IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 62385/2013

DATE: 11 MARCH 2016

In the matter between:

TREVOR THOMAS KEYES *N.O.*	Applicant
and	
CHRIS ELLINAS	First Respondent
JANGO ELLINAS	Second Respondent

DATE OF HEARING	**16 FEBRUARY 2016**
DATE OF JUDGMENT	**11 MARCH 2016**

JUDGMENT

MANAMELA AJ

Brief background and the applicant's submissions

[1] In 2005 the first respondent was appointed, in terms of a power of attorney, by his late father (the deceased), then based in Nicosia, Cyprus, to manage all the deceased affairs and properties in South Africa, and to generally represent him in all business affairs and dealings in South Africa The power of attorney appears to have also conferred on the first respondent the power to sell, dispose of or transfer the deceased' sproperties.

[2] Exercising his representative powers, the first respondent sold, in December 2009, to the second respondent (his son and therefore the deceased's grandson) immovable property known as [Erf 4…, Rynfield Township, Benoni] (the property) for an amount of R650 000.00. The second respondent took transfer of the property in May 2010. The applicant is dissatisfied with the aforesaid purchase price paid by the second respondent for the property. He alleges that, to the respondents' knowledge the purchase price is substantially Jess than the fair and reasonable market value of the property. He argues that there was collusion between the first and second respondents (the respondents) in this regard.

[3] The deceased passed away on 21 January 2010. The applicant was thereafter appointed executor of the deceased's estate on 22 October 2012. In 2013, the applicant in his aforementioned capacity issued summons against the respondents for, among others, cancellation of the transfer, or the retransfer of the property back to the applicant at the second respondent's cost. The action is defended by the respondents and is allocated for trial on 12 May 2016. This is after the matter was a subject of a summary judgment application, which the respondents opposed.

[4] In their affidavit in opposition of summary judgment, the respondents made some averments which have since gained considerable significance in this matter. They submitted that when the property was sold to the second respondent "it was in a state of complete disrepair, was near unusable and was continuing to diminish. The property was in dire need of maintenance and substantial repair".[1] They added that, the second respondent "had to invest a substantial amount of money into not only repairs and maintenance of the Property but in fact also in effecting substantial modifications and renovations".[2] In their view, due to "the modifications, renovations, maintenance and repair" to the property, the property did not resemble what it was when it was sold in 2009. Therefore, the valuation of the property, subsequently done at the instance of the applicant (and attached to the particulars of claim), is disputed.

[5] The applicant later sought, in terms of Rule 35(3) and request for further particulars, further details and documents relating to the repairs effected to the deceased' property by the second respondent. The Rule 35(3) notice was complied with, except for an issue of costs, which I have to rule on later herein. The court reserved costs on 18 May 2015.[3] The applicant is dissatisfied with the responses by the respondents to paragraphs 7 and 9 of his request for further particulars. Paragraph 7 of the request for further particular is as follows:

> "7.*1 The plaintiff requires a list of all maintenance which the second defendant has performed in respect of the property since he became the registered owner thereof on 11 May 2010 (as alleged in paragraph 12.2 of the first defendant's answering affidavit in the summary judgment application), indicating in each instance:*
>
> *7.1.1 the date on which the maintenance was performed;*
>
> *7.1.2 the person or persons who performed the maintenance;*

[1] See paragraph 12.1 of the respondents' answering affidavit in the summary judgment application.
[2] See paragraph 12.2 of the respondents' answering affidavit in the summary judgment application.
[3] See costs order by Bofilatos AJ of 18 May 2015.

7.1.3 the nature of the maintenance;

7.1.4 the amount which the person or persons who performed the maintenance charged;

7.1.5 a copy of the invoice or statement of the person or persons who performed the maintenance.

7.2 The plaintiff requires a list of all repairs which the second defendant has performed ***in*** *respect of the property since he became the registered owner thereof on II May 2010 (as alleged in paragraphs 12.2 of the first defendant's answering affidavit* ***in*** *the summary judgment application), indicating in each instance:*

7.2.1 the date on which the repairs was performed;

7.2.2 the person or persons who performed the repairs;

7.2.3 the nature of the repairs;

7.2.4 the amount which the person or persons who performed the repairs charged;

7.2.5 a copy of the invoice or statement of the person or persons who performed the repairs.

7.3 The plaintiff requires a list of all modifications and renovations which the second defendant has effected in respect of the property since he became the registered owner thereof on II May 2010 (as alleged in paragraph 12.2 of the first defendant's answering affidavit in the summary judgment application), indicating in each instance:

7.3.1 the date on which the modifications and renovations were effected;

7.3.2 the person or persons who effected the modifications and renovations;

7.3.3 the nature of the modifications and renovations;

7.3.4 the amount which the person or persons who effected the modifications and renovations charged;

7.3.5 a copy of the invoice or statement of the person or persons who effected the modifications and renovations."

And paragraph 9 of the applicant's request for further particulars reads as follows:

> *"The plaintiff requires* ***a*** *list of all renovations which had to be performed to make the property marketable."*

Respondents' submissions

[6] The respondents' response to the request in paragraph 7 was that the requested information is not required or necessary for purposes of preparation for trial, as the applicant's claim "is purely based on a projected income basis, and the state of disrepair of the property is but one of the factors taken into account ... in determining the fair and reasonable purchase consideration" .[4] I hasten to point out that, there is some level of contradiction in the aforesaid submission or statement, as the respondents, whilst denying the necessity of the particulars on the repairs, somewhat admit that same is necessary, but as one of many factors. I will return to this. Further, the respondents submit that they had already discovered invoices relating to the repairs and renovations effected on the property. The same response was given with regard to the applicant's request under paragraph 9, quoted above. The applicant brought this application to compel. The application was heard on 16 February 2016 and I reserved this judgment after listening to oral argument by Mr HF Oosthuizen, on behalf of the applicant and Mr GV Meijers for the respondents.

[7] The respondents bemoan the fact that, the applicant launched this application without firstly affording them a courtesy of an informal notice. They state that the applicant ought to

[4] See paragraph 13 of the respondents' reply to the applicant's request for further particulars (attached to the application to compel as annexure "TK2") on indexed page 22.

have indicated in what respect he considered the furnished responses or further particulars insufficient. They consider this to be manifestation of lack of collegiality on the applicant's part and the cause of the incurring of substantial costs in the matter.

[8] I have already indicated above that, the respondents said that the information or particulars required by the applicant are not necessary for the applicant to prepare for trial, as the applicant's claims have no relevance to the required particulars. They add that, the absence of a counterclaim (from their side) based on costs of maintenance, repairs, modifications and renovations to the property, is another reason why the information is not necessary for preparation of trial. A proper request should have related to income generated by the property, they further submit. The highlight of the respondents' submissions is that they have, despite all these reasons, already provided the applicant with all documents in their possession relating to maintenance, repairs, modifications and/or renovations (hereinafter referred to collectively as the repairs) to the property. Their attorneys forwarded a letter dated 15 May 2015, in terms of which, they informed the applicant's attorneys that there are no further documents or details beyond what has already been provided. They conclude that with this being the situation, the applicant should have not persisted with the current application. I will return to this below.

[9] Apart from aspersions casted regarding the lack of collegiality mentioned above, the respondents further submit that the application is harassment by the applicant, and ought to be visited upon by this court with a punitive costs order on attorney and client scale, no matter the outcome of this application. They also consider the applicant's conduct to constitute disregard of the rules of court and "sound practice". According to them the applicant may be motivated by an ulterior motive in this regard. These are also pinned on the

fact that the applicant had brought this application on short notice, when it was postponed on 18 May 2015 with costs reserved. I will deal with the reserved costs issue, together with costs of the application below. However, I just want to mention that, I do not see the need to deal with the submissions as to what motivated the applicant to bring this application.

[10] On the other hand the applicant submits that, the respondents' defences do not hold, for various reasons. Chief, amongst them is that, the material dispute between the parties is regarding the fair and reasonable market value of the property at the relevant times. The value would have been influenced by the condition of the property at the material times and any repairs done to the property have to be taken into account. The repairs are significant to determining value of the property. I agree with these submissions. The repairs constitute improvement to the property and once proven, serves to defeat or reduce the applicant's claim that the property was sold for a lesser consideration, all other things remaining equal, I must add.

[11] Further, the applicant contends that the respondents must bear in mind that the purpose of further particulars for trial is to prevent surprises, by advising the other party of what is going to be proved to enable him or her to prepare his or her case accordingly in order to meet the case to be presented or to combat any counter allegations.

Applicable legal principles

[12] The applicable primary legal principle in this matter is Rule 21 of the Uniform Rules of this court. It reads as follows in the part I consider critical current purposes:

"21 Further particulars

(1) ...

(2) After close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting ***only such further particulars as are strictly necessary to enable him to prepare for trial."***

[underlining and bold ink added for emphasis]

[13] It is said that in order to determine what kind of particulars fall within the scope of the rule, once has to refer to the pleadings.[5] Further, as submitted by the applicant, the purpose of further particulars has been found by our courts to be three-fold. Firstly, the process is aimed primarily at preventing surprises. At trial a party is required to be ready to adduce evidence to prove or disprove the material facts, and not to spring up surprises on opponents. Secondly, the parties should be made aware with greater precision what the other party is going to prove in order to enable the opponent to prepare his or her case and to combat any counter allegations. And thirdly, the objective is not to tie the other party down and limit his or her case unfairly at the trial.[6]

[14] I find it beyond argument that the requested particulars are strictly necessary to enable the applicant to prepare for trial. His claim is based on the value of the property as it stood when the respondents concluded the impugned sale agreement in terms of which the second respondent paid an amount of R650 000.00 for the property. The applicant says this amount was substantially less than the fair and reasonable market value for the property. The

[5] See *Hardy* v *Hardy* 1961(1) SA 643(W) at 646D onwards; *Swart v De Beer* 1989(3) SA 622(E).

[6] See Van Loggerenberg DE *Erasmus Superior Court Practice* vol 2, 2th ed (Juta Cape Town 2015) at Dl-252, and the authorities cited there.

respondents disagree with this and contended, at summary judgment that, the property was significantly improved through some repairs effected and that the current condition and look of the property does not resemble what it was when the sale was concluded. How can they ever consider the nature and extent of these alleged repairs to be unnecessary for purposes of preparation for the trial to take place in this matter, escapes me. With the repairs effected, the applicant's assertions as to consideration paid being not fair and reasonable is advanced or defeated. Therefore, the furnishing of particulars in this regard is strictly necessary to enable the applicant to prepare for trial. The applicant has convinced me on this. I will proceed to make a finding that the requested particulars be furnished.

[15] Be that as it may, the respondents do not appear to me to be refusing the requested information. They in fact say they have furrnished all there is available to the applicant. The only thing that stands out for me here is that the respondents do not appear to appreciate the full extent of the submissions they made in the summary judgment application in this regard. What was said there point to a drastic aesthetical improvement on the property, which does not appear to be fully confirmed by the documents furnished. It may well be that the respondents need to explain, more or perhaps even better, their assertions made in opposition to the summary judgment application. This has to be unequivocal and before that is done the requested particulars are necessary for purposes of preparation for trial in this matter.

Costs

[16] There are more than one costs orders to be determined in this matter. On 18 May 2016 my brother Bofilatos AJ, made two orders in terms of which costs were reserved. The third order to be made will be for the application, which will follow the outcome.

[17] Regarding, the reserved costs order relating to the current application (for compelling the furnishing of further particulars) the respondents submit that the application was brought by the applicant on a very urgent basis. The applicant served the application on 13 May 2015 and the matter was to be heard within three court days later on 18 May 2015. The respondent, despite the extremely short notice, managed to file their answering affidavit, it appears on 16 May 2015. The respondents argue that this was an abuse of the court process. The applicant justifies his conduct by saying he merely wanted to avoid delay in the matter due to postponement of the trial which was on 1 June 2015. The applicant further submits that, he simply got the registrar to enrol the matter for the date it was already allocated in respect of the Rule 35(3) application. The applicant's conduct, at face value may appear unfair, but the respondents have not shown any prejudice in this regard which could be corrected through an appropriate costs order. The sitting of the court on 18 May 2015 was necessary to deal with the costs element of that application (i.e. the Rule 35(3) application), which was still unresolved. Therefore, I will disallow any wasted costs occasioned by the postponement of this application (to compel further particulars) on the 18 May 2015. Each party will bear his or their own costs in this regard.

[18] Regarding the Rule 35(3) application the reserved costs order is from the set down of the matter onwards. The respondents argue that costs should only be allowed up to the set down of the matter on 13 May 2015. It is submitted that parties had agreed at a pre-trial conference held before the aforesaid date that the applicant will advise the respondents if he persists in the Rule 35(3) application. It is common cause that the applicant advised the respondents, although he did not do so within the agreed deadlines or time frames. But, the respondents, as well, appear not to have strictly acted within the agreed time frames. They also bemoan that the applicant's belated advice was not as prominent as was expected and

they consequently missed it. In my view they only have themselves to blame in this regard. They should have tendered costs, when they complied with the request or to have anticipated that it will remain the issue until it is dealt with. Therefore they are liable for any consequential costs. I will order that they pay the costs of the Rule 35(3) application from the date of set down onwards.

[19] As indicated above, with success in this application, the applicant will also be awarded costs of this application to compel the furnishing of further particulars. To avoid doubt these costs will exclude the wasted costs occasioned by the postponement of the matter on the **18** May 2015, in respect of which, parties are to bear their own costs.

[20] Therefore, I will make an order as follows:

(1) that, the application is granted, and

(1.1) the respondents are ordered to comply fully with paragraphs 7 and 9 of the applicant's request for further particulars, a copy of which is attached to the applicant's founding affidavit marked Annexure "TKI", by delivery of a their response within 7(seven) days from date hereof;

(1.2) the respondents are ordered to pay the costs of the application, excluding wasted costs occasioned by the postponement of the matter on the **18** May 2015.

(2) that, the respondents are ordered to pay the costs of the Rule 35(3) application from date of set down of the application onwards.

K.L.M. MANAMELA

Acting Judge of the High Court

11 March 2016

Appearances:

For the Applicant	Adv HF Oosthuizen
Instructed by Johannesburg	Richard Meaden & Associates Inc, c/o Rooth & Wessels Inc, Pretoria
For the 1st and 2nd Respondents	Adv GV Meijers
Instructed by	Paul Farinha Attorneys, Johannesburg c/o Strydom Attorneys, Pretoria