

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.

2892/2022

In the matter between:

B[...] M[...] (Born M[...])

APPLICANT

and

S[...] M[...]

FIRST RESPONDENT

SQUIRE SMITH & LAURIE INC

SECOND RESPONDENT

**REGISTRAR OF DEEDS,
KING WILLIAMS TOWN**

THIRD RESPONDENT

JUDGMENT

Rugunanan J

[1] This is an opposed application.

[2] At the heart of the matter lies fixed property described as Erf [...] East London, held by the first respondent under title deed number T[...] /2013 endorsed by the registrar of deeds in terms of section 45*bis* (1)(a) of the Deeds Registries Act 47 of 1937.

[3] The relief claimed by the applicant straddles some three pages of her notice of motion. It is a sloppy and inelegant piece of drafting discordant with the description of the Title Deed annexed to the founding affidavit (i.e. T[...] /2013) and mentioning instead Title Deed number T1989/2013 which is certainly not the subject of these proceedings. What can be garnered from its nebulous and bungling formulation – as far as I am able to fathom and put into my own words – is that the applicant essentially seeks an order reviewing and setting aside the decision by the third respondent:

- 3.1 to endorse Title Deed number T[...] /2013 indicating that the first respondent is entitled to deal with Erf [...], East London being property jointly held by the parties;
- 3.2 to register the Proprietary Agreement dated 8 July 2014 entered into between the first respondent and herself; and
- 3.3 to endorse Title Deed number T[...] /2015 indicating the first respondent as having acquired in terms of section 45*bis* of the Deeds Registries Act 47 of 1937 the applicant's half-share in [...], East London.

[4] The applicant in addition seeks orders:

4.1 interdicting the first respondent from selling the property;

4.2 directing the third respondent to review and to set aside *inter alia* 3.1, 3.2 and 3.3 above; and

4.3 awarding her the costs of the application.

[5] Of the three respondents cited in these proceedings the relief claimed is targeted against the first respondent and the third respondent (the registrar of deeds). Save for the first respondent (to whom I will hereinafter refer to as the respondent), the remaining respondents have made no appearance in these proceedings.

Procedural context

[6] The matter initially had its inception in the High Court, Bhisho. A transfer to this Court proceeded from a point *in limine* taken by the respondent that the former Court did not have jurisdiction to hear the matter.

[7] During argument in this Court the respondent persisted with two additional points *in limine*, namely, (a) that the notice of motion and founding affidavit were not formulated as an application for the review and setting aside of an administrative decision, and (b) that the applicant's cause of action constituted a debt that had become prescribed.

[8] In relation to these issues it bears mentioning at the outset that the prescription issue is not without merit. I deal with this below but for reasons to follow the argument suggesting that no case is made out for advancing an administrative review is unsustainable.

[9] At the commencement of the proceedings the applicant sought condonation for the delay of approximately 5 days in filing her replying affidavit. This was, quite sensibly, not opposed.

History

[10] During 2009 the applicant and the respondent celebrated their marriage in community of property. In March 2013 they purchased the fixed residential property known as Erf [...], East London (the property) in regard to which their joint ownership was reflected in Title Deed number T[...]/2013. The second respondent acted as the transferring attorneys. On 17 April 2014 and in the Regional Court, King Williams Town, their marriage was dissolved and a decree of divorce incorporating a settlement agreement was granted (the divorce order). The settlement agreement stipulated that the parties agreed that the property was to be sold and that any profit or loss acquired therefrom was to be shared equally between them. On 8 July 2014 the applicant and the respondent concluded what they style as a Proprietary Agreement (hereinafter referred to as the agreement or the proprietary agreement depending on the context).

[11] Up to this stage of the factual narrative, that much of the preceding summary is common cause.

[12] There are however factual disputes between the parties' versions and more is said about this in the paragraphs that follow. As with any motion proceedings, to the extent that any facts are genuinely in dispute, they must be resolved in favour of the respondent, unless a referral to oral evidence is sought.¹ It is perhaps opportune to point out that the applicant did not apply for the respondent to be called for cross-examination under rule 6(5)(g) of the Uniform Rules of Court.² She could have done so in which event the outcome

¹ *Reddy v Siemans Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

may have been different. It must therefore be assumed that in pressing for a decision on the papers in the face of the material disputes of fact dealt with below, the applicant by necessary implication assumed the risk of the matter being decided on the version presented by the respondent.

The *in limine* issues and arguments

[13] Adverting to the terminology in the notice of motion the respondent contends in his answering affidavit that the relief claimed by the applicant is not competent since it is advanced as a review in regard to which the founding affidavit does not meet the requirements for the review of administrative action under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), nor have proper grounds been set out for reviewing the conduct of the registrar of deeds.

[14] If the application is indeed a review of administrative action, he argues it would have to be dismissed.

[15] The argument is misguided.

[16] The applicant, in reply, pointedly relies on section 6 of the Deeds Registries Act. The section does not provide for a review in the conventional sense. It provides for the cancellation by a registrar – upon an order of court – of *inter alia* a deed of transfer, a certificate of title, or other deed conferring or conveying title to land. In resorting to the section the applicant's cause of action is that the agreement was entered into in contravention of the divorce order and that she was fraudulently misled by the respondent as to the purpose of the agreement (as to which see later).

[17] Despite the inaccurate choice of wording in the notice of motion suggesting a review, I am satisfied that the application is not intended to be a

review under the PAJA, but rather it is primarily for the cancellation of the endorsements on Title Deed numbers T[...]/2013 and T[...]/2015 in favour of the respondent.

[18] Focus shifts to the prescription issue.

[19] At the outset the founding affidavit read with the annexures indicates that the case put forward by the applicant is that the proprietary agreement was fatally flawed. To be specific, besides it being in direct contravention of the divorce order it was tainted by the respondent's fraudulent misrepresentation.

[20] In heads of argument the respondent submits that the applicant's cause of action (or claim) being as it is, a claim founded on the *condictio ob turpem vel iniustam causam* (which is a claim for transfer of money or property in terms of an illegal agreement³) is a debt for which the Prescription Act 68 of 1969 lays down a prescriptive period of three years.⁴

[21] The claim falls in the realm of contract law.⁵

[22] In argument reference was made to *Lydenburg Voorspoed Ko-operasie v Els*⁶ where the court considered the date when prescription would commence to run in the case where a party entered into an invalid contract. The court concluded⁷ that the right of action by the plaintiff arose immediately upon the conclusion of the invalid agreement.

[23] On this approach the respondent's argument posits that the agreement to which the endorsement transfer gave effect, was null and void *ab initio* and any right of action arising as a result thereof arose immediately upon the conclusion

³ du Bois Wille's *Principles of South African Law* (9th ed) (Juta) p1064.

⁴ Section 11(d) of the Prescription Act 68 of 1969.

⁵ du Bois Ibid.

⁶ 1966 (3) SA 34 (T).

⁷ At 37E.

of the agreement on 8 July 2014 and has since become prescribed three years later.

[24] The applicant's version is that on several occasions subsequent to the conclusion of the agreement she requested the respondent to make payment. During or about March 2018 when she approached her bank for a loan she learnt that the property had been transferred and registered in the name of the respondent. A series of further requests for payment – all met with excuses by the respondent and assurances that payment would be forthcoming – culminated in a letter of demand sent by the applicant's attorneys to the respondent on 16 September 2020.

[25] Although the Prescription Act provides that the running of prescription may be interrupted by a debtor's acknowledgment of his indebtedness⁸, the respondent denies the applicant's allegations of assurances by him to make payment. While admitting that he received the letter of 16 September 2023, he takes issue therewith.

[26] He does so by averring that he approached the applicant's attorneys and presented them with the proprietary agreement as proof that there was no sale of the property and hence no debt to acknowledge. Parenthetically, this aspect of the respondent's version ought not to be seen in isolation from the matrix in which the dispute of fact in the parties' versions is assessed for determining whether the applicant is entitled to final relief.

[27] The applicant maintains that when she had sight of the agreement in September 2020 she learnt for the first time that the agreement incorrectly records her consent that her share of the property would be given to as opposed to being sold to the respondent. She apprehended that this did not accord with

⁸ Section 14.

the terms of the divorce order and that she had been misled by the respondent to part with her share in the property without receiving payment.

[28] It is implicit in the nature of the *conditio* that the illegality of the proprietary agreement arises by operation of the law. The running of prescription from the date of the agreement is unaffected by the applicant's factual circumstances aforementioned from which she intends to demonstrate that prescription has either been interrupted or delayed until she became aware of the full extent of her rights, nor until she had gathered evidence enabling her to draw legal conclusions.⁹

[29] To sum up, an acceptance of the applicant's version would be tantamount to leaving the determination of the prescription issue entirely in her hands and against whom it would otherwise be running.

[30] This is contrary to the nature of the *conditio* and the rationale of the Prescription Act.¹⁰

[31] If I were wrong in my conclusion on prescription – the outcome of the matter, as will be seen from what follows below, is determined essentially on the version advanced by the respondent. In that regard I intend to say only what is considered absolutely necessary to support my concluding order.

Resolution of factual disputes

[32] In *National Director of Public Prosecutions v Zuma*¹¹ Harms DP observed that motion proceedings were designed for the resolution of legal disputes based on common cause facts.¹² If a party has recourse to motion proceedings it is trite that the determination of the facts to which the court will

⁹ *Claasen v Bester* [2011] ZASCA 197 para 13; 2012 (2) SA 404 (SCA) para 13.

¹⁰ See generally *Mike Sellick Trust (Pty) Ltd v Ethekwini Municipality* [2014] ZAKZDHC 33 para 18.

¹¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

¹² See also *Mthizana-Base and Others v Maxhwele and Others* [2019] ZAECMHC 11 paras 5-9.

have regard is exercised in accordance with the *Plascon-Evans* rule. Under the rule, where disputes of fact arise on the affidavits, it is well established that final relief can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such relief.

[33] The general approach, therefore, in motion proceedings in which final relief is sought, is that factual disputes are resolved on the papers by way of an acceptance of those facts put up by an applicant that are either common cause or not denied as well as those facts put up by the respondent that are in dispute. It may be different if the denial by a respondent of a fact alleged by an applicant does not raise a real, genuine or *bona fide* dispute of fact for example, 'if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'.¹³

[34] The adequacy of a respondent's denial for purposes of determining whether a real, genuine or *bona fide* dispute of fact arises was considered in *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another*.¹⁴ There it is stated that a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise it has in his affidavit seriously and unambiguously addressed the fact said to be disputed. A bare denial may suffice, but may not be sufficient if the fact averred lies purely within the knowledge of the disputant and no basis is laid for disputing the accuracy or veracity of the averment.¹⁵

[35] The factual dispute in the parties' versions is manifest in the circumstances in the conclusion of the agreement and its intended purpose.

¹³ *National Director of Public Prosecutions v Zuma* supra fn 9 para 26. See also *Mthizana-Base and Others* ibid paras 6-7.

¹⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) paras 11-13.

¹⁵ *Ibid* para 13.

[36] According to the applicant, the respondent remained in occupation of the property after the divorce. It became apparent to her that he had no intention of vacating when he proposed to purchase her half-share in the property at fair market value. Since she was a single mother with a minor child and in need of cash, she agreed to this proposal which she believed was incorporated in the proprietary agreement that she signed on 8 July 2014 in his presence at the offices of the second respondent.

[37] She avers that the agreement was signed in haste, that it was not explained to her and that she was never given a copy thereof. On a number of occasions in the period that followed she requested the respondent to make payment in accordance with the agreement but was met with a mix of excuses and assurances. When she approached her bank in March 2018 for financial assistance she learnt that her share in the property was transferred and registered in the name of the respondent in March 2015.

[38] During September 2020 and upon receipt of a copy of the proprietary agreement, it became apparent that she gave/donated her share of the property to the respondent and that this was contrary to the divorce settlement, absent a variation thereof. She then realised that she was misled by the respondent into believing that she sold her share to him (in accordance with his proposal). This lies at the heart of the argument that the respondent perpetrated a fraudulent misrepresentation.

[39] According to the respondent, the registration of the applicant's share of the property in his name and its transfer achieved exactly what the parties intended in the proprietary agreement. He denies any allegation of having misled the applicant in his interaction with her leading to the conclusion of the agreement. He denies that there was a sale to him of the applicant's share in the

property because he did not have the means to acquire it. He maintains that the proprietary agreement was a novation of the settlement agreement on divorce and that it had the effect of entitling him to take transfer of the property without the necessity to apply to court to vary the divorce settlement/order.¹⁶

[40] The further detail in the respondent's version is that subsequent to the divorce the applicant orally agreed that he would keep the property and that her share would be transferred to him at no cost. This arrangement arose against the circumstance that he gave the applicant the option of taking over his share of the property provided that she assumed full responsibility for servicing the outstanding bond. She refused this proposal stating that she did not want the property nor did she wish to be saddled with bond payments or bond cancellation costs.

[41] Accordingly, the intended purpose of the proprietary agreement was that he would continue servicing the bond and the applicant would effectively be released from her obligations under the bond. According to the respondent, the applicant was happy with this arrangement and knew well what the agreement that she signed on 8 July 2014 did contemplate. At the time of signing it both he and the applicant knew of the purpose of the meeting at the second respondent's offices and they confirmed that they had knowledge of what they were about to sign. Upon signature of the agreement each of them were handed copies thereof.

[42] In summing up, the version put up by the respondent does not lend support for the applicant's assertions that she was fraudulently misled in the progression of events that led to the conclusion of the proprietary agreement. Her contention that the agreement was fatally flawed cannot be upheld.

¹⁶ See *PL v YL* 2013 (6) SA 28 (ECG) para 6, where it is stated that 'it is of course always open to parties to abandon the judgment in whole or in part and to enter into a new agreement.'

[43] And so, on the version of the respondent, I am prompted to find that the applicant intended for her share in the property to be transferred to him without there being a sale, and that the registrar of deeds merely gave effect to the parties' agreement. Where it is shown that the agreement is untainted, that it stands as valid, and that the applicant's consent has not been vitiated by fraud, the (clerical) errors in the documentation supplied by the respondent to the registrar of deeds (and which are annexed to the founding papers) are inconsequential and do not support the applicant's case for the relief set out in her notice of motion.¹⁷

[44] Having resorted to the principles applicable to disputes in motion proceedings I need go no further than say that the respondent has proffered positive contrary evidence¹⁸ in support of his denials which are genuine and *bona fide* on material matters. This precludes the applicant from succeeding in the face of an opposing version that is neither fictitious nor palpably implausible or untenable.

[45] In the circumstances, I make the following order:

1. The late filing of the applicant's replying affidavit is condoned.
2. The application is dismissed.
3. The applicant shall pay the costs of the application.

¹⁷ *Nedbank v Mendelow* 2013 (6) SA 130 (SCA) paras 12-14.

¹⁸ See *SKG v Eskom Holdings SOC Ltd and Others* [2022] ZAECELLC para 71 and the cases referred in the footnotes thereto.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

L. S. Burger
Instructed by

O'Reilly & Associates
(Ref: F O'Reilly)
Tel: 081 579 6594 or 083 255 9922
c/o Mili Attorneys
Makhanda

For the First Respondent:

K L Watt
Instructed by
Gordon McCune Attorneys
(Ref: G Williams)
Tel: 043 642 1519 or 072 514 8737

Date heard: 12 October 2023.

Date delivered: 10 January 2024.