

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 12977/2007

DATE: 20 MAY 2008

5 In the matter between:

WILLEM IEIMAN Applicant

And

ALLISTER SCOTT 1ST Respondent

SANDRA MICHELLE SCOTT 2ND Respondent

10 THE REGISTRAR OF DEEDS 3RD Respondent

J U D G M E N T

DAVIS, J:

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[1] This is an application in which the applicant seeks an order that a deed of sale which was entered into between applicant and first respondent. On 12 July 2006 the sale of the immovable property situate at 66 Lily Street, Bellville South (the “property”) be declared void.

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[2] As Mr van Reenen, who appeared on behalf of first and second respondent wryly remarked, the basis of the applicant’s case has altered significantly for reasons to which I shall allude presently. In essence, the applicant

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initially alleged that the first respondent misrepresented the market value of the property of the applicant which induced him to sell the property to the applicant for the sum of R93 000. The market value of the property at the time the agreement was concluded was more than R93 000.

[3] Furthermore, applicant alleges that first respondent unduly influenced and manipulated the applicant to alienate the property for less than its market value. In addition, applicant alleged that the agreement was entered into without the consent of the second respondent (first respondent's wife) and the agreement was accordingly void.

{4] Further affidavits were filed pursuant to this application.

Additional allegations were then made by first applicant. I shall not dwell on them all but, significantly, in a further affidavit, applicant averred that he had been subject to duress in circumstances where first and second respondent had indeed exploited his penchant for drinking and that he was an alcoholic. None of these averments were pursued in the final stages of this case when it was contended by applicant that, in essence, the agreement was void because of a common mistake.

[5] It appears to me, having examined the papers, that the issue of common mistake as the justification for the relief sought by applicant was, at the very least, comprehensively raised for the first time on 13 May 2008.

5 At that hearing, applicant's legal representatives abandoned all legal arguments which were raised previously and the argument of common mistake was only one with which he persisted.

10 [6] In order to assist in this particular examination as to whether there was a justification for the relief sought by applicant on the grounds of common mistake, I requested further supplementary heads of argument from both legal representatives. I am indebted to both counsel for having
15 supplied me with written arguments.

[7] There is a further difficulty to which I must make reference. In examining the question of mistake, I was not entirely certain as to the form of mistake upon which
20 the case was based. I must assume that the mistake to which the applicant refers is a mistake which is referred to in the literature as a "common mistake". That itself raises a problem because the question arises as to the nature of a common mistake. When parties share the
25 same mistake, they are in essence in complete

agreement. There is a consensus between the parties but it is based on a common false supposition that a certain state of affairs exists when in fact the converse is the case.

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[8] The authorities indicate that if such a supposition is “vital to the transaction” in that neither party would have concluded the contract had they known the true facts, a court can hold the contract to be void *ab initio*. (See in this connection Dickinson Motors (Pty) Ltd v Oberholzer 1952(1) SA 443 (A) at 450; and Van Reenen Steel (Pty) Ltd v Smith N.O. & Another 2002(4) SA 264 (SCA) at 270-271). The contract is void, only where the parties expressly or by clear implication concluded the contract on the basis of the correctness of their assumption. In short, they elevate the assumption, (the supposition) to the status of a term of the contract. That, it appears to me, is the basis upon which applicant finally came to court for the relief it sought.

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[9] When I trawled through the multitude of affidavits, there were hints that the argument was in fact based upon a form of *justus error*. For example, B knows of A's mistake, B keeps quiet in order to snatch a bargain. B should have realised as a reasonable contracting party

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that A was labouring under a mistake when the contract was concluded, or B induces A by some form of misrepresentation as to the nature or contents of that which had been agreed upon. All of these cases form part of the broad jurisprudence relating to *justus error*. (See in this connection Sonap Petroleum SA (Pty) Ltd v Pappadogianis 1992(3) SA 234 (A).)

[10] If the papers in this case are examined, there are suggestions that initially this was the case brought by the applicant. The essence of the case would then have been that the respondent knew the real value of the property, knew also that the applicant was labouring under a misapprehension and snatched at the bargain. But that is not what was argued. What was argued was the following: Applicant relied expressly on Sharrock:Business Transactions Law (1993) and the following example provided by the author. S agreed to sell a horse to B for a million rand both parties believing the horse to be a racehorse where it is in fact a carthorse. The agreement, therefore, is a nullity because it was made on the mistaken assumption that the horse sold had the qualities of a racehorse and consequently was of considerable value.

[11] The argument is that this example is similar to the facts of the present dispute, i.e. applicant sells his house to respondent for R93 000. Both parties believe that R93 000 is the market value, whereas it is the municipal price. Accordingly it is a price far less than the market value price, which is alleged by applicant to be in the region of R180 000. In short, the submission is that this agreement should be set aside as being void *ab initio* because it was made on the mistaken assumption that the house was sold at market value whereas to the contrary, it was sold at the municipal price. That is applicant's case, or the case ultimately brought before this court. I emphasise this point again so that there can be no doubt as to what was argued before me and on what particular basis I have been required to analyse the law in relation to the factual matrix.

[12] Applicant sought to rely both on Dickinson, *supra*, and therefore, by analogy, on Van Reenen Steel, *supra*. The facts in Dickinson are instructive. Plaintiff invoked the *condictio indebiti* for repayment of an amount paid in error to defendant. The substance of the case was that plaintiff had paid the amount in error because both he and defendant considered that the car that was to be delivered to him in return for payment was a Plymouth

motor vehicle (A) which had been sold to plaintiff's son
by the defendant and that they had no idea that it was
Plymouth (B) which was the subject of the agreement.
Defendant then delivered Plymouth (B) to the plaintiff
5 and thereafter another party repossessed it. Schreiner.

JA said at 448D that:

"This error common to both parties is not in dispute
and the real issues in the case were what was the
nature of the transaction which led to the payment
10 and what legal consequences flowed therefrom".

[13] The common error was that the car delivered was car (A)
and not car (B) That was common cause. In this case
that assumption cannot be employed, the submissions of
15 applicant's counsel notwithstanding, that many of the
facts were common cause. The facts are somewhat more
complicated when considered within the context of the
law that I have briefly outlined. Applicant relies on an
answering affidavit in which at paragraph 24 thereof, first
20 respondent states:

"I wrote the purchase price being R93 000 in the
agreement. I thought that the price was reasonable
and I was desperate to that area(sic). I also
thought that the rates invoice represented the value
25 of the property"

Applicant appears to rely on the last sentence of this paragraph to contend that both parties believed that the municipal rates invoice reflected the market value of the property.

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[14] Further in the affidavit, first respondent explains the basis on which he considered that R93 000 represented a fair price for the property. Accordingly, he states thus:

“During April 2005 a property was sold in Lily Street which is the same street in which the applicant and my family-in-law (the second respondent’s family) reside. I was informed by my father-in-law that the property sold (R80 000(sic)). I was also interested in buying a property in that area.

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I had expected to pay R80 000 to R100 000 on the basis of what my father-in-law had told me regarding the sale in the same street for R80 000. I was of course willing to pay more depending on the condition and size of the property.

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I thought that the price would be between R80 000 to R100 000 as it was in a worse state than the house in the same road which sold

for R80 000. I understood that we would negotiate the exact purchase price later”.

A further material statement by first respondent is the following:

“When I got to the portion of the document which is blank for the purchase price to be inserted I asked how much the applicant wanted to sell the house for. The applicant stated that he had a rate invoice and produced it from his pocket. The applicant stated that according to the rate invoice the value of the property was R93 000. I checked the rate invoice and I saw that the property was valued at R93 000... I deny that I kept the true market value of the property from applicant as I was of the opinion that R93 000 was a fair price for the property based on the fact that another house was sold in the same street for R80 000 a year earlier. It was the applicant who suggested the purchase price and not me. I was prepared to pay the amount of R93 000”.

[15] This case must be evaluated on the law relating to applications. The so-called Plascon-Evans rule governs

cases of this kind. I have not had an application for oral evidence. Accordingly I am required to examine the factual matrix essentially on the basis of common cause facts, together with facts which are averred to by respondents, save where in terms of Plascon-Evans, those facts can be legitimately ignored by the Court.

[16] To my mind, first respondent considered that the amount of R93 000 was a fair amount to pay for the property due to the sale of the house which had taken place in the same street in April 2005. There is no suggestion that this did not take place or that the first respondent was disingenuous with this Court. Mr van Reenen submitted that first respondent did not consider that R93 000 represented the fair value of the house because it was reflected on the rates invoice, but rather because of his experience which flowed from the comparative sale of a house for R80 000. In his view, the rates invoice corroborated this particular belief.

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[17] It may well be that the applicant considered that the municipal rates invoice reflected the market value of the property as being R93 000. Given the unreliability of applicant's evidence, it may be somewhat generous to make any finding in this regard, but I will assume in his

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favour that indeed he so thought it to be the case. But that was certainly not the view taken by first respondent who considered that the R93 000, albeit that it had been shown to him *via* the invoice, represented a fair market value based on the experience which he had.

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[18] At one point, it appears that the applicant sought to shift its case from a common mistake on the basis that both parties were not necessarily of the view that R93 000 was the fair value, but rather in some form of *justus error* or misrepresentation perpetuated by the first respondent. For example, in the founding affidavit applicant states:

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“It is my respectful submission that first respondent intentionally kept the true state of affairs as to the actual market-related value of the property from me and induces(sic) me to alienate and sell my property far(sic) less to what the market-related value was”.

Later he says:

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“It is my humble submission that the first respondent misrepresented himself by conveying to me information based on the false premise and in so doing induced me to sell the property to him for R93 000”.

There is a further allegation that the fault lay at the door of first respondent's attorneys who should have so informed the applicant and that accordingly he was misled.

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[19] On the first version, first respondent is alleged to have known that the property was worth in excess of R93 000. Later, applicant alleged that first respondent mistakenly believed that the property was worth R93 000 due to the fact that this amount was reflected on the municipal rates invoice. On the one case there was a common mistake. On the other case, there was an inducement by the one party, who knew what the true state of affairs was, to persuade the other party to enter into a contract either on the basis of misrepresentation or *justus error*. I am not going to deal with the jurisprudential implications of these two grounds in that, for the reasons I have already advanced on these papers, first respondent put up a credible explanation as to why he considered R93 000 to be a fair value; indeed to have been the market value of the property, the municipal rates invoice notwithstanding.

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[20] It was suggested that our Constitution introduces a concept of good faith into our law of contract and that courts should utilise this concept to protect the weak and

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those who have suffered from an abuse of contractual power. Leaving aside the controversy relating to these questions of contract in our constitutional error, courts have to base an analysis upon the facts. Neither of these parties had a significant amount of contractual power. This was a relatively simple transaction between two individuals, neither of whom appears to be an owner of any means of production.

10 [21] The facts illustrate that the price which was agreed was R93 000. The facts do not indicate that first respondent knew or reasonably could have known that R93 000 was not the fair value of the house because, as he averred, he had information about a comparative sale on the same street approximately a year earlier. On the factual matrix which must inform the application of the law, there is no room in this case for utilising concepts of good faith to trump the facts which have been set out on the affidavits.

20 [22] For these reasons, I find that there is no basis for this application to succeed and for the sale to be set aside. There was a submission by Mr van Reenen that this Court should order that the applicant pay the first and second respondents' costs on an attorney and own client scale, alternatively on an attorney and client scale in that

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there has been significant postponements and adjournments in this particular case and that the losing party, being the applicant, resorted to a whole range of strategies and trifling defences and delaying tactics, none of which are sustainable in law and all of which have put first and second respondent to significant disadvantage.

[23] Given the nature of the parties and the kind of dispute which arose in this case I would be reluctant to impose any punitive costs scale. The order which is made is as follows:

1. The application is dismissed.
2. The applicant is ordered to pay the first and second respondents' costs, such costs to include the costs on the postponement of this matter on 30 November and the hearing on 13 May 2008.

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DAVIS J

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