Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 109/2007
Case Heard: 03/08/2007
Date delivered: 17/08/2007

In the matter between:

Gregory Jonathan Victorio Martin **Applicant**
SectionI.1

and

SectionI.2Tshwaro Euphemia Pearl Moleko Respondent

Coram: Olivier J

JUDGMENT

OLIVIER J:

1. The applicant, mr Gregory Jonathan Victorio Martin, lodged an application to compel the respondent, mrs Tshwaro Euphemia Pearl Moleko, to fulfill her obligations in terms of a deed of sale by signing the documentation necessary to effect transfer of an immovable property situate at 9 St Augustines Road, West End, Kimberley, into the name of the applicant.

2. In the notice of motion and in the notice of set-down the property was described as Erf 9272, Kimberley, and also in a draft order which was at a later stage served on the respondent. The applicant has, however, filed a supplementary affidavit from which it appears that the correct description of the property, as reflected in the applicable deeds registry, is in fact *"Remaining extent of Erf 9272"*, in the district and city of Kimberley.

3. After the application was initially served on the respondent a notice of opposition was filed on her behalf by attorneys. Shortly thereafter the attorneys withdrew and the respondent has since appeared in person. She has applied for legal aid, but it was refused. According to a letter from the

Kimberley Justice Centre the application for legal aid was refused because the respondent had failed the means test and because they were of the view that the respondent's case had no merit.

4. The application has been postponed on several occasions to afford the respondent the opportunity of obtaining legal representation. On the last occasion (on 8 June 2007) the respondent apparently indicated that she intended proceeding in person and an order was then made, in the presence of the respondent, postponing the matter to 3 August 2007 for hearing and stipulating dates for the filing of, **inter alia**, an answering affidavit and heads of argument.

5. The respondent did not file heads of argument. On 31 July 2007 (and not on or before 10 July 2007 as ordered) she filed a document which will be referred to again in due course, but which was not an affidavit. At the hearing on 3 August 2007 the respondent appeared in person and indicated that she intended arguing the matter herself.

6. After the notice of opposition was filed, certain supplementary papers were filed on behalf of the applicant, including a letter which the respondent had apparently addressed to the attorneys responsible for the transfer of the property and which reads as follows:

"Regarding the letter you wrote to me on 06 October 2006 I still cancel the sale of the property.

The whole mess arose as a mistake between myself and the agent Mr. Vincent Segwai in that my specific instruction to him was to sell my property, 408 Kgadiete street, Ikhutseng township at Warrenton.

On the 13th September 2006, I sign contract with the agent in result of the house in Warrenton. The agent made me sign the contract and said he will complete the document at a later stage. I signed the document knowingly that I was selling my Warrenton property.

On the 26 September I was shocked when I learned from Mr. Vincent Segwai that the contract is of Kimberley property.

I went to Mr. B. Sharpley to present my case. He advised me to write a letter.

I still maintain that the contract must be cancelled and I will defend any case against me.

I hope my plea will reach your favorable consideration."

7. The respondent's defence is therefore, apparently, that she had instructed the estate agent to sell a property in Warrenton, and not the property in Kimberley, and that he had then asked her to sign the deed of sale in blank form and had promised to complete it at a later stage. The nub of the respondent's version is that she had not intended selling the property in Kimberley and that she was induced, by the agent's fraud, to sign the deed of sale in blank form, and that the agent had fraudulently filled in the particulars of the Kimberley property and had represented to the purchaser that the respondent actually offered the Kimberley property for sale.

8. The document filed by the respondent on 31 July 2007 did not comply with the order of 8 June 2007, because it was not an affidavit and it was not filed on or before 10 July 2007. In view of the conclusion to which I have in any event come as regards the merits of the respondent's version it is unnecessary to make a ruling on the admissibility of the statement. The essence of the contents of the statement is again that the respondent's agent, mr Vincent Segwai da Vinci, had wrongfully entered the details of the Kimberley property in the deed of sale after she had signed it.

9. This was denied by the agent in two affidavits which were filed on behalf of the applicant in the form of supplementary papers. It is therefore clear that there is, on the papers, a factual dispute as to whether the deed of sale reflected the details of the Kimberley property when the respondent signed it. In view of what follows, however, it is not necessary to make any finding regarding this dispute and in what follows I will assume (without deciding) that the respondent's version is correct.

10. The respondent did not merely apply her signature to the deed of sale on the last page thereof. What quite clearly appears to be her initials can be

seen on all the other pages of the deed of sale and, more importantly, where details such as the description of the property, the purchase price and the special conditions now appear in handwriting. There is no allegation that the agent had even bothered to motivate his strange request and there is no explanation in either the letter or the statement of how the agent had *"made"* the respondent to do so.

11. Even if it were therefor to be accepted that the respondent had signed and initialled the deed of sale in blank form, she must have been aware of the important details that would be filled in by the agent and, in the apparent absence of any explanation by the agent as to why this was necessary, the respondent's conduct would have been negligent and unreasonable and would not have entitled her to avoid the contract (compare **Standard Credit Corporation Ltd v Naicker** 1987 (2) SA 49 (N), **Standard Bank of SA Ltd v El-Naddaf and Another** 1999 (4) SA 779 (W) at 783H-I and **Prins v Absa Bank Ltd** 1998 (3) SA 904 (C) at 908).

12. There is another angle from which the respondent's defence can be viewed. Mr Da Vinci, the agent, had quite clearly been the respondent's agent and, if she had signed the deed of sale on the basis that the agent would later fill in material details, she had in effect authorised him to make representations on her behalf.

13. In this regard I refer to the following passage on page 315 of Christie's book **The Law of Contract in South Africa**, 4th Ed:

"It is clear on the general principles of agency that a principal who instructs or authorises his agent to make representations is responsible for them, and he may thus become liable for damages for fraud or to have the contract rescinded against him. He is in the same position if he has instructed or authorised his agent to make the contract on his behalf and the agent takes it upon himself to make a misrepresentation in the course of so doing, and it is no defence for the principal to prove that the agent was at the same time committing a fraud upon him; having selected the agent, the principal rather than the third party must suffer from the agent's double fraud."

14. In **Randbank Bpk v Santam Versekeringsmaatskappy** 1965 (4) SA 363 (A) the proper approach in such cases was set out as follows by **Steyn CJ** at 371E-F and 372C-D:

"Dit wil my voorkom dat dit wel van belang is om te onderskei tussen die geval waarin die verteenwoordiger teenoor sy prinsipaal te staan kom en die geval waarin die prinsipaal die bedroëne aanspreek om tot eie voordeel 'n kontrak af te dwing wat deur sy verteenwoordiger se bedrog of misleiding tot stand gekom het. Na my oordeel vereis die billikheid onteenseglik in laasgenoemde geval dat die bedrog die prinsipaal sal tref, al is hy hoe onskuldig, en dat die ander party se posisie nie beoordeel sal word asof geen bedrog teenoor hom gepleeg is nie."

"Ek sou eerder meen dat die volgende stelling uit 'n Engelse gewysde, wat in ***Ravene Plantations Ltd v Estate Abrey and Others****, 1928 AD 143 op bl. 153, goedgekeur word, ook vir die geval waar magtiging van 'n agent om voorstellings te doen regtens veronderstel word, hier van toepassing is:*

> *'I think that every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract.'*

Dit is redelik dat die prinsipaal wat sy verteenwoordiger kies en hom voorhou as 'n betroubare persoon, en nie die ander party wat geen seggenskap by die keuse het nie, die risiko van sy moontlike oneerlike voorstellings of verswygings sal dra, ..."

(see also **Aling v Van Dyk** 1906 EDC 268 at 271).

15. The respondent's submission, in argument, that the contract should not be enforced against her and that the applicant could then take steps against the agent, would mean that the applicant as the innocent party would have to suffer the consequences of the fraud of the applicant's agent. Such a result would in my view be neither fair nor justified, all the more so where it appears that part of the purchase price has already been utilised to pay the respondent's arrears municipal rates and taxes and to pay the conveyancing fees. It follows that I am of the view that the contract should be enforced against the respondent.

16. Nothing would prevent the respondent, on her version, from claiming damages from the agent (should damages be suffered) and/or from reporting him to the applicable authorities, including the police.

17. The applicant and his wife, to whom he is married out of community of

property, are co-purchasers of the property. For some reason the application was, however, lodged in the name of only the applicant. His wife, mrs Jennifer Judy Martin, has however now deposed to an affidavit in which she states that she is aware of the application, that she ratifies the applicant's actions and that she requests transfer of the property to them.

18. As far as costs are concerned I am afraid that there is no reason to deviate from the normal rule that costs should follow the result and therefore the respondent should, subject to what follows and to what has been ordered previously as far as wasted costs are concerned, pay the costs of the application.

19. As far as the costs of the proceedings of 8 June 2007 are concerned, when the matter was finally postponed for hearing, it appears that no order was then made as to costs and therefore each party would be responsible for its own share of the costs occasioned by that postponement. The matter was also at an earlier stage removed from the roll due to the fact that certain supplementary affidavits had not been served on the respondent and mr Haddad (the attorney who appeared on behalf of the applicant) has, wisely in my view, not attempted to argue that the applicant is entitled to any wasted costs in this regard.

20. Mr Haddad has filed no less than three sets of supplementary affidavits without at any stage applying for leave to do so. Two of those affidavits were necessary to clear up the problems regarding the non-joiner of the applicant's wife and the wrong description of the property; problems which could in no way be attributed to the respondent. As regards the rest of the supplementary papers there is no explanation on oath as to why that information could not have formed part of the supporting papers.

21. The supplementary papers were, however, served on the respondent timeously and she made no attempt to comment thereon or to object thereto. In the interests of justice I decided not to strike the supplementary papers. I am, however, of the view that it would be unfair to burden the respondent with the costs of the supplementary papers and this was in fact also conceded by mr Haddad.

22. The applicant did not give the registrar of deeds notice of the application. I do not, however, intend making any order granting *"authority or an order involving the performance of any act in the deeds registry",* as envisaged in section 97 (1) of the Deeds Registry Act, 47 of 1937. The relief I intend granting will be limited to addressing the rights and obligations of the parties **inter se**. Although it will in all probability ultimately result in the registrar of deeds having to consider the transfer of the property, no *"performance of any act"* by the registrar of deeds will at this stage be authorised or ordered (compare **Smith v Weston** 1961 (1) SA 275 (W) at 279 and **Ex parte Sanders et Uxor** 2002 (5) SA 387 (C) at 391I-392C).

23. In the premises I make the following orders:

1. **The respondent is ordered to forthwith and when required to do so to take all steps and to sign all documentation that may be necessary to effect transfer into the names of the applicant, Gregory Jonathan Victorio Martin and his wife, Jennifer Judy Martin, of the immovable property described as Remaining extent of Erf 9272 in the city and district of Kimberley and situate at 9 St Augustines Road, West End, Kimberley.**

2. **In the event of the respondent failing or refusing to sign any such documents or to take any such steps within 24 hours after having been called upon to do so, the sheriff is ordered and authorised to sign such documents and to take such steps on the respondent's behalf.**

3. **Subject to all the requirements and the approval of the registrar of deeds the attorneys Claude Llewellyn Towell and Brezh Sharpley are authorised to take all steps necessary to effect such transfer.**

4. **The respondent is ordered to pay the costs of the application, provided that such costs shall not include the costs of any papers filed after 7 February 2007 or the costs occasioned by the removal of the matter on 30 April 2007.**

5. **The registrar of this Court is requested to inform the**

respondent of her right to apply for leave to appeal and of the applicable legal rules and requirements.

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the applicant: Mr V Haddad
Elliott Maris Wilmans & Hay, Kimberley

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