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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

……..……..... **……**

SIGNATURE **DATE**

Case: 4957/22

In the MATTER between:

SIMON NKOSI **1st APPLICANT**

ELIZABETH QUEEN THEMANI **2nd APPLICANT**

and

TUSO ATTORNEYS **1st RESPONDENT**

TEAM JP AGENTS **2nd RESPONDENT**

JUDGEMENT

KHOLONG AJ

INTRODUCTION

1. This is an opposed application in terms of which the applicant Mr Simon Nkosi (herein-after 'first applicant') has applied for Tuso Attorneys (herein-after 'first respondent') to pay money which it contends it received in respect of the proceeds of sale of a property belonging to first applicant and his wife, Ms Queen Elizabeth Themani (herein-after 'second Applicant'), located at house no […] Temong Section, Tembisa.

2. For convenience, first and second applicants will here-under simply be referred to as 'applicants' in this matter. They are a married elderly couple, that resided at the aforementioned house until they decided to sell this property and eventually vacated it.

3. Applicants have applied to this Court seeking relief in terms of which Tuso Attorneys, first respondent is ordered to pay money which it received in respect of the proceeds of sale of the property of the applicants. That first respondent pay what they term "money envisaged in clause 8.1.2 of the agreement they had plus interest in terms of clause 8.1.2'. This refers to payment received in consideration for the sale of their property, in Temong Section, Tembisa.

4. In terms of paragraph 3 of the notice of motion, applicants seek an order declaring that a dispute exists with regards to who was at fault with respect to the alleged breach of the agreement of sale document signed by applicants as purchasers and Team JPS Estate Agents as sellers and for the matter to be referred for adjudication through a Court process as envisaged in clause 9.3 of the agreement of sale document.

BACKGROUND

5. The factual matrix leading to the application can be summarized briefly as follows: The applicants, an elderly male and his wife decided to sell their property and approached one Ms. Louisa Modingoana herein-after 'Louisa', an estate agent, who according to Applicants was an agent and tasked her to help them sell their house. Louisa agreed to this agency arrangement.

6. Whilst their house was on the market and a potential buyer had been identified and was undergoing bank approval processes, Louisa is alleged by applicants to have picked them up in order to help them view other properties they might be interested in buying ones their property was sold. Applicants identified a property in Birchleigh after the viewing tour and, in their submission, informed Louisa about the property they liked. What follows is a dispute surrounding the purchase of this new Birchleigh property; alleged subsequent failure to make payment for the Birchleigh property; whether or not they consented or authorized the cancellation of the purchase agreement for the Birchleigh property and a dispute over a sum of R400 000 applicants allege second respondent paid over to sellers as cancellation penalty fee without their consent. They seek this Court to order first respondent to pay this sum over to them.

FACTUAL ANALYSIS

7. First respondent in their answer raised two points of law objecting to this claim. The first is non-joinder of Louisa, the Estate Agent as she is alleged to have duped applicants into purchase of the Birchleigh property. The second objection is what respondent contend is anti-cipated dispute of fact by applicants. The result of which is that they should have anticipated that there will be dispute of fact principally about whether first respondent was authorized by them to cancel the purchase agreement with resultant penalties. That on this score alone applicants claim must be dismissed, as it should have been prosecuted properly not through motion but action proceedings.

8. This Court has deemed it convenient to examine the facts, in their proper context as presented, to inform it properly in the examination of the legal questions. There is dispute about circumstances that led to the purchase of the Birchleigh property which brought with it obligation to pay purchase price by applicants or in the event of failure, as it appeared on the facts of this case, penalties deducted from the proceeds of their Tembisa property.

9. The agent, Louisa's version in her confirmatory affidavit to first respondent has a different version to that of applicants as to the genesis of the decision to view other properties with a view to buying. This is a point first respondent raise as a major issue in their answer. Her version is that applicants themselves decided to buy another property upon selling their own property and in that process changed their minds at least once with respect to identifying what they deemed a suitable property for them. Whatever the cause, what is common cause is that they settled on the Birchleigh property and put an offer to purchase this property, which offer was accepted.

10. In applicant's version, the agent, Louisa subsequent to what they term 'tour' to view properties, arrived later at their house with papers for them to

sign. In the founding affidavit, She is alleged by applicants to have explained these papers as papers for the sale of their property. Applicants accept that they signed the papers. When their son returned from work they informed him of what they term the sale agreement they entered into but that they did not have the copies. Their son, one Kenneth, then advised them otherwise and whatever happened Kenneth then called Louisa and advised her that they wanted to cancel, as he Kenneth, was unhappy that Louisa made them sign the agreement in his absence knowing the parents were elderly, uneducated, and do not understand the papers they signed.

11. What then puzzles this Court, is that the following day Louisa, despite the foregoing arrived and informed them that she was taking them to an attorney as part of the further process in the selling of the house and that they must bring with them the following:

    a) Title deed
    b) Marriage certificate, and
    c) Their identity documents.

12. It appears despite what they term engagement between their son Kenneth and Louisa the previous day expressing unhappiness that they were made to sign without him being present and are eldrerly and uneducated, they proceeded to continue cooperating with Louisa including producing relevant documents needed to complete the ‘sale’. They aver Louisa informed them that her attorney would be processing the transfer for them. There is no explanation in the light of Kenneth’s communication with Louisa informing her of his parent’s decision to cancel, why in the days that followed they willingly accompanied her to what they term ‘Louisa’s Attorneys’, who is the first respondent in this matter, where evidently they

settled various papers related to the sale, which are now the subject of dispute.

13. It is nonetheless applicant's version that they went the following day to the offices of Anna Tuso, the conveyancer and first respondent here-in. That they were asked for and that they produced aforementioned documents. That they were made to sign further papers, which they contend first respondent explained as documents for the purpose of sale of their property.

14. They aver that an argument ensued after first respondent had informed them that the papers she wanted them to sign were for the sale of their property. Their version is that they argued why sign another sale agreement having signed one previously with Louisa. Louisa upon being called to the meeting explained that the documents she made them sign were for the purchase of the Birchleigh property. They further allege that at this meeting, and following their protestation, Louisa confirmed that she would have those documents related to the purchase of Birchleigh property cancelled and they need not worry.

15. A week after this meeting first respondent called them and advised them that there is an Estate Agent threatening to sue them if they cancelled the purchase agreement on the Birchleigh property.

16. A meeting was called with all parties to try resolve the issue but no agreement could be reached. Upon sale of the property at R650 000 a sum of R400 000 of the money was transferred to 2nd respondent as damages or penalties. Applicants received 171 000 balance. That following the sale applicants were removed from their house. They allege that they are now temporarily housed elsewhere and are effectively homeless.

17. Applicants contend that they did not know 1st respondent prior to their decision to sell. That first respondent was brought by Louisa and that they intended to appoint their own Attorney.

18. There is reference in the papers and notice of motion to purchase agreement but that was not uploaded and filed. This Court raised an issue on the day of the hearing about this failure to upload the agreement. An indulgence was requested by applicants as they alleged to have problems uploading on caselines, and with respondents expressing no opposition, indulgence was granted for the matter to momentarily stand down and the agreement uploaded on caselines.

19. Applicants reflect in their founding affidavit that the Birchleigh property was bought for a sum of R1 950 000 which was to be a cash sale and a deposit thereof to be paid in full into a trust account, managed by first respondent.

20. Applicants contend that no deposit or payment to seller was made in consideration of the Birchleigh property. There is dispute about whether payment by applicants to second respondent was ever discussed at least until sellers started making demands for payment of deposit, which in effect was full purchase price as it was a cash sale. At paragraph 10.1.2 of their affidavit applicants contend that had a request been made by first respondent for that deposit then they would have at an early stage been made aware then that they were ‘duped into signing documents for a purchase of a property they had no intention of purchasing’. That Louisa did not cancel the documents as undertaken. That had this come to their attention, they would at that early stage have taken action to clarify issues.

21. That the first respondent without any mandate took the proceeds of the sale of their property and decided on her own to disburse the money according to how she saw fit. That there was never any authorization from them that the proceeds from the sale of their property should be used as a deposit for the purchase of the Birchleigh property. That they didn't receive any notice of breach as required by the purchase agreement for Birchleigh property.

22. They contend that first respondent 'as their attorney should have made sure that before second respondent claims damages, that all necessary terms of the agreement are adhered to. They further complain of procedural steps not adhered to in terms of the said agreement. That the principle of rouwkoop is not applicable as they made no deposit towards the Birchleigh property. That the meeting they or their son attended at the estate agents did not result in any agreement or authorization. That the conveyancer is their attorney and aught to have acted in a manner that protected their interests and she failed to do so. Consequently they have been prejudiced as a result thereof.

23. They complain in the papers that first respondent failed to service them with required skill, expertise and honesty required in the code of conduct for lawyers, in terms of Section 35 of the Legal Practice Act. That she disregarded terms of the contract that she purported to rely on when she 'dispensed' of their money. Further that she failed to account faithfully, accurately and timeously to them thereby breaking the code of conduct of lawyers as envisaged in the Legal Practise Act. That she should have ensured that all due processes are followed as required by the purchase agreement. That having failed to do so she was grossly negligent and ignored significant provisions protecting her clients.

The Purchase Agreement

24. Whilst there is a dispute about circumstances surrounding applicant's decision to enter into the purchase agreement of the Birchleigh property. The existence of the agreement is not in dispute. Applicants themselves invoke various provisions of this agreement, which they contend first respondent aught to have observed and failed to do so.
25. First respondent in the papers and in argument does not query its obligations under the agreement, save to plead that cancellation was authorized by applicants, at least through their mandated son Kenneth, with resultant penalties.

26. Paragraph three of the notice of motion pleads with this Court for an order declaring that a dispute exists with regards to who was at fault with regards to the alleged breach of the agreement of sale document signed by Simon Nkosi and Queen Themani as purchasers and Team JPS Estate Agents as sellers, and for the matter to be referred for adjudication through a court process as envisaged by clause 9.3 of the agreement of sale document.

27. Clause 9.3 of this Agreement of sale between the parties signed on or around 23 May 2019 provides that:

"*Should there be a dispute as to who the defaulting party is and/or whether the agreement has been validly cancelled, the Conveyancer must hold the deposit payment referred to in clause 4.1.1 in trust until such dispute is finalized either by agreement between the purchaser and the seller or in terms of a Court order*."

28. This Court considers it just and equitable for the provisions of this clause to be considered. To the extend therefore that there has been any non-compliance by applicants in uploading this agreement on caselines timeously and bringing it into evidence; noting also first respondent's non

objection for the agreement to be braught into evidence before this Court, the Court thus exercises its discretion and condones any non-compliance with regard to handing up the evidence in Court through caselines and hereby accepts the agreement of sale into evidence.

29. Paragraph 2.3 appoints Tuso Attorneys, the first respondent as Attorneys appointed' by the seller'. Paragraph 9.2.1 states that if the defaulting party is the purchaser, then the estate agent and the Conveyancer i.e. first respondent will be entitled immediately upon cancellation of this agreement to receive payment of the commission and wasted costs from the deposit payment referred to in clause 4.1.1 of the agreement. This clause relates to the purchase price of R1.9 Million. It also provides that the seller will be entitled to the balance if any of such payment, together with all interest payed thereon.

30. Evidently cursory reading of this clause reflects that the first and second respondent stand to benefit from the cancellation of this purchase agreement, to the detriment of applicants. As history would have it R400 000 has been disbursed not from a deposit related to this transaction but a different agreement. It is therefore in the interest of justice for this Court to properly understand the circumstances surrounding cancellation of the purchase agreement. Whether that cancellation was indeed authorized.

31. On the facts it is common cause that the deposit money of R1.9 Million was never paid as envisaged by this agreement. Further that this agreement has cancelled any suspensive conditions from paragraphs 14.1 to 14.1.3. Further that from the review of this purchase agreement, it can be identified that the sale of 'purchaser's property' is also cancelled by being scratched over with a pen to indicate non-applicability of this provision. Put differently, there is no reference in this purchase agreement to the sale of the applicant's Temong, Tembisa property. On the face of

this agreement on record and in the absence of any other, there appears to have been two distinct transactions. This, notwithstanding. the fact that one conveyancer, first respondent, was attending to both.

32. Whilst this Court notes first respondent's argument that applicants, through their son Kenneth, authorized cancellation of the purchase of this Birchleigh property. There is no reasonable explanation, even if this Court where to accept this explanation, why given that the respondent was also hired to attend separately to the sale of the Tembisa property, were the proceeds of that sale, which is distinct and different from this purchase agreement, used to off-set the damages or penalties envisaged in clause 9.2 of this purchase agreement. This considering that no payment, as applicants contend, was ever made into or for this trust account.

33. Both parties agree that there is dispute about whether this agreement was validly cancelled with resultant damages or penalties. What first respondent takes issue with is whether they are ventilating their dispute in the right Court. It is the Court's view therefore that paragraph 9.3 as prayed for by applicants at paragraph 3 of the notice of motion is relevant to determination of this dispute. This court must, however, consider as raised by respondent, whether a party to a contract's request for a declaratory relief is competent through motion proceedings as the facts obtain in this matter. This Court will thus proceed to examine these points of law raised by first respondent.

Non-joinder of the 'Applicant'.

34. The respondent in their answer raises issue with the non-joinder of the estate agent, Louisa Dingangoane (the agent). That contrary to allegations raised by applicants in their founding affidavit, first respondent was not present when they signed the offer to purchase the Birchleigh property and could therefore not give evidence on any matter related thereto. Nor

whether they were misled or tricked by Louisa to sign the purchase agreement.

35. That the first time she came to know of the matter is when they together with their agent, Louisa, son and daughter came to her office for assistance with regards to transfer of their property.

36. First respondent disputes that there were any complaints raised at their meeting to deal with transfer nor was she informed that they believed they may have been duped by the agent, Louisa, into signing wrong documents. She contends that the only complaint raised was that by the son, Kenneth, that they shouldn't have signed the agreement in his absence.

37. First respondents points out to this Court that applicants did not join their agents in this matter but the court is asked to determine whether they were duped by their agent into signing the agreement. That determination of the issue of whether the applicants were misled or tricked would one way or the other affect the legal rights of the agent, particularly the right to be heard. That it affects the right to put their side of the story before a decision is made.On this basis alone respondent contends that application falls to be dismissed for non-joinder.

38. This Court recalls the dictum in **Amalgamated Engineering Union v Minister of Labour**[1] that the question of whether all the necessary parties have been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the Court's order may affect the interests of third parties. In essence the Court in this matter noted two essential principles of law that is that:

[1] 1949 (3) SA 637 (A) at 651

1) That a judgement cannot be pleaded as res judicata against someone who was not a party to the suit in which it was given, and
2) That the Court should not make an order that may prejudice the rights of parties not before it.

39. Given the facts before it, this court disagrees with first respondent's contention on this matter. The issue in dispute as set out in paragraphs one and two of the notice of motion and respondent's answer is whether first respondent had the authority to disburse R400 000 as conveyancer towards damages or penalties for cancellation of the Birchleigh agreement of sale settled by the parties on 23 May 2019. It is this Court's view that the agent Louisa is peripheral to the Court's determination of this point. Further, she is not party to this agreement which both applicants and defendants seek to rely on for the respective relief they seek, but Magda Muller, an agent of team JP Estate Agents who is second respondent in this matter. This Court therefore finds this objection to be meritless and is thus dismissed.

Dispute of facts

40. First respondent, as a second basis of attack of applicant's case is the contention of existence of dispute of facts. This in respondent's view included consideration of inter alia whether applicants were duped into concluding the sale agreement for the Birchleigh property. Whether first respondent had instructions to use portions of the proceeds of sale to pay damages in respect of applicant's repudiation or breach of the sale agreement in respect of the Birchleigh property.

41. First respondent contends that she engaged with the agent and she disputes applicant's version that applicants were duped or misled. She

puts her version and that of the agent, corroborated by the agent in the confirmatory affidavit that applicants approached the agent not only to sell their property but also to have her help them find a property they could move into once their property is sold. That prior the disputed sale agreement they had intended to buy another property for which they settled a purchase agreement with sellers of Birchleigh property.

42. That they first intended to by a different property but changed their mind about that property as they felt it was too small for them. As a result the agent did not put the offer to the seller. As a result they continued to search for suitable sizeable property to purchase until they got the Birchleigh property.

43. According to first respondent and the agent, they baught the more expensive property and sold their Tembisa property because of certain funds to the value of R4 Million they expected to receive shortly, but which did not eventuate.

44. It is respondent's case that because the agent, did not have properties in her portfolio suitable for applicants, the agent for Tembisa property Louisa, enlisted assistance of second respondent, the listing agent who had the Birchleigh property in her portfolio. As a result the agent for the Tembisa property procured the offer to purchase from the listing agent, second respondent, as the Birchleigh property was in her portfolio. That she explained the offer to purchase the Birchleigh property to them in the presence of their daughter, Portia. That Portia participated in explaining the offer to purchase to applicants prior to signing.

45. First, respondent avers that she only became involved when applicants came to her offices, with agent, Louisa, and Kenneth with an agreement that had already been signed and accepted by sellers. That on this score

alone applicants should have foreseen dispute of facts and not approach court through motion proceedings. This Court considers this objection irrelevant to the determination of whether first respondent was authorized to cancel the purchase agreement as duly appointed conveyancer for applicants.

46. First Respondent further contends that she had a mandate from applicants to cancel the Birchleigh property and to pay the amount of damages from the proceeds of the sale of Temong, Tembisa Property which mandate was given in the presence of their son Kenneth and Magda Muller of second respondent. That if there is dispute about agreement to pay damages, that would require oral evidence from both sides with cross examination.

47. Respondent on claim for damages contend that applicants conveniently claim general damages per para 8.1.4 of founding affidavit but relief is not found in the notice of motion. Further that there are no facts pleaded for general damages. That a claim for damages cannot be brought through application proceedings as oral evidence has to be led on a number of elements of such claim. That the nexus between first respondent's conduct and harm has to be pleaded; that the quantum of damages has to be pleaded; witnesses called and their evidence tested.

48. First respondent further argues that they should therefore have foreseen that this action should not have been brought through motion proceedings and that the application must therefore be dismissed with costs.

49. In argument, first respondent submitted that the Court should not consider hearsay evidence and strike out any and all averments that amount to hearsay. That Kenneth Nkosi, applicant's son instructed cancellation,

which she confirmed with applicants in subsequent correspondence. Payment of damages and correspondence to that effect was remitted to daughter.

50. First respondent contended that she presented to applicants at their meeting and was mandated to deal with both transfers of Temong, Tembisa and purchase of Birchleigh properties. That at the meeting at first respondent's offices the son simply just reprimanded the applicants for dealing with matters in his absence and there-after, of their own volition, proceeded to indicate that they will proceed with purchase of the Birchleigh property. Especially as they were just waiting for money from their investment, which money according to respondents did not come. They then proceeded to sign all necessary sale documents referenced in Annex AT 5 of respondent's papers.

51. The agent, in her confirmatory affidavit contended that she never told applicants that she will cancel the purchase of the Birchleigh property. That if it is true that the agent undertook to cancel the sale, then applicants would not have had to sign further documents. That the purchase that was cancelled relates to the 1st aborted purchase of a smaller house of 1.3 million. First respondent and the agent thus deny that applicants had cancelled to buy the Birchleigh property.

52. They contend that sellers had demanded contrary to applicant's version, specific performance, through their Attorneys Nortje Attorneys. Hence the meeting attended by Kenneth on their behalf where he disclosed to that meeting that the investment didn't come through and that they would settle the wasted costs. That after the meeting with Nortje Attorneys first respondent proceeded to her offices together with Magda of second respondent and Kenneth instructed first respondent to cancel the agreement.

53. First respondent denies applicant's version that she was appointed by the agent but argues that she was appointed by applicants themselves nor that her appointment only related to the transfer of the Birchleigh property. What is not explained to this Court is why if she was appointed by the applicant and not the agent does the purchase agreement state as aforesaid that conveyancer, and first respondent herein is appointed by the 'seller'.

54. First respondent's version is that she made repeated requests for payment by applicants of cash amount for purchase of Birchleigh property to no avail. That there was no need to give notices as the parties agreed to settle the matter amicably per meeting held at leapfrog offices with 'sellers' Attorneys, Nortje Attorneys. Accordingly, that first respondent acted in accordance with mandate given by applicants. That the sum of 400 000 paid was not a deposit but payment of damages by applicants for the aborted purchase of Birchleigh property.

55. First respondent further avers that when she became aware of demand for specific performance by sellers of the Birchleigh property or their demand in the alternative, that applicants pay damages, she had prior to the leapfrog meeting intended to resolve this dispute, repeatedly called Kenneth indicating to him seller's intention to sue if they don't come forward with deposit. That applicants became aware, contrary to applicant's version, of the amount of R403 825,85 disbursed through statement of accounts they received through their daughter. That applicants received feedback of leapfrog meeting per email remitted to the daughter on 10 July 2019.

56. Respondent denies that she acted in a manner that didn't protect the interests of applicants. That whilst applicants are pensioners they still had full contractual capacity as adults and were at all material times assisted by their son Kenneth and at times their daughter, Portia.

57. In argument first respondent's Counsel raised various arguments some of which were not pleaded on the papers. He contended that section 9.3 of the agreement should be found by this Court not to be applicable as there was a settlement. That the fact of there having been a settlement makes the provisions of this clause 9.3 non-applicable. Further that for the fact that there was settlement borne by the statement of accounts sent to Portia, whether informal or formal puts this matter within realm of res judicata.

58. Applicants contend that the statement sent to Portia was simply note for information and not a settlement agreement. AT3 email correspondence from first respondent to Portia, appears to be a statement of demand outlining how the damages for cancellation would be computed and that applicants must respond thereto before end of business that day. AT4 is found to be correspondence to Nortje Attorneys informing them of the outcome of the meeting they had with Kenneth Nkosi representing his parents. This letter makes representations which are disputed by applicants. What is missing to this Court is any reply either from Anna, Kenneth or applicants themselves that points to parties being ad idem within the meaning of settlement as argued by first respondent's Counsel. Whatever the true facts might be, this Court cannot deem a statement of demand or accounts sent to a third party seen against the pleadings by applicants to be a settlement agreement that excludes applicability of clause 9.3. especially in the absence of plausible explanation by first respondent on what they relied on, when in their view the authorization was given by applicants, to cancel the purchase agreement. It appears to this Court that in the absence of any extraneous evidence the parties

would have had to go back to the purchase agreement to deal with issues of cancellation as this agreement dealt with the purchase of the Birchleigh property.

59. Respondent seeks an order dismissing the application. In this regard confirmatory affidavit of the Agent, Louisa supports first respondent version. Louisa in her confirmatory affidavit complains that she is constrained to respond fully as she has not been joined to the proceedings and seriously false allegations have been levelled against her.

60. In reply Applicants contended that the basis of their case is premised in para 10 of founding affidavit. That reference to Agent was just for background and that therefore argument of non-joinder be dismissed by the Court. At paragraph 12 applicants deny respondent's version and puts her to proof thereof.

61. They argue in reply that the basis of this application is non-compliance with clause 9 of the offer to purchase the Birchleigh property. That therefore the dispute is capable of being adjudicated upon through application proceedings. That 1st respondent acted ultra vires when she transferred R403 825,85 as she did so without their mandate. Applicants conceded in argument that there were no facts submitted to support claim for general damages. Applicant's representative abandoned this argument of general damages in Court. They, however, maintained that there was no free will nor volition when they purchased the Birchleigh property. They denied that they mandated Kenneth to cancel but agree that Kenneth indicated in that meeting that his family had no financial means to pay the Birchleigh property.

62. The preceding paragraphs and the different versions put by the parties quite evidently, in this Court's view, point to a dispute of fact which this

Court is incapable of resolving in the absence of viva voce evidence, and taking a view on the credibility or otherwise of various witnesses to this dispute. There is dispute about whether Kenneth gave the instructions to cancel the Birchleigh agreement and for applicants to pay damages of R403 825,85. Applicants themselves concede in reply that Kenneth, their son, attended that meeting that sought to resolve the dispute about the sale or performance regarding the Birchleigh property. What they dispute is that Kenneth gave instruction to cancel the agreement.

63. This Court agrees that it simply cannot determine this issue without various witnesses being called and granting parties opportunity to cross examine. This Court concurs that it cannot take a view on the credibility or otherwise of any of the parties involved on paper. The issue which remains is whether this dispute of fact can be deemed to have been anticipated by applicants making the application inappropriate for motion proceedings as argued by respondents.

THE LAW

64. This Court recalls the dictum in **Plascon Evans Paints v Van Riebeeck Paints**[2] which confirmed **Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty)(Ltd)**[3] that where there is dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by respondents together with the admitted facts in the applicant's affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted. This dictum, generally held, were said by Corbett JA to require clarification.

[2] 1984 (3) SALR 623(A) at 634H
[3] 1957 (4)SA 234 (c)

65. In this regard Corbett JA noted that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. That in certain instances the denial by respondent of a fact alleged by applicant may not be such as to raise a real, genuine or bona fide dispute of fact.

66. The Court held that if in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6(5)(g) of the Uniform Rules of Court and the Court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. The Court noted at 635C that where the denials of the respondent are so far fetched or clearly untenable, the Court may be justified in rejecting them merely on the papers.

67. From the papers in this case respondents want this Court to believe that they were appointed by the applicants and where at all material times serving their interests when the evidence before Court as reflected in the agreement of sale at paragraph 2.3 at the very least, notes that respondents, Tuso Attorneys as transferring attorneys are appointed by the seller. This may very well have been a clerical error. But seen against other provisions in the purchase agreement pointing to the first respondent being entitled to penalty charges and damages against applicants in the event of cancellation leaves this Court with a lot of questions around real facts surrounding cancellation of the purchase agreement.

68. Rule 6(5)(g) provides that where an application may not properly be decided on affidavit the Court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. This rule notes that the Court has discretion to direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact or it may refer the matter to trial with appropriate directions as to pleadings and definition of issues.

69. The crux of first respondent's Counsel on this point was that for the fact that a dispute of fact has arisen, applicants should have anticipated that. Thereby making their case ill-advised for motion proceedings lending it to dismissal. The ratio in **Room Hire Co (Pty)(Ltd) v Jeppe Street Mansions (Pty)(Ltd)**[4] is that a Court has discretion where a dispute of fact arises to
    a) dismiss the application;
    b) direct that viva voce evidence be heard, or
    c) send the dispute to trial.

    Murray AJP noted[5] that in a Court's exercise of its discretion as set out above, an application may even be dismissed with costs, particularly when the applicant should have realized when launching his application that a serious dispute of fact is bound to develop.

70. The Court noted that it is not proper that an applicant should commence proceedings by motion with knowledge of the probability of protracted enquiry into disputed facts not capable of ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.

71. On the facts applicants clearly concede that a dispute of fact has arisen. They even offered to put first applicant forward for oral evidence in their papers, if the Court so elected.

[4] 1949 (3) SA 1155 (T) at 1168
[5] Op cit 1162

72. Paragraph 9.3 of the agreement reads “Should there be a dispute as to who the defaulting party is and/or whether the agreement has been validly cancelled, the conveyancer must hold the deposit payment referred to in clause 4.1.1. in trust until such dispute is finalized either by agreement between the Purchaser and the seller or in terms of a Court order.
73. The evidence before this Court that this disputed amount for which applicants wish to rely on in paragraph 9.3 may have been “disbursed” and not held in trust until this dispute is resolved or there is an appropriate Court order makes the proposition by respondents that this Court must simply dismiss the application on the basis of ‘anticipated dispute of facts’ even if not borne by evidence on record before this Court untenable, inequitable and unjust. Especially seen against what this Court deems to be a simple declaration prayed for by applicants in paragraph 3 of their notice of motion, which is competent through motion proceedings.

74. With respect, this court cannot agree with respondents that by virtue of applicants invoking their rights under paragraph 9 of the sale agreement which they are entitled to and can litigate this right speedily and cheaply through motion proceedings, that the exercise of that right should be deemed by this Court worthy of sancture simply because a dispute of fact has arisen.

75. This Court does not find that this factual dispute, with the evidence before it, could be found within the meaning and context of sancture anticipated in **Room Hire.** The record before this Court does not point it to any major anticipated dispute by applicants before this motion proceedings were initiated. What it has, in spite of many irrelevant facts, is that applicants sold their Tembisa property. Entered into a purchase agreement for Birchleigh property. The agreement was cancelled. A statement of accounts was sent to applicant’s daughter, in respondent’s view setting

out the settlement of the dispute. Which settlement in their view makes section 9.3 of agreement not applicable. Applicants were paid R171 000 from the sale of their property. They now want the balance of R403 825,85 paid to them. Respondents now on papers before this Court dispute this demand as meritless as that amount now claimed by applicants was authorized by them to be paid as penalties. The dispute over how the R403 825,85 penalty came about has come up in the affidavits. Counsel for respondent argues in his heads of argument that the first respondent became aware of this dispute is when the affidavit was filed. This, in this Court's view is the point that requires resolution and cannot be said to have been anticipated by applicants to put their motion within the realm of sancture. What it does point to is a dispute of fact that has arisen and may be incapable of resolution simply on the papers.

76. This Court therefore finds that a dispute of fact exists that is incapable of resolution on paper and in its discretion in terms of rule 6(5)(g) refers this dispute to trial to determine whether in terms of paragraph 9.3 of the purchase agreement, that agreement was validly cancelled with consequential penalties.

Conclusion

77. This Court therefore concludes that it cannot conclude this dispute between applicants and respondents simply on affidavits in the light of factual dispute that has arisen without hearing viva voce evidence. That the interest of justice requires hearing evidence from relevant parties involved on whether the purchase agreement was validly cancelled with consequential penalties.

Costs

78. Both applicants and first respondent have asked for costs of this application. It is this Court's view, however, that conclusion of this dispute after hearing oral evidence will give proper guidance on the issue of costs, as costs go with the result.

Order

79. Having heard Attorney for applicants and Counsel for respondents, and having read the notice of motion and other documents file of record

IT IS ORDERED THAT:

1. That a dispute envisaged in clause 9.3 of purchase agreement exists between the parties.
2. That the matter under case number 4957/22 is referred to trial to determine whether the Team JP Estate Agents Agreement of Sale was validly cancelled in terms of clause 9.3 of said agreement or any other relevant agreement by the parties with resultant penalties.
3. The affidavits filed of record by the parties in this matter are considered for purposes of this trial to be pleadings, subject to normal rules of this Court.
4. Costs will be costs in the cause.

_____

SST KHOLONG
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG DIVISION
PRETORIA

Appearances:

For the Applicant:	Ms. Nkosi of Nkosi (Nonhlanhla) Attorneys
For the Respondent:	LJS Madiba for 1st Respondent Instructed by: Tuso Attorneys
Date Heard:	22 January 2024
Date Judgement delivered:	6 February 2024