IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 52533/2020
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

05/03/2021

SIGNATURE **DATE**

In the matter between:

MAKEPEACE, ALISON	**Applicant**
and	
SAN LAMEER VILLA 3212 CC	**First Respondent**
DIRK UYS ATTORNEYS	**Second Respondent**
THE REGISTRAR OF DEEDS,	
PIETERMARITZBURG	**Third Respondent**

Disputed sale agreement concluded pursuant to an auction of immovable property

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JUDGMENT

DE VILLIERS, AJ:

[1] This dispute originated at an auction of an immovable property and played out in a written agreement concluded pursuant thereto. The applicant seeks to enforce the agreement. The seller avers that the agreement of sale was not concluded with the applicant. The parties before me are the applicant, who is the alleged purchaser; the first respondent is the seller; the second respondent is the seller's conveyancers; and the third respondent is the relevant registrar of deeds.

[2] The auctioneers have not been joined, and I refer to them as "*the auctioneers*"*.* The (original) purchaser of the property has not been joined either. He is the applicant's husband and I refer to him as "*Mr Makepeace*". I refer to the applicant as "*the applicant*" or "*the purchaser*", to the first respondent as "*the first respondent*" or "*the seller*", and to the second respondent as "*the conveyancers*"*.*

[3] This matter has been allocated to me by agreement, for decision on the papers filed of record, after the judge who had heard the matter in urgent court became indisposed. Included in the papers are four sets of heads of argument (two by each side). These heads of argument properly set out the disputes. I possibly unnecessarily so, also sought and obtained consent that this matter be determined in the Gauteng Local Division.[1]

[4] I address the merits of the dispute. My predecessor did not strike the matter for lack of urgency. I agree, it has commercial urgency. No one took issue with the court's jurisdiction, as both the applicant and the first respondent (the main protagonists) are resident within this court's jurisdiction.

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[1] See *Thembani Wholesalers (Pty) Ltd v September and Another* 2014 (5) SA 51 (ECG) at para 13, and the two courts' concurrent jurisdiction set out in Government Notice 30 published in Government Gazette 39601 of 15 January 2016.

[5] The application is unusual in that only final relief is sought in urgent court. By its nature, the urgent court is a holding court, where one would have expected an interim interdict restraining transfer pending proceedings to determine the underlying disputes. Instead, *inter alia*, the following final relief is sought before me (upon which the remainder of the relief sought is based):

> "*2. The deed of sale in respect of the property concluded between applicant and first respondent on 03 March 2020 ("the agreement"), a copy of which is annexed to the founding affidavit of Alison Makepeace, as annexure "MMl", is valid and binding on the parties inter se, until fully performed or lawfully terminated*".

[6] Ancillary relief is sought interdicting a re-sale of the property, enabling the applicant to produce a bank guarantee for the purchase price, and to give declaratory relief regarding the cancellation of the agreement, but these all depend on the main relief sought.

[7] The applicant formulated her claim as follows in the founding affidavit:

> "*13. Pursuant to a successful bid at a public auction, my husband, Murray Makepeace ("Murray"), on my behalf, executed an offer to purchase on 26 February 2020, which was accepted by San Lameer Villa*[2] *on 03 March 2020, thus constituting an agreement valid in law. A copy of the agreement is hereto attached, marked annexure "MM1".*"

[8] The applicant did not attend the auction, her husband did. As already reflected, I do not refer to him as "*Murray*" as she does, but as "*Mr Makepeace*". I also do not refer to the first respondent as "*San Lameer Villa*" as the applicant does, but as "*the first respondent*" or "*the seller*".

[9] Both the relief claimed, and the formulation of the main contention reflect that in issue is the factual question of whether the written agreement was concluded between the applicant and the first respondent (or between the applicant's husband and the first respondent). The issue is if Mr Makepeace acted as the applicant's agent (and not in his own name) when he executed the written agreement.

[10] It would become common cause in the papers that as at 3 March 2020, the auctioneer and the seller did not know of the existence of the applicant, and no written appointment of Mr Makepeace as the applicant's agent existed.

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[2] The applicant's defined reference to the first respondent.

Indeed, the agreement relied upon by the applicant was a version produced in the later part of July 2020 by an employee at the auctioneers, a version that had never been signed by the applicant or the seller.

[11] Upon looking at the document attached as "MM1" to the founding affidavit:

[11.1] It bears on an annexure the name of the first respondent as the seller (in handwriting), and the name of Mr Makepeace as the purchaser (also in handwriting), followed in typed script "*OBO Dr Alison Makepeace*";

[11.2] The purchaser purportedly completed the document at Cape Town on 26 February 2020, represented by "*MC du Toit*". His/her role was not explained in the founding affidavit;

[11.3] The seller purportedly completed the document at Pretoria on 3 March 2020.

[12] The above was as far as the founding papers took the matter on the identities of the contracting parties to the alleged written agreement of sale.

[13] The auction terms and conditions were not produced, and MC du Toit did not depose to an affidavit.

[14] The seller's answering affidavit (the deponent is a member of the first respondent) in the material part, reads:

> "*18. On 26 February 2020, Mr. Makepeace (acting on his own behalf) successfully bid for the property via an auction conducted by the auctioneers. The auctioneers signed the agreement on 26 February 2020 in Cape Town, whereafter I signed the agreement on 3 March 2020 in Pretoria.*
>
> *19. Subsequently, the auctioneers sent the signed agreement to Mr. Makepeace on 5 March 2020. See in this regard the email from the auctioneers, enclosing the signed agreement, attached hereto as annexure S1.*
>
> *20. The Honourable Court is directed to the last page of the agreement reflecting my signature and that of the auctioneer, Mr. MC du Toit, acting on behalf of Mr. Makepeace. Notably, this page differs from the page in annexure MM1 to the founding affidavit, in that there is no reference to Mr. Makepeace allegedly acting on behalf of the applicant*."

[15] Indeed, the typed script addition "*OBO Dr Alison Makepeace*" is missing from the agreement concluded on 3 March 2020 (the date of the agreement relied upon by the applicant). This is the end of the applicant's factual claim that she had concluded an agreement of sale on 3 March 2020, as attached by her to the founding affidavit, is a different version of the agreement to the one relied upon and confirmed by the seller. It means that prayer 2 referred to earlier[3] must fail,[4] and hence the whole application must fail too. Or does it?

[16] After the sale, the deposit had to be paid and the balance secured for payment on transfer by way of a guarantee within 30 days from date of signature of the agreement (in other words, by about 3 April 2020). One would have expected a purchaser to address compliance with the agreement of sale. Instead, the applicant's version in the founding affidavit was this terse one:

> "*14. In terms of the Agreement, the purchase price for the property was R1,650,000.00 (one million, six hundred and fifty thousand). I confirm I paid the deposit to the Auctioneers and that the balance of the purchase price was to be secured through the registration of a bond with First National Bank ("FNB").*
>
> *15. After the agreement was executed, the country went into a National State of Emergency, which caused some delays in communication between the parties. I do not deem it necessary to deal with any communication that flowed between the parties during this period.*
>
> *16. On 30 June 2020, FNB addressed an email to myself, confirming an Approval in Principle (AIP), that the bond has been approved subject to valuation of the property. This was immediately communicated to Dirk Uys*"[5]

[17] This version does not address the period from about 3 April 2020 when the guarantee was due, or even when finance was sought from First National Bank ("*FNB*"). A bank guarantee has still not been delivered.

[18] It would become common cause in the papers that the applicant did not pay the deposit as she had alleged in the founding affidavit. Mr Makepeace paid it

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[3] "*2. The deed of sale in respect of the property concluded between applicant and first respondent on 03 March 2020 ("the agreement"), a copy of which is annexed to the founding affidavit of Alison Makepeace, as annexure "MMl", is valid and binding on the parties inter se, until fully performed or lawfully terminated*."

[4] See *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635C.

[5] An attorney at the conveyancers.

or paid it from his business ("*Bettor Business*") and the seller produced proof of such payment of R177 950.00, including the auctioneers' commission.

[19] It would become common cause in the papers that the communications in the period 3 March 2020 to 30 June 2020 referred to, but not addressed by the applicant, did not include her. A number of e-mails were exchanged between the conveyancers and Mr Makepeace, and in all instances, he held himself out as the actual purchaser of the property. The seller did not know of the applicant's existence as a potential contracting party until advised of the FNB loan in principle on 30 June 2017.

[20] The answering affidavit reflects that upon being advised of the loan in principle to the applicant, the conveyancers immediately sought clarity from Mr Makepeace why the approval was for a loan to the applicant (and not to him). On 22 July 2020 Mr Makepeace produced an unsigned letter from the applicant's practice that he had represented her in bidding at the auction. In reply the applicant confirmed that she authored the typed, but unsigned letter, on about that date.

[21] It is common cause that the applicant did not allege that the signed agreement incorrectly reflected the events at the auction. She does not seek rectification of the signed agreement. It is common cause that the agreement correctly reflected Mr Makepeace as the purchaser. The validity of the agreement is also not in issue. It is (or was) a valid agreement.

[22] As it is common cause that the contract was properly concluded with Mr Makepeace, I need not address the contractual provisions regarding the procedure that had to be followed (but which was not followed) had Mr Makepeace been an agent for the applicant.

[23] Mr Makepeace contractually required written consent by the seller to cede or assign his rights and obligations to the applicant. No such consent was ever sought. The agreement reads:

> "*AGENT/NOMINEE AND PROHIBITION ON FURTHER SALE*
>
> *16.1 …*

16.3 Should the Purchaser fail to nominate the principal by close of business on the date of acceptance by the Seller, then it shall be bound to perform all his obligations as Purchaser in terms of this Agreement.

16.4 Other than set out above in respect of nominee agreements, the Purchaser shall not without the express written consent of the Seller on-sell the property, or alienate, cede and/or assign any of its rights and responsibilities under this Agreement to any third party prior to registration of transfer of the Property into its name. Any transaction entered into by the Purchaser in contradiction of this prohibition may be ignored as pro non scripto by the Seller."

[24] Only in reply, the applicant sought to circumvent the contractual stipulation that the seller had to agree in writing to the substitution of the purchasers by relying on a tacit amendment substituting her as the purchaser - being a tacit amendment between the auctioneers and the conveyancers who substituted her as the purchaser, and that the seller tacitly acquiesced therein (and thus ratified their actions):[6]

"*9.4. I am advised and accordingly submit that the agreement was lawfully amended to reflect the true state of affairs, viz. Murray is acting on my behalf under the agreement. The amendment was effected through ratification by acquiescence. Further legal argument on this score will be presented at the hearing.*

9.5. In the following paragraphs, I illustrate that the amendment to the agreement was implicitly ratified by the conduct of the parties involved inter se as evidenced by the email correspondence outlined hereunder."

[25] The applicant stated her argument as follows in her heads of argument:

"*The applicant is the purchaser under the agreement following the respondents' ratification by acquiescence of the amendment or variation of the agreement*."

[26] The material facts are that an employee of the auctioneers added to the agreement after the name of the purchaser, Mr Makepeace, the words "*OBO Dr Alison Makepeace*", and did so in July 2020. (This is the version of the contract attached to the founding affidavit). Later in the applicant's heads of argument, the point is made that the seller could have objected to the conduct of the auctioneers sooner. I disagree. No case has been made out when the

[6] It seems to me be implicit in the manner in which the case was pleaded, that the applicant accepted that any acts by the auctioneers and the conveyancers in this regard, probably were unauthorised. She had no evidence of actual authority, and implied authority was not pleaded.

seller knew of the amendment by the auctioneers. Its version is clear, it would have insisted on a proper amendment to the agreement if and only if the bank guarantee was produced. The conveyancers were to write to the applicant in September 2020 as if she was the purchaser to demand the bank guarantee, and then to cancel the agreement by writing to the applicant in September 2020. The applicant avers that she did not receive these e-mails. I disagree that the most probable inference from this conduct is anything but error or mistaken caution by an agent (in as far as probabilities could be relied upon in these proceedings). We do know that when the seller could give its reaction to the alleged substitution in October 2020, it denied such an agreement, a denial consistent with the fact of frustration caused by persistent non-performance under the agreement.

[27] The claim must fail on one of several grounds.

[28] First, the claim must fail as the cause of action should have been pleaded and proven in the founding affidavit. See *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 269B-F, where an applicant, also in vain, sought to rely on a tacit contract in reply.

[29] Second, the claim also must fail as any introduction of the applicant as purchaser would have required a written amendment due to the terms of the agreement. I have dealt with the requirement in clause 16.4 of the express written consent of the seller in case of a cession/delegation. Mr Makepeace had to follow the contractual provisions to be replaced as contracting party, he did not do so. See too especially, clause 29.2 that requires expressly of the seller to sign a written amendment, a step that was not followed:

> "*WHOLE AGREEMENT*
>
> *29. 1 This Agreement makes up the whole agreement between the Parties. No Party shall be obliged to comply with any express or implied term, condition, undertaking, representation, warranty, or promise not recorded in this Agreement. This Agreement replaces any arrangement or understanding held by the Parties before this Agreement was signed and accepted.*
>
> *29.2 No amendment, addition or consensual cancellation of the Agreement will be binding unless it is recorded in writing and signed by the Parties*."

[30] Three, the claim must fail as section 2(1) of the *Alienation of Land Act* 68 of 1981 states:

> "*2 Formalities in respect of alienation of land*
>
> *(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority*."

[31] The applicant has not pleaded that she has concluded an oral agreement for the purchase of land, nor could she have done so validly. It does not matter that section 3(1) of the act excludes section 2 from sales of land by public auction, as the applicant did not purchase the property on auction, her husband did. The applicant seeks to be substituted as purchaser in a written contract enabling her to take transfer of land as contemplated in the act. The agreement she seeks to enforce would fall under section 2(1) of the act.

[32] Four, the claim must fail as no case has been made out that the seller authorised the substitution of the purchaser with the applicant. In motion proceedings for final relief, the version by the seller that it did not agree to an amendment, stands. See again *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635C. The seller was merely willing to consider such a substation if the bank guarantee was delivered. Instead the matter dragged on and the seller decided against agreeing to a substitution of parties. The seller's version is clear:

> "*42. However, at no stage did l mandate or agree to or sign the agreement as amended by the auctioneers to the effect that Mr. Makepeace acted on behalf of the applicant retrospectively.* …"

[33] The seller's version is clear that when no bank guarantee was forthcoming, it decided to bring matters to a head:

> "*44. By 17 August 2020, a final bond approval and bank guarantees were still not forthcoming and on my instruction and as a matter of caution, the second respondent sent a notice to both Mr. Makepeace and the applicant stating that the guarantees had to be forthcoming within seven days from date of the notice. A copy of this email is attached hereto as annexure S20.*
>
> *45. Despite this notice, no final bond approval or bank guarantee was forthcoming and the second respondent sent a further notice on 3 September 2020 and final cancellation on 11 September 2020.*

> *46. As stated above, although the aforesaid notices were sent to the applicant, no valid agreement had been concluded with the applicant for the sale of the property*."[7]

[34] Five, the claim must fail, as there is no evidence of any ratification by the seller. The main case relied upon by the applicant, *Wilmot Motors (Pty) Ltd v Tucker's Fresh Meat Supply Ltd* 1969 (4) SA 474 (T) dealt with liability for motor vehicle repairs in terms of an oral contract where the alleged contracting party's own conduct of ratification was in issue.[8] It further does not address the matter where, by a law, a written agreement is required; contractually, a written agreement is required; or the party held liable has had no interaction with the party claiming that a contract came into being as liability for instructions by agents. The two cases with respect are not comparable. Similarly, the other case relied upon by the applicant, *Bohica Business Consulting CC v Bathusi Investments (Pty) Ltd* [2017] ZAGPPHC 1118, is of no assistance to the applicant, with respect. It dealt with an implemented agreement where services were paid for and thus, by implication, unauthorised conduct was ratified by the contracting party. In the mater before me, the facts do not meet the test as formulated in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 9:

> "*[9] It is in general essential for a valid ratification*
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> 'that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that that intention must be expressed either with full know ledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be'
>
> (*Reid and Others v Warner 1907 TS 961 at 971 D in fine - 972).*"

[35] Under these circumstances, I need not address the *in limine* defence of non-joinder of Mr Makepeace; the Electronic Communications and Transactions Act 25 of 2002; what address the applicant allegedly tacitly chose

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[7] In para 51, the agreement with Mr Makepeace is also cancelled, although he is not a party to the proceedings.

[8] At 476H-477A: "*Although there are thus strong indications that Lloyd and Grobler were authorised to act on behalf of the defendant in commissioning the repairs, it is not necessary to decide the appeal on that ground, because I am satisfied that the second ground urged by Mr. Schwartz, who appeared for the appellant, is valid. That was that, in spite of the fact that the defendant repeatedly received invoices and accounts addressed to it indicating that the plaintiff was charging the work to it and thus that Lloyd or Grobler had given instructions to debit the repairs to the defendant, neither Tucker nor any of the defendant's servants repudiated liability for the repairs to the automatic Jaguar. There was no such repudiation of liability even when Mrs. Brink telephoned the accounts department. On the contrary, the first account for repairs to the automatic Jaguar was paid.*"

to have been her address for the transmission of notices under the agreement; or if the agreement was validly cancelled with the applicant (if she had become the substituted purchaser).

Accordingly, I make the following order:

1. The application is heard as one of urgency in terms of Uniform Rule 6(12);

2. The application is dismissed with costs.

DP de Villiers AJ

Heard on:	28 October 2020 (before Makhubele J)
Decided on paper:	02 March 2021
Delivered on:	05 March 2021 by uploading on CaseLines

On behalf of the Appellant/Applicant:	Adv X Khoza
Instructed by:	Adams Attorneys
On behalf of the First and Second Respondents:	Adv E Fürstenburg
Instructed by:	Dirk Uys Attorneys care of VZLR Inc.