid unnecessary litigation. The main effect of the formalities being to confine the parties to the written contract and to preclude reliance on an oral consensus not reflected therein. See *Fraser v Viljoen* [10].

[42] It is now settled law that, in order to comply with the s 2 (1) of the Alienation of Land Act, all the material terms of the agreement, the identity of the parties being one of them, must be contained in the document at the time of signature. In this instance, it is common cause that, at the time the respondents signed the agreement the identity of the second respondent was not stated in the agreement and is still not stated And as is trite, if evidence *dehors the* agreement is necessary to establish the identity of the seller the agreement is invalid. See the judgment of the Supreme Court of Appeal in *Fraser* v *Viljoen*[11] which relied on the principle adopted in *Fourlamel (Pty) Ltd v Maddison*[12];

[43] It my view that, the second respondent is not defined with sufficient precision so as to be identified as a party to the agreement on which the applicant relies, and, I conclude therefore that she is not a party thereto. The first respondent, being a party to the agreement, did not have the contractual capacity to sell immovable property which forms part of the estate of a marriage in community of property without the consent of the second respondent. In order for the agreement to be valid the second respondent should also be a party to the agreement. On that basis the agreement should be visited with a nullity.

[44] The general rule is that there can be no ratification of an agreement of the sale of immovable property unless *ex facie* the document, the deed of sale complies with the requirements of the relevant statute.[13] The issue of ratification was never raised, and I do not intend to deal with it, safe to say that in my opinion the applicant would still have not passed this hurdle.

[45] It is my view, therefore, that the agreement is void for non-compliance with the Alienation of Land Act. It follows, therefore, that the applicant is not entitled to the relief claimed.

[46] In the premises the application is dismissed with costs.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCE

HEARD ON THE: 14 MARCH 2014

DATE OF JUDGMENT: 20 AUGUST 2014

APPLICANT'S COUNSEL: ADV J P PRINSLOO

APPLICANT'S ATTORNEY: NEL A LOMBARD ATTORNEYS

RESPONDENT'S COUNSEL: ADV C R HIINE

RESPONDENT'S ATTORNEY: S RANGOANASHA INC

C/O FRIEDLAND HART SOLOMON & NICOLSON

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1 *1974 (4) SA 821 (T) at 828A-829C*

2 1981 (1) SA 697 (0) at 699A - D

3 *National Employers' Mutual General Insurance Association* v G*any* 1931 AD 167 at 199

4 1919 AD 266 at 271

5 1980 (3) SA 927 (A) at 946H

6 2008 (1) SA 654 (SCA) para [7] at 656D.

7 1959 (1) SA 709 (W) at 712A - D

8 *Above at 938C-F*

9 Sed, 2006, p12l

10 2008 (4) SA106 (SCA) para [6]

11 above

12 1977 (1) SA 333 (A) at 344A - E

13 *Magwaza v Heenan* 1979 (2) SA 1019 (A) at 1024F - 1029B