

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case number: /07

Date: 12/08/2008

UNREPORTABLE

In the matter between:

ELBESTER & VENNOTE

Applicant

And

AMANDA JEANETTE MITTENS

Respondent

JUDGMENT

RAMAGAGA, AJ

This is an application for the eviction of the respondent from property known as unit 19, 235 Impala Park, Doringkloof, Centurion, Gauteng (the property).

Respondent was the registered owner of the property until the 14th June 2006 when ownership of the property was transferred to Boshoff Shawn and Bester Ernst Lodewyk as joint owners with equal shares in the property. I assume that the applicant is a partnership of the two registered owners of the property and will henceforth refer to them or either of them as the applicant.

Central to this application is the question as to what the intention of both parties was when they agreed to transfer the property from the respondent to the applicant. Applicant contends that the intention of the respondent was to

dispose of the property while the respondent contends that the transfer was to serve as security for the loan that the respondent had raised from the applicant.

At the beginning of 2006, respondent was in serious financial distress. At the recommendation of her friend Mrs Harding, she approached the applicant for advice regarding her financial affairs. She consulted with Mr Bester from the applicant's partnership, during the consultation issues relating to consolidation of all debts and to a compromise of all debts were discussed. Respondent avers that the applicant undertook to negotiate a compromise of the respondent's debt to a payment of 30c to a Rand in full and final settlement. Applicant denies ever making such an undertaking, however he admits that the issue was canvassed during the consultation. Further, the respondent avers that the applicant calculated all her debts, in the calculation he included a loan of R 15 000 to the respondent's daughter. He arrived at a figure of R360 000 as the amount that would suffice to settle all the debts of the respondent. Respondent would borrow the said amount of R360 000 from the applicant who would then settle all the respondent's debts. The full amount of the loan plus an additional twenty percent would be repaid to the applicant after twelve months. As security for repayment of the loan, the respondent's house would be transferred into the name of the applicant. During the period of the loan, the respondent would "rent" the house from the applicant for an amount of R4000.00 per month earning the applicant an additional amount of R48000 for providing respondent with a loan. The applicant denies that the

amount was arrived at as a result of his calculation of respondent's debts. He maintains that the amount of R360 000 is the highest amount that the applicant was prepared to offer to buy the respondent's property at. Applicant denies ever lending the respondent R360 000. Further, the applicant avers that the respondent did not disclose all her debts during the first consultation, some of the debts only surfaced later. The respondent further alleges that the intention of the scheme was to have all her debts reduced and consolidated, so that she could be left with the applicant as her only remaining creditor. I have already stated that the applicant denies the existence of a loan between it or any of its partners and the respondent. The applicant states that the respondent did not have any income or funds to settle her debts on compromise. Mr Bester states that he explained to the respondent the business transaction that the applicant would conclude with persons in circumstances similar to the respondent's. He advised that the applicant in order to enable the respondent to settle her debt would buy the property from the respondent and it would be open to the respondent to later buy back the property at a profit to applicant. The respondent indicated an interest in this type of transaction. Respondent was also advised that this type of transaction i.e. the sale with a buy back option would prevent her sequestration. Further the respondent avers that the applicant advised her to urgently sell her house due to the circumstances in which she found herself. The respondent settled for the buy back option suggested by the applicant. No valuation of the property was made. She however states that at the material time, the property market was good and the sale of her property would have fetched in the

region of about R500 000, but because she did not want to dispose of the property, she settled for the option of buy-back offered by the applicant. Applicant denies that the respondent could have sold the property at about R500 000, he states that the respondent was in arrears with her bond repayments and if the property had been sold in execution of judgment debts, it would probably have been sold at a relatively low price. The parties reached an agreement to settle for the offer made by the applicant to buy and then sell back after a year. A day after the negotiations, respondent went to the applicant's office where she was presented with three agreements to sign, namely an offer to purchase the property by the applicant, a lease agreement whereby the applicant was letting the property to the respondent and an addendum to the lease agreement providing for an option for respondent to buy back the property. Respondent signed all three documents there and then, she was not furnished with copies of the agreements. In terms of the agreement the sale price was R360 000.00, in terms of the buy back option, the respondent would have a buy back option to buy back the property at R450000.00 after twelve months and in terms of the lease agreement the applicant let the property to the respondent for twelve months at R4000.00 per month payable in advance. Notwithstanding the fact that she had signed all three agreements without delay, the creditors continued to haunt the respondent to a point that she registered her concern about delayed settlement of debts with the applicant. The respondent only made payments of rent for two months and stopped. The applicant after giving due notice, cancelled the lease agreement in January 2007 and demanded that the

respondent leave the property. The applicant did not fetch her mail and continued to live on the property, as a result, the applicant approached this court seeking an eviction order against the respondent. The respondent resists the application on the basis that the deed of Sale between the parties was a simulated contract and thus does not reflect the true intention of the parties with specific reference to the reason for transfer of the property. Consequently, the respondent is making a counter-application for rectification of the sale agreement and for an order that the applicant take all necessary steps and sign all necessary documents to transfer the property back to the respondent.

The applicant argues that the counter-application is futile in law in that there is a non joinder of the mortgagee and the Registrar of deeds.

On the issue of a simulated contract, the applicant argues that this contention cannot sustain the respondent's case in that for all intents and purposes, the two agreements namely the lease and the purchase have been given effect. The transfer from respondent to applicant is registered and the respondent has also paid occupational rent for two months. The respondent seeks to rectify the sale agreement without making an indication of an intention to rectify the lease agreement which is the foundation of this application. Further, the argument goes that the respondent has not made necessary averments to explain why the document does not reflect the common intention of the parties and how the error occurred.

The respondent argues that she was in a desperate financial position when she sought for help from the applicant. The applicant abused her situation and made her sign the three documents. She signed the documents without an intention to sell the property. The applicant should have foreseen that respondent would not be in the position to repay the loan in a year due to her financial position. The applicant misused its position as a financial advisor. The respondent further argues that the applicant breached the sale agreement in that by September 2006, it had still no settled all the creditors in accordance with the agreement. The respondent maintains that she never intended to totally dispose of the property. She wants the sale contract to be rectified and reflect that the transfer was made with an intention to give the applicant security for a loan. Respondent submits that the whole contract be set aside as a simulated contract. Further, goes the argument that the lease agreement does not reflect the true intention of the parties in that she would not be in a position to be a tenant that paid R4000 per month, it was her understanding that R4000 would be paid monthly until she had paid the loan received from the applicant. The respondent denies that she signed the power of attorney that was used to effect transfer of the property.

Applicant argues that the deed of sale reflects the true intention of the parties, he relies on a non-variation clause of the contract to show that the parties did not and could not have and did not amend the contract to provide otherwise.

What I find interesting is that the clause dealing with payment of the purchase price makes no reference to direct payment to the seller's creditors notwithstanding the fact that it is common cause that the R360 000 was supposed to be paid directly to creditors. would seem that it is necessary that the matter be referred for viva voce evidence to enable the parties to give the court a clear picture relating to the facts in dispute.

On the papers before me and the arguments presented the following are clearly dispute of fact that

1. What the parties' intention was when the three documents were signed on the 27th February 2006
2. Whether the respondent signed the power of attorney to transfer or not
3. Capacity in which the applicant was approached for advice
4. Whether the applicant indeed advised respondent to sell the property urgently
5. Whether at the time when applicant advised respondent, there were already steps taken to execute the respondent's property or whether there was a looming insolvency application against the respondent

6. Whether the applicant promised respondent that it (the applicant) would negotiate a compromise of about 30c in a rand for settlement of the debts

It is settled that courts should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to advantages of viva voce.

In the circumstances, I am of the view that this matter cannot be finalised on the papers due to factual disputes and thus make the following order:

1. That the matter be referred for viva voce evidence
2. That the papers filed in this application serve as pleadings
3. That the costs be costs in the cause

M. J. RAMAGAGA

JUDGE OF THE HIGH COURT