IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

NOT REPORTABLE
CASE NO: 26952/09
DATE: 11/06/2009

In the matter between:

TIMOTHY DAVID DAVENPORT PHILIP	Applicant
and	
TUTOR TRUST (PTY) LTD	1st Respondent
VENDITOR AUCTIONEERS (PTY) LTD	2nd Respondent
ANTON STRYDOM N.O.	3rd Respondent

KAREN KEEVY N.O.	4th Respondent
HAASBROEK & BOESAART INC	5th Respondent
STANDARD BANK	6th Respondent
MASTER OF THE HIGH COURT	7th Respondent
REGISTRAR OF DEEDS GAUTENG	8th Respondent
(MR & MRS} JORDAAN	9th Respondent

JUDGMENT

MURPHY J

1. The applicant originally sought as a matter of urgency an order directing the first to fourth respondents to transfer certain immovable property into his name as well as ancillary relief related to the property transaction in question. As will become

apparent presently, he has attempted through an amendment to alter his cause of action to one of an enrichment claim.

2. The property in question is a residential property in E […….]. The property forms part of the insolvent estate of one Mr DP Venter. The first, third and fourth respondents are the trustees of the insolvent estate. The second respondent, Venditor Auctioneers (Pty) Ltd is the estate agent and auctioneer through whom the sale was effected on behalf of the estate. The fifth respondent is the firm of attorneys tasked with the responsibility for transferring the property. The sixth respondent is Standard Bank, the bondholder on the property. The applicant has also cited the Master of the High Court, the Registrar of Deeds and a certain Mr Jordaan to whom he has re-sold the property. The applicant seeks no relief against the fifth lo eighth respondents.

3. After certain negotiations the applicant made an offer R131, 000 which was accepted on 16 October 2008 on behalf of the estate with the concurrence of the bondholder, Standard Bank, the sixth respondent.

4. The applicant then paid a deposit of R130 000 into the trust

account of the second respondent on 24 October 2009.

5. On 27 November 2008, the applicant received an email from an employee of the second respondent. Karen Coetzee instructing him to pay the balance of the purchase price into the account of the second respondent and not as would normally be expected into the account of the transferring attorney. The applicant complied and the next day transferred an amount of R1 180 000 into the second respondent's account. Thereafter, another employee of the second respondent drew a cheque in favour of the transferring attorneys Karen Coetzee hand delivered this cheque to the transferring attorneys but instead of crediting it to the account of the applicant for the purposes of the transfer of the property she appears to have been able to allocate the amount of the cheque to ten different accounts This seems to have been part of a scheme in which she was engaged involving the misappropriation of funds from the second respondent and its clients. In this way, Coetzee may have perpetrated *a* fraud on the applicant.

6. Because neither the insolvent estate nor the transferring

attorneys have received the purchase price, the transferring attorneys refused to effect transfer. In its answering affidavit the fifth respondent points out that the sixth respondent, Standard Bank, is a bondholder over the properly in terms of two bonds registered in its favour being registered as security for amount of about R1.8 million, The fifth respondent also indicates that it holds instructions to cancel the existing bonds registered against the property but that it can only do this on receipt of either the balance of the purchase price or on receipt of acceptable guarantees securing the balance of the purchase price Because this has not happened they are unable proceed.

7. The trustees of the insolvent estate maintain that the second respondent, the agent, did not have a mandate to receive the balance of the purchase price. In terms of clause 5 of the offer to purchase, a 10% deposit was payable to the second respondent, who was entitled to deduct its remuneration and expenses, with the balance to be paid over to the seller (the trustee) or the attorney attending to the transfer on confirmation. The only clause regulating the payment of the balance of the purchase price is clause 5.2 which provides that the balance of the purchase price shall be secured by means of an approved bond

by a financial institution within 30 days after confirmation by the seller.

8. As I understand the case of the trustees and the agent, they maintain that these clauses read together indicate that the agent, the second respondent, had no mandate to receive the balance of the purchase price on behalf of the seller In terms of the agreement the balance ought to have been paid to the sellers attorneys. Only then would the obligation have arisen to effect transfer to the applicant. The fact that Karen Coetzee may have paid amounts to the fifth respondent in respect of other accounts, it was submitted, did not amount to a payment 1o the frrst respondent on behalf of the applicant.

9. The respondents also raised the defence that the applicant failed to join the wife of the insolvent who had a 50% share in the property and thus has a direct and material interest in the relief sought.

10. The second respondent, the estate agent, joined in the defences raised by the trustees and added that Karen Coetzee was not acting in the scope or course of her employment with the

second respondent and hence was on a frolic of her own.

11. In an answering affidavit filed a few days before the matter was enrolled for hearing, the fourth respondent raised another point of significant consequence. The fourth respondent is a practising insolvency practitioner and an admitted attorney of this court. She is also a joint trustee of the estate of Mr DP Venter, having been appointed jointly with the third respondent She states in her answering affidavit that she is not acquainted with the allegations made by the applicants: nor has knowledge of the involvement of the second respondent; or knew about the alleged misappropriation of funds by the second respondent's employee- However, she states that the applicant's application is fatally defective as she was not a signatory to the agreement of sale annexed to the founding affidavit. She correctly points out that it is trite that joint trustees have to act jointly She avers that she had no knowledge of the conclusion of the sale agreement and did not sign the agreement. Nor did she grant anyone the authority to sign the agreement on her behalf. She was also not party to (he appointment of the second respondent for any purposes whatsoever.

12. At the commencement of the proceedings before me Mr. Brand, who appeared on behalf of the applicant conceded that the latter point was a good point, that the relief sought in the original notice of motion was accordingly not competent and that the claim for transfer of the property into the name of the applicant could not be sustained. However, he filed an amended notice of motion adding an alternative prayer in the event that it is found that the sale agreement is null and void *ab initio* seeking an order that the first, second, third and fourth respondents jointly and severally be ordered to pay the applicant an amount of R1 310 000, being the deposit and the balance of the purchase price. He predicated this claim upon the alleged enrichment of the respondent as a result of the payment mistakenly made. From the applicant's perspective, the payment was made pursuant to the mistake that there was a valid sale, when there was in fact not, and also on the mistaken basis that the second respondent had a mandate to receive payment of the balance of the purchase price on behalf of the seller.

13. In other words, the applicant through the amended notice of motion is seeking to recover the money under the *condictio*

indebiti. The basic elements of the *condictio* are that the plaintiff must prove that the property or the amount reclaimed was transferred or paid by him or his agent (o the defendant. He must prove that such transfer or payment was made *indebiti* in the sense that there was no legal or natural obligation or any reasonable cause for the payment or transfer. And he must also prove that the property or money was transferred or paid by mistake

14. In this instance there seems to be two species of *indebiti.* The first is that it is alleged that there was no debt of any kind owed at all because the sale was invalid. The second form of *indebiti* is that the amount has been transferred to the wrong creditor. It should have been transferred to the seller but was in fact transferred to an unmandated agent

15. Mr Labuschagne, who appeared on behalf of the first, second and third respondents, made the predictable submission that the amendment sought to introduce a new cause of action, with the result that the application upon which they were brought to court is no longer the application and claim which he was required to meet before me. Moreover, in the context of an urgent

application, the applicant had about five days before the hearing to consider the point raised by the fourth respondent that the sale was invalid and ought to have made the concession at that time He accordingly strongly urged me not to convert an application for the transfer of immovable property into an application for relief based on enrichment. None of the respondents, he submitted, had had a proper opportunity to consider the various defences to the enrichment issue and to file papers dealing with them.

16. As a result also of the change in the cause of action, it was submitted, the issue of urgency had lost some of its force. The applicant's primary claim or urgency was that he had sold the property for a handsome profit to the eighth respondent and that such sale was in jeopardy By virtue of the claim being one of enrichment that is no longer so. He has no property to sell. He is presently in possession of the property, which may or may not provide him with some form of security until the dispute is finally resolved. He in any event does not make out any case that he is about to be evicted and hence there is no urgency arising from that issue. In the absence of any clear averments any consideration in that regard would be speculative.

17. Added to that, Mr Labuschagne submitted that the papers as presently drawn do not make out a case for a *condidio.* The factual averments set out in the founding affidavit are insufficient to grant an enrichment action in that they fail to deal with the ongoing extent of the enrichment. In our law enrichment is understood to mean the acquisition of an economic benefit and is calculated with reference to the net surviving gain in the defendant's estate - *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5} SA 193 (SCA). Enrichment usually takes the form of an increase in the defendant's assets but a defendant may also be enriched by his or her assets not decreasing. And. furthermore, a decrease in the defendant's liabilities might constitute enrichment, as may a non-increase in liabilities. Accordingly, before a court may determine the extent of an enrichment claim, the quantum requires to be calculated on the basis of a difference in the patrimony of the defendant before and after the enriching fact. An enrichment claim is directed at the value remaining with the enrichment debtor as suppose to the value received. This gives rise to the possibility of different defences by the different respondents in this case

18. It is not unusual for a court to allow an amendment to a

pleading, even an application that seeks to introduce a new cause of action. However, it should only do so where such an amendment would cause no prejudice to the defendants or respondents. In the context of this urgent application, where the amendment was introduced at the hearing, one must accept that the respondents have indeed been prejudiced by the amendment in that they have had no opportunity to deal with the questions surrounding an enrichment claim and possible defences in their answering affidavits.

19. In any event, on account of the applicant not having acquired any right to sell the property on to the eighth respondent by virtue of the invalid sale, I am persuaded that the applicant s ground for urgency has fallen away. There are also disputes of fact with regard to some of the earlier defences, and the difficulties that have arisen with regard to any enrichment claim. Furthermore, the issue of whether the second respondent should be held vicariously liable for the delict of Karen Coetzee cannot be determined on the papers Evidence will be required to establish whether there is a sufficiently close link between Coetzee's conduct for her own interests and the business of the second

respondent to determine whether her actions were modes of doing her employers business, albeit unauthorised, involving an element of mismanagement in the performance of her work.

20. Accordingly, the matter having lost urgency, the difficulties of pleading enrichment and the disputes of fact that have arisen all cumulatively lead me to conclude that the matter should simply be struck from the roll for want of urgency

21. With regard to the question of costs, one has natural sympathy with the applicant. He obviously has been defrauded by an employee of the second respondent. As 1 have just indicated, that may or may not engender vicarious liability. I am also unimpressed by the conduct of the trustees. They entered into an invalid sale. While it is correct that the point taken by the fourth respondent would seem to be good, and thus leads to the possibility of an enrichment action as the primary cause of action despite her claim that she did not sign the sale nevertheless signed the transfer documents. At page 171 of the record there is a power of attorney to pass transfer wherein it is recorded that the trustees. Anton Strydom (the third respondent) and Karen Keevy (the fourth respondent), in their capacities as trustees,

nominated, constituted and appointed the fifth respondent to be attorneys to effect transfer in respect of the sale entered into with the applicant on 10 December 2008. This document was signed on 9 March 2009. It accordingly does not sit well with the fourth respondent two months later to assert that the sale was invalid because she was not in any way involved. Mr Brand, on behalf of the applicant, has submitted that she may not be before the court with clean hands. I agree that such may be possible. The applicant may consider submitting the matter to the Law Society for investigation.

22. Accordingly, given what I consider to be the unsatisfactory conduct of the trustees in this matter, despite the fact that I am disinclined to grant the applicant urgent relief. I do not propose to burden him with a costs order at this stage.

23. In the result, the following orders are issued:

(i) The matter is struck from the roll for want of urgency:

(ii) The costs of this application will be costs in the cause of the main application or any action instituted in respect of this or any related cause of action;

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 19 May 2009

For the Applicant: Adv CFJ Brand, Pretoria

Instructed By:Greyvenstein & Grundlingh, Pretoria

For the 1st -3rd Respondent: Adv EC Labuschagne SC, Pretoria

Instructed By: Jaco Roos Attorneys, Pretoria

Fourth Respondent: Adv HA vd Merwe, Johannesburg

Instructed By: Senekal & Simmons, Johannesburg