IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19302/2013

In the matter between:

MOGAMAT ADIEL SAIT **Applicant**

and

LINDI NQONJI N.O. **First Respondent**

(In her capacity as executor of the joint estate
of herself and the late Stanley Ntsikelelo Nqonji)

LINDI NQONJI **Second Respondent**

THE MASTER OF THE HIGH COURT **Third Respondent**

THE REGISTRAR OF DEEDS **Fourth Respondent**

PIERRE GRANT CHRISTIAN **Fifth Respondent**

STANDARD BANK OF SA LIMITED **Sixth Respondent**

JUDGMENT DELIVERED ON 14 MAY 2014

BOQWANA, J

Introduction

[1] This is an extended return day of a rule nisi issued by this Court, per Cloete J, on 25 November 2013 for an order:

1.1 that the deed of sale concluded on 16 July 2012 between the applicant and the first respondent be rectified by amending the description of the seller on the first page thereof to refer to the first respondent by adding the words: '*in her capacity as executrix of the joint estate of herself and the late Stanley Ntsikelelo Nqonji*' after the surname 'Nqonji';

1.2 that the first and second respondents be ordered to effect transfer of the property to the applicant;

1.3 that the first and second respondents be ordered to sign all the necessary documents to comply with the order in 1.2 above within 7 (seven) days from the date upon which this order comes to their attention;

1.4 that should the first and second respondents fail to comply with this order that the Sheriff of this Court be authorised to sign all the required documents on their behalf in order to give effect to this order;

1.5 that the first and second respondents and/or such further parties opposing the application, be ordered to pay the costs thereof.

[2] An interdict prohibiting the first and second respondents from giving transfer to any person or entity of immovable property known as: Erf 5763 Goodwood, in the City Cape Town, Cape Division, Province of the Western Cape, In Extent: 495 square metres, situated at 7… M…. Street, G……., Western Cape ('the property'), pending the adjudication of this application, was granted by Cloete J on 25 November 2013.

Factual Background

[3] This case is about a deed of sale which was concluded on 16 July 2012. The applicant alleges that he concluded this deed of sale for the sale of the property with the first respondent in her capacity as executrix of the deceased joint estate and not in her personal capacity as the first and second respondents allege. The first and second respondents are one and the same person. The property in question belongs to the joint estate, having been registered in the names of the Stanley Ntsikelelo Nqonji ('the deceased'), who passed away on 21 June 2007, and his wife the second respondent. The second respondent was appointed as executrix of the joint estate in terms of the deceased will. She is cited in the papers as first and second respondent, i.e. both in her representative capacity as executrix of the deceased joint estate and in her personal capacity. I will at times, where appropriate, refer to the first and second respondent as Nqonji.

[4] The application is opposed by the first, second and fifth respondents ('respondents'). The fifth respondent opposes the application on the basis that he concluded a 'valid' written deed of sale with the first respondent in respect of the property on 18 September 2013.

[5] A mortgage bond was registered over the property in favour of the sixth respondent. During 2011, the sixth respondent obtained judgment against the first and second respondents to enforce a debt owed by the deceased joint estate. Pursuant to the judgment, a sale in execution of the property was scheduled for September 2012. The sixth respondent agreed not to go ahead with the sale in

execution of the property but to allow the first respondent to attempt to sell the property privately first. The property was then placed on the market by the first respondent. It is the events that follow, which I discuss below, that culminated in this application.

Applicant's case

[6] The applicant alleges that: On 16 July 2012 he concluded a deed of sale with the first respondent following placement of the property on the market by an estate agent, Maria Van Eck ('Maria') of Eckland Properties on behalf of the first respondent. This deed of sale was then presented to the sixth respondent who accepted its terms and cancelled the scheduled execution. Since then the first respondent has failed to finalise the administration of the estate and has failed to deliver transfer of the property to the applicant. The applicant and his family moved into the property in November 2012 and had been residing there since paying occupational rent as agreed between him and the first respondent. The occupational rent agreed to was initially an amount of R4500 but was increased to R5500 as the first respondent was not satisfied with the R4500. This led to the signing of the addendum, which the applicant attached to his replying affidavit, in response to the disputed occupational rent clause of the deed of sale.

[7] The sixth respondent became impatient and arranged a further sale in execution that was scheduled for 23 September 2013. The first or second respondent attempted to sell the property to the fifth respondent for reasons unknown to the applicant. The applicant became aware of this sale after he received a letter from the fifth respondent and an entity called Bravo Space 181 CC informing the applicant to vacate the property as they were now the owners of the property.

[8] Upon further investigations, ESI Attorneys, who were appointed as transferring attorneys in the deed of sale concluded on 16 July 2012, furnished the applicant with a copy of a notice headed 'letter of cancellation' signed by Nqonji

on or about 21 September 2013 in which she notifies William Inglis Attorneys (attorneys for the sixth respondent), inter alia, as follows:

> 'This letter serves to confirm that I wish to continue with the sale of my property to PIERRE GRANT CHRISTIAN ['the fifth respondent]. The Deed of Sale was signed by me on the 18th September 2013.
>
> I herewith cancel the mandate of all other offers signed by myself prior to the abovementioned sale...' (Own insertion)

[9] The applicant contends that he is not aware of any valid reason for the cancellation of the deed of sale. He has been patiently waiting for the transfer of the property which was delayed due to the administration of the deceased joint estate and the first respondent's lack of urgency. He further alleges that he did not receive any letter of cancellation calling upon him to remedy any possible breach of the deed of sale followed by a notice of the cancellation of the deed of sale. He initially based his contention on section 19 of Alienation of Land Act No. 68 of 1981. Mr Walters, who appeared for the applicant, however, conceded in his supplementary note that the Alienation of Land Act was not applicable in this instance. He submitted however that the submission on cancellation of the deed of sale was based on common law. The applicant contends that the first respondent is not entitled to cancel the deed of sale and will herself be in breach should transfer be given to the fifth respondent.

[10] The applicant further alleges that he has complied with the terms of the deed of sale and intends continuing to fulfil his obligations as stipulated therein. He states that he once again tenders the payment of the purchase price against transfer of the property. In his replying affidavit he attached proof that he obtained approval of the bond from the sixth respondent and also paid a deposit of R65 000 in compliance with the deed of sale.

[11] The purchase price for the sale of the property in terms of the deed of sale with the applicant is R630 000. According to the applicant, the first respondent will

receive R90 000 more than the amount required to be paid in the deed of sale entered into with the fifth respondent should the deed of sale he concluded with her be honoured.

[12] He contends that he brought the application on an urgent basis in order to prevent transfer of the property to the fifth respondent and to rectify the deed of sale to specify that the deed of sale was signed by the first respondent in her capacity as executrix. The applicant claims that these words were omitted in error by the parties, upon the signing of the agreement.

First and Second Respondents' case

[13] The crux of the Nqonji's defence is that she signed an offer to purchase the property in her personal capacity and not in her capacity as executrix. She further alleges that even if the agreement was valid, which she denies, the applicant failed to comply with the suspensive condition in the agreement resulting in the lapse of the contract. She further states that in any event the applicant failed to comply with the terms of the deed of sale in that he failed pay all the occupational rent and by doing so he repudiated the agreement and it was accordingly cancelled.

[14] To substantiate these assertions, Nqonji's case is as follows: Following her appointment as executrix of the deceased joint estate and due to her being a layperson she instructed Nolita Kose ('Nolita') of Mfazi Kose Attorneys as administrator of the deceased estate and to assist her with the administration process, and other relevant processes. Nolita's confirmatory affidavit is attached to the answering affidavit.

[15] She states that Nolita informed her that due to the fact that the estate had quite a substantial shortfall and that it was insolvent, the Liquidation and Distribution account in respect of the joint estate could not be lodged unless the shortfall was accommodated for. The most substantial realisable asset in the joint estate was the immovable property, which forms the substance of this litigation. She and Nolita then approached the sixth respondent to halt the sale in execution,

and allow them to attempt to sell the property privately, to which the sixth respondent agreed.

[16] During early July 2012 Maria approached her with a potential buyer and on or about 16 July 2012 Maria provided her with a written offer to purchase which was signed by the applicant on 10 July 2012. Nqonji informed Maria that the property belonged to the joint estate and that although she was appointed as executrix, Nolita was appointed as administrator and she did not want to enter into an agreement without speaking to Nolita first. She made it clear to Maria that she could not sign any deed of sale without first discussing it with Nolita. Maria referred her to clause 17 of the offer to purchase which provided that the offer will expire on that same date of 16 July 2012, and in order to prevent expiration of same, she could merely sign in her personal capacity and after discussing with Nolita she could then sign in her capacity as executrix. She then signed as advised by Maria.

[17] Shortly, after this she had a discussion with Nolita who informed her that the joint estate was insolvent and that it would be impossible to lodge the Liquidation and Distribution account, if no specific provision was made for the payment of the shortfall. Nolita contacted EIS Attorneys who were to deal with the transfer of the property advising them to draft a deed of sale which made provision for the shortfall and she further confirmed to EIS that the first respondent had signed the offer of purchase in her personal capacity and not in her capacity as executrix. Nqonji states that she never received the said deed of sale from either Maria or EIS but instead Maria constantly harassed her regarding finalisation of the estate and particularly the occupation of the property by the applicant. On every occasion she repeated what Nolita had told her and asked Maria to contact Nolita directly and she believes Maria did.

[18] Maria insisted further that the alleged deed of sale made provision that the applicant could take occupation of the property on 01 November 2012. Nqonji told

Maria that as far as she could remember the offer to purchase was signed on 16 July 2012 and it provided that the applicant would only take occupation of the property upon transfer. She was however not too concerned at that stage as she believed that no valid deed of sale was concluded as yet. She also advised Maria that if Maria was of the view that a valid deed of sale was concluded she had not received any payment of the purchase price nor any confirmation that the applicant's bond was approved. Nolita also never received any confirmation in this regard. Therefore, she was of the view that the deed of sale in any event had lapsed. Nqonji alleges that she has now discovered that the date of occupation was altered fraudulently and without her knowledge and consent. She claims that she did not initial next to the changes made, which is indicative of the fact that she did not agree to the new occupation date of 01 November 2012.

[19] During early November 2012, and in the late evening, Nqonji heard a knock on the door and to her shock a gentlemen who introduced himself as Mr Sait ('the applicant') informed her that he was moving into the property. Due to the fact that her three children lived with her and her two daughters were in the middle of matric exams she immediately relocated to a friend's house in Parow that evening. She contacted Maria the next day who apologised but confirmed that the deed of sale was valid, that the sixth respondent had approved same and occupation was from 01 November 2012. Maria told her that the applicant would transfer an amount of R5500 directly into the first respondent's account on a monthly basis. She however received short payment in the amount of R3250.00 from the applicant in November 2012 and thereafter only received payments of the above amount during December 2012 and January 2013 respectively. She never again received payments from applicant in respect of occupational rent or anything else.

[20] She states that due to the fact that she was financially unable to take any legal steps such as spoliation or eviction proceedings, against the applicant, she decided that it would be in the best interest of the joint estate that she rather attempt to finalise the administration of the joint estate, by giving applicant an

opportunity to pay or provide security for payment of the purchase price to sixth respondent as was required by the offer to purchase. In August 2013 she however received notice from the sixth respondent that a sale in execution of property was scheduled for 23 September 2013. She then realised that it was obvious that no security for payment of the purchase price had been provided. In light of the fact that she and Nolita regarded the sale of the property as being in the best interest of the joint estate, they did not object to the sale in execution taking place. Furthermore a substantial amount of time had lapsed. The applicant had dragged his feet by not obtaining security for the purchase price despite the fact that she gave him an opportunity even though he was not even rightfully entitled to the transfer of property. According to her the administration of the estate needed to be finalised.

[21] She asserts further that, before the sale in execution took place, she was contacted by the estate agent, Joe Cunningham ('Joe'), of PAJ Investments, who informed her that he had a potential buyer ('the fifth respondent') who had offered the required purchase price and who was willing to settle the property's rates and taxes account in the amount of R84 704.16, which was still outstanding. Nqonji informed Nolita and they both agreed that it was in the best interest of the estate to accept the offer. She signed the deed of sale in her representative capacity as executrix of the joint estate although her capacity is not reflected in the document. She decided to advise the sixth respondent that the applicant's offer was refused and she wanted to proceed by selling the property to the fifth respondent. She believes that it would be in the best interest of the joint estate that the deed of sale with the fifth respondent be enforced and transfer be awarded to him.

Evaluation

[22] The issue to be determined by the Court is whether the deed of sale concluded on 16 July 2012 is valid and binding on the first respondent thereby entitling the applicant to the relief he seeks in the notice of motion.

Disputes of fact

[23] This case consists of a number of disputes of fact. The legal position is clear on how the Court should approach the matter when material facts are in dispute. The general rule is that a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent justify such an order.[1]

[24] There are essentially two material disputes of fact raised by Nqonji. The first one relates to the capacity in which Nqonji signed the deed of sale of 16 July 2012 and the second one relates to applicant's compliance with the deed of sale.

[25] It was submitted by Mr Walters on behalf of the applicant that the disputes of fact raised by the respondents are not bona fide, are extremely far-fetched and are clearly untenable, which would justify the Court to merely reject them on the papers. Mr Walters however submitted in the alternative that if the Court was unable to decide the matter on the papers, it should refer the question of the capacity and any other issue relevant to the Court's decision to oral evidence.

[26] Mr Bosman who argued for the respondents was vehemently opposed to this approach. His view was that the applicant ought to make his application for the matter to be referred to oral evidence at the outset and not after argument. In this regard he referred to the decision of **Kalil v Decotex (Pty) Ltd and Another**[2]. It should however be noted that this is not an inflexible rule as the Court noted in the same decision.[3]

[27] Mr Bosman also referred to the decision of **Standard Bank of SA Ltd v Neugarten and Others**[4] which dealt with what the Court should determine in deciding whether or not a matter should be referred to oral evidence or to trial. The relevant passage in that decision reads as follows:

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[1]Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634
[2]1988 (1) SA 943 (A) at 981 D –F
[3] See Kalil v Decotex (Pty) Ltd supra at 981E.
[4]1987 (3) 695 (W) at 698I – 699D.

'If the acceptability or cogency of evidence stands to be influenced by the manner in which the evidence is given or, more generally, by what may eventuate if the evidence is tested by cross-examination, the truth cannot be satisfactorily established on a written exposition of the evidence. Oral evidence should be heard. The way for the hearing of such evidence must be paved by a summons - and subsequent pleadings - which circumscribe the issues. But it unfortunately does happen that a dispute requiring such an evaluation sometimes arises in proceedings which are unsuitable for such a dispute. The first alternative is to dismiss the application. The predictable abortiveness of the litigation because of the inability of the Court to decide the factual dispute on the papers is usually visited on an applicant who should have foreseen a dispute irresoluble on the papers. Reprehensibility may, of course, be absent because of considerations which justify the use of application procedure despite a foreseeable dispute. In the absence of reprehensibility, the second alternative is generally the appropriate one. The Court then brings about what the dispute, perhaps more readily realised on hindsight, needed in the first place. It orders that the litigation be undertaken by action procedure. But sometimes the factual dispute is within such a narrow compass, and can be so relatively expeditiously disposed of, that a complete trial procedure is disproportionately costly and cumbersome. When the true facts are 'capable of easy ascertainment', the case merits different treatment, viz the authorising or the requiring of verbal evidence. The Court's function, if there is a factual dispute, is to 'select the most suitable method of employing viva voce evidence for the determination of the dispute'. Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd1949 (3) SA 1155 (T) at 1162, 1164 and, with reference to discovery, 1163.Cf the wording of Rule of Court 6(5)(g). <u>But the hearing of oral evidence remains generally appropriate only to cases where it is found 'convenient', where the issues are 'clearly defined', the dispute is 'comparatively simple' and a 'speedy determination' of the dispute is 'desirable'.</u> See the Room Hire case supra at 1164, 1165; cf Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd1978 (4) SA 696 (T); Less and Another v Bornstein and Another1948 (4) SA 333 (C) at 337; Conradie v Kleingeld1950 (2) SA 594 (O).' (Own emphasis)

[28] I thought long and hard about whether or not to refer this matter to oral evidence. As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the Court is satisfied that there is no real

and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits.[5]

[29] My view is that this matter is capable of being resolved on the papers. I am not convinced that sending it to oral evidence would be of any value if the probabilities can be ascertained from the affidavits that have been filed. I take note of the warning that a Court should not lightly settle a factual dispute solely by weighing up probabilities emerging from the papers, without giving any due consideration to the advantages of oral evidence.[6] I however wish to refer to the decision of this Court: **South Peninsula Municipality v Evans and Others[7],** where Van Heerden J said the following:

> '..On the other hand, South African Courts have recognised that, in motion proceedings, disputes of fact cannot necessarily be accepted at face value and that, in each case, the Court should closely scrutinise the alleged issues of fact in order to decide whether there is indeed a dispute of fact that cannot satisfactorily be determined without the aid of oral evidence (see, for example the Nampesca case at 893A – C and the authorities cited there). Thus, while the Court should be circumspect in its approach,
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> '(i)f, on the papers before the Court, the probabilities overwhelmingly favour a specific factual finding, the Court should take a robust approach and make that finding' [8](Own emphasis)

[30] It is also useful to refer to the decision of **Truth Verification Testing Centre v PSE Truth Detection CC[9].** In that case Eloff AJ held the following:

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[5]*Erasmus Superior Courts Practice (Electronic Edition) at RS 41, 2013 Rule – B1 – p50.*
[6] See Sewmungal and Another NNO v Regent Cinema 1977 (1) SA 814 (N) at 820 E –F.
[7]2001 (1) SA 271 (C).
[8] South Peninsula Municipality v Evans supra at 283F-H.; See alsoDhladhla v Erasmus 1999 (1) SA 1065 (LCC) at 1072.
[9]1998 (2) SA 689 (W) at 698

> 'I am mindful of the fact that a court should be loath to determine disputed issues on affidavit on the basis of probabilities as they present themselves from an analysis of the respective conflicting versions of the parties. (Da Mata v Otto NO 1972 (3) SA 858 (A) at 865 *in fin*.) I am also mindful of the fact that the so-called 'robust, common-sense, approach' which was adopted in cases such Soffiantini v Mould 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable.'(Own emphasis)

[31] From the above decisions it is clear that the Court is permitted to scrutinise the detailed version presented on affidavit in order to establish if indeed there is a real and genuine dispute of fact and whether the version offered by the respondent is wholly fanciful and untenable.

[32] It makes no sense in my view for the Court to refer the matter to oral evidence when it is apparent that *viva voce* evidence is likely not to disturb what appeared from the papers. It must be stated further that none of the parties in this present matter specifically asked the Court to refer the matter to oral evidence, except for Mr Walters who submitted in the alternative that the Court should, if it finds that it cannot decide the matter on the papers, refer the narrow aspect of capacity to oral evidence. Apart from that both parties, arguing from different perspectives, were confident that this matter could be decided on the papers.

Was a valid deed of sale concluded?

[33] The first issue I need to determine is whether a valid deed of sale was concluded. It is common cause that the property in question belonged to the joint estate. Nqonji in her personal capacity had no right to the property before the finalisation of the administration of the joint estate and by law could not be party to the deed of sale in her personal capacity. There are however anomalies in Nqonji's

version. She admits that she signed the deed of sale but she claims that she was told by Maria that she could sign in her personal capacity and later sign as an executrix after discussing the matter with Nolita.

[34] The first anomaly is around the issue of the shortfall. The issue of the shortfall not being provided for in the deed of sale was raised as the main reason for Nqonji not to sign as executrix after conferring with Nolita.

[35] I find this to be quite strange in that the deed of sale concluded with the fifth respondent made no provision for the shortfall either. In fact the purchase price in the deed of sale signed on 16 July 2012 was R630 000.00 which was R90 000.00 more than the amount offered by the fifth respondent. The fifth respondent offered to pay R540 000.00 as a purchase price. It appears that there were outstanding property rates and taxes amounting to R84 704.16 which according to the first respondent the fifth respondent had offered to pay. That was however not provided for in the deed of sale between them. Furthermore, clause 21 of the deed of sale between the first respondent and fifth respondent specifically states that: 'all rates and taxes, water and service charges including all levies and imposts if any, up to the date of registration of the sale is included in the abovementioned purchase price.'(Own emphasis)

[36] It accordingly does not make sense that Nolita and the first respondent would find the fifth respondent's offer to be in the best interest of the joint estate and agree that the first respondent could sign the deed of sale with fifth respondent in her representative capacity as executrix when it did not provide for the shortfall, while at the same time claiming that the deed of sale concluded with the applicant could not be signed because of the absence of the provision of the shortfall. In any event even if the fifth respondent had promised to pay R84 704.16 for outstanding rates and taxes, the amount of R90 000 which is the difference between the purchase price of the two deeds of sale was more than the R84 704.16 offered by the fifth respondent. The first respondent's version on the issue of the shortfall is therefore unconvincing, far-fetched and untenable. It must therefore be rejected.

[37] Even if it were to be accepted that the first respondent could not have signed the deed of sale in her capacity as executrix without Nolita's approval, she in her own papers states that she decided to give the applicant an opportunity to pay or provide for security for payment of the purchase price to sixth respondent. This in my view indicates that she decided to abide by the provisions of the deed of sale contrary to the assertion that the agreement was void.

[38] She further allowed the applicant, whom she claims occupied her property unlawfully, to occupy the property from November 2012 to date without taking any action to evict him. I accept that she may not have had funds to litigate, it is however improbable that Nqonji would without resistance leave her property with her children late in the evening and allow a total stranger whom she had never met to move into her property if she did not believe that he had the right to occupy the property. She also accepted some rental amounts that were paid, albeit some months were short paid or not paid at all according to her. Her actions clearly condoned the situation regarding occupation.

[39] In addition to this she signed above the words 'owner' appearing in the deed of sale knowing full well that she could not sign as owner in her personal capacity. Nqonji's version clearly bears out that she knew before signing the deed of sale that she could not sign the document in her personal capacity.

[40] I am persuaded by the applicant's alternative argument that Nqonji had represented to the applicant that she was acting in her representative capacity on behalf of the owner (thereby in her capacity as executrix) when she offered property for sale and signed the deed of sale. The applicant acted on that as he obtained bond approval, paid deposit, moved in the property and incurred expenses to clean and restore it. Nqonji's conduct could reasonably have been expected to mislead the applicant into believing that she had the right to sign the deed of sale and did so in her required representative capacity. To this end, she did not act as a

reasonable person would have done and was accordingly negligent.[10] I am satisfied that the requirements of *estoppel* have been met and Nqonji must therefore be *estopped* from claiming that she did not sign the deed of sale in her capacity as executrix.[11]

[41] The respondents did not find it necessary to argue the issue of *estoppel* in detail as they believed that the applicant had failed to fulfil his obligations in terms of the deed of sale.

[42] Another interesting point is that the deed of sale concluded with the fifth respondent makes no mention of the first respondent's representative capacity. This in my view makes the version that the second respondent signed the deed of sale with the applicant in her personal capacity highly improbable.

[43] The version that the first respondent signed in her personal capacity as opposed to her capacity as executrix is untenable and is therefore rejected. I therefore find that the deed of sale concluded on 16 July 2012 was valid.

Compliance with the deed of sale

[44] The second defence raised by Nqonji is that the applicant did not comply with the suspensive condition requiring approval of the bond by a financial institution by no later than 07 August 2012. This condition was deemed to be fulfilled once the bank or financial institution had issued a written quotation. In his founding papers the applicant alleges that he complied with the terms of the deed of sale and at no point did the first respondent ever point out that he was in breach of the terms of the deed of sale. In fact he attaches a grant quotation from the sixth respondent in his replying affidavit dated 02 August 2012,showing a loan amount

[10] See Aris Enterprises (Finance) v Protea Assurance 1981(3) SA 274 (AD) at 291D-E; Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter [2004] 4 All SA 589 (SCA) at paragraphs 7, 11 and 12 and Africast (Pty) Ltd v Pangbourne Properties Ltd [2013] 2 All SA 574 GSJ at paragraph 44.

[11] See Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd [2011] JL 27157 (SCA) ZASCA 20 (17/03/2011))at [16] and [17]; and Rabie & Sonnekus, The Law of Estoppel in South Africa, Butterworths (2nd Edition, 2000) at p 63, Para 5.1, and (LAWSA, Vol 9; 2nd Ed, (2005) Estoppel (Rabie & Daniels): Para 657.)

of R565 000.00 and a purchase price of R630 000, in respect of the property in question, as proof of compliance with clause 8 of the deed of sale. There is no reason for the Court not to accept this evidence as it is relevant. This evidence is in my view not new. It is in reply to an assertion made by the respondents in their answering affidavit that the applicant failed to comply with the suspensive condition and therefore the first respondent construed the deed of sale as having expired due to non-compliance by the applicant.

[45] If the respondents had an issue with these allegations made in reply they could have asked for leave to deal with this issue by filing further affidavits, but they failed to do so. It further did not make sense that after the first respondent realised that the deed of sale had lapsed in August 2012 she would still allow the applicant to move in and occupy her property on 01 November 2012 after expiry of the deed of sale.

[46] The third issue raised is non-payment of occupational rent. On this issue Nqonji alleges that the applicant failed to pay the amount of R5500.00 per month as required in clause 6 of the deed of sale. She states that she received reduced amounts in November 2012 and another two amounts in December 2012 and January 2013 respectively. In reply to this the applicant states that he found defects in the house and was told by Maria that he could attend to those and deduct it from the rental hence the reduced amount in November 2012. As of April 2013 he paid the rental amount to EIS every month as he was told to do so *via* email. The position is not clear with regard to March 2013 rental and other short payments for May, September and October 2013.

[47] The respondents' submission is that the applicant had a clear intention not to comply with the material terms of the deed of sale and therefore repudiated same through his conduct. He therefore is not entitled to the relief he seeks of transfer of property to him.

[48] The applicant's submission however is that the first respondent was not entitled to cancel the deed of sale as there was no breach from his side. Secondly even if there was a breach, which he denies, he never received a letter requiring him to rectify the breach, followed by a letter of cancellation.

[49] In the Supreme Court of Appeal decision of **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd**[12]the Court held that:

> '[16] "Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated...
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> .....
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> The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'(Own emphasis)

[50] Assessing the conduct of the applicant and all the background material in this case, I am not convinced that an inference can be drawn that there was a clear cut and an unequivocal intention on the part of the applicant to no longer be bound by the terms of the deed of sale. The last payment made to EIS by the applicant was an amount of R5500 on 17 November 2013. He had been making payments and attached proof of payments to his replying affidavit. He states that these are

[12]2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A)

proofs of payment that he could get hold of. It is clear that some months are missing. Furthermore, payment was made to EIS Attorneys' trust account and not directly to the first respondent. I am not satisfied that the applicant's conduct amounted to unequivocal intention not to comply such that a reasonable person would conclude that proper performance was not forthcoming. In any case, I am also not convinced that occupational rent is a material provision of a deed of sale, in the context of this case, such that non-compliance with it would amount to repudiation of the whole contract. The character and the essence of this contract relates to the sale of property. In **Schlinkmann v Van der Walt**[13] the Court held, *inter alia*, that: 'A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not as a rule be deemed to amount to repudiation….In every case the question of repudiation must depend on the character of the contract, the number and weight of wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case….To this I would add only that the onus of proving that the one party has repudiated the contract is on the other party who asserts it.'

[51] It appears from the papers that Nqonji cancelled the contract. It is not clear if she elected to do so based on a perceived repudiation occasioned by non-payment of occupational rent by the applicant. It seems to me cancellation as alleged in the respondents' papers was triggered by the applicant's slow pace in obtaining the necessary security for the purchase price and by non-provision of a shortfall in the deed of sale.

[52] I say so because Nqonji, under the heading cancellation of deed of sale, alleges that she decided to give the applicant an opportunity to pay or provide security for payment of the purchase price as was required by the offer of purchase. However when she received notice from sixth respondent during August 2013 that the sale of execution of the property was scheduled for 23 September 2013, she

[13]1947 (2) SA 900 (E) at 919, quoting from *Re Rubel Bronze and Metal Co. and Vos* (1918, 1 K.B. at p. 322) a decision by MCCARDIE, J.

then realised that obviously no security for payment of the purchase price had been provided. According to her a substantial amount of time had passed and the applicant had dragged his feet despite been given an opportunity, even though he was not rightfully entitled to the property. The actions to cancel the deed of sale were not as a result of short-payment of occupational rent but applicant's failure to secure payment of the purchase price as appears in the answering affidavit. I have already dealt with the applicant's reply on this issue.

[53] In reality it seems to me that the real reason for the delay in transfer was the non-finalisation of the administration of the joint estate owing to the shortfall as opposed to the applicant's failure to obtain security for the purchase price. The first respondent's version leading to cancellation of the deed of sale is far from convincing and is inconsistent with a number of allegations that I have already dealt with.

[54] Even if it were to be accepted that the applicant did repudiate the contract, which is not the case in my view, the contract comes to an end upon communication of the innocent party's acceptance of repudiation and rescission to the party who has repudiated as stated in the **Datacolor**[14] case.

[55] It is common cause that the first respondent did not communicate the cancellation of the deed of sale directly to the applicant, but the applicant became aware when he was investigating claims by Bravo Space that they were now new owners of the property, of a letter directed to the sixth respondent's attorneys confirming her wishes to sell the property to the fifth respondent and cancelling mandate on all other offers.

[56] The Court in **Datacolor International (Pty) Ltd went on to state the following:**

> 'Since the election to cancel, provided that it is unambiguous, need not be explicit but may be implicit, and since the cause for cancellation need not be correctly identified

[14] Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd supra at paragraph 16

> and stated, it follows that the actual communication of the decision to cancel, once made and manifested, may be conveyed to the guilty party by a third party. In the instant case the defendant, by circulating the agency announcement, made its attitude plain for all the world to see.'[15] (Own emphasis)

[57] The **Datacolor** decision makes it clear that communication does not need to have gone directly to the applicant, but cancellation may be conveyed by or *via* a third party, which seems to be what happened in this case. My concern though in this case is that the applicant stumbled on this letter of cancellation in that had it not been for his investigations, the applicant would not have known about the notice. It could therefore not be concluded in the circumstances that Nqonji communicated her intentions to cancel 'for all the world to see', including the applicant, as it were.

[58] The problem in this present matter also is that the notice addressed to the sixth respondent's attorneys is dated 21 September 2013. There were payments made for occupational rent by the applicant for the periods of September, October and November 2013. Based on this, the applicant could not have been said to have conveyed repudiation to Nqonji as these actions could not reasonably be held to be suggestive of a person who no longer wanted to be bound by the terms of the deed of sale.

[59] I now deal with the issue of urgency which the respondents took issue with. Mr Bosman submitted that there was no reason for the applicant to set the matter down on the semi-urgent roll. It was postponed to the semi-urgent roll on condition that the applicant obtained an undertaking from the sixth respondent not to proceed with its sale in execution which the applicant did. Whilst the matter is no longer as urgent in the sense that the sixth respondent has agreed to stay execution of the property and an order was granted on the interim basis by Cloete J interdicting the Nqonji from effecting transfer of property to any person or entity pending

[15] Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd supra at paragraph 19

adjudication of this application, the matter did warrant to be heard on the semi-urgent basis, in my view.

[60] Furthermore, it is in the interest of all the parties that this matter be finalised as soon as possible. From the reading of the papers, it seems that all parties are anxious in getting the affairs surrounding this property finalised as they have been ongoing for many years. The sixth respondent for instance had agreed to stay execution three times. The conclusion of the estate administration process and necessary transfers should be finalised. In any case the matter was fully argued before me on the semi-urgent roll and I find no basis to dismiss the application purely on the applicant's failure to set it down in fourth division.

[61] In conclusion, I am of the view that the applicant has made out a case that he is entitled to the final relief he seeks in this matter.

[62] In the result I make the following order:

1. The Rule Nisi granted on 25 November 2013 is confirmed.

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N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE APPLICANT: Advocate A Walters

INSTRUCTED BY: Africa & Associates, Woodstock

FOR THE FIRST, SECOND

AND FIFTH RESPONDENTS: Advocate C J Bosman

INSTRUCTED BY: Laubscher & Hattingh Inc. C/O Smith Buchanan Boyes, Cape Town

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