

SOUTH AFRICA / JUDGMENT

Maharage v Braaf and Others

(25657/2011)

[2012] ZAWCHC 311 (17 September 2012)

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COURT

Western Cape High Court, Cape Town

BEFORE

L M Olivier

CASE / FILE NUMBER

25657/2011

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, APE TOWN)

(Case Number 25657/2011)

In the matter of:

REECE RODNEY MAHARAGEApplicant

and

SHEILA CAROL BRAAFFirst Respondent

RODNEY KENNETH MAHARAGESecond Respondent

BERYL LOUISE BERNADETTE MAHARAGEThird Respondent

JUDGMENT: 17 SEPTEMBER 2012

OLIVIER, A J:

- [1] This is an application for the enforcement of the provisions of a deed of sale in that Applicant seeks an order compelling first respondent, his aunt, a 50% owner of immovable property co-owned by Applicant's father and mother, to sign all documents necessary to effect a transfer thereof to him.

- [2] From the papers it is immediately apparent that this is no ordinary sale of immovable property. First respondent and her husband had previously owned the property. The bank sought repayment of the mortgage loan. The property was thereupon sold to :a Mr. Katz with an option to first respondent to repurchase same provided inter alia that she did not default on the lease that she had entered into pursuant whereto she occupied the property in the interim.
- [3] Second respondent initially refused to assist. When he however heard of the transaction with Katz second respondent agreed to, as was stated in reply “step in front of the bus” for his sister and secure the property when she defaulted on the lease and the option to repurchase was threatened.
- [4] Second respondent indirectly paid what was due to Mr. Katz whereafter the property was transferred to the three respondents being the current co-owners.
- [5] The deed of sale which Applicant seeks to enforce is part of a larger transaction which was only alluded to by Applicant in reply. It appeared from the replying affidavit and annexures thereto that the purpose of the whole transaction was to provide second respondent with security for the funds that he had paid on behalf of his sister and to enable her to repurchase the property at some time in the future>
- [6] The transaction which consisted of the deed of sale, a. lease and an option to repurchase was in my view:a simulation. It was not the intention of the purchaser to acquire ownership as owner of the property. This is apparent from the fact that first respondent has: .at all times remained in occupation of the property throughout the yariou? previous transfers thereof. Further the price at which the property was twice sold had no bearing on its value and: the; option to., repurchase was priced with: reference to what was paid by second respondent to Katz. Second: . respondent sought security not ownership of the property.
- [7] Mr. Wilkin, when pressed, conceded that the transaction was a. simulated loan against security of the property.
- [8] Faced with this predicament he applied for a postponement so as to afford applicant an opportunity to reformulate the relief sought and to amplify his papers. Mr. Jaga opposed this application as well as the referral of any issue to evidence.
- [9] I am not disposed to grant a postponement as applicant had ample opportunity to place his case upon the correct footing before the Court. He failed to do so and should not now be afforded a further opportunity to do so. This is so especially in the light of the failure td disclose the full transaction in the founding papers.
- [10] The application is therefore refused.

- [11] As far as the counter application is concerned first respondent seeks an order that the deed of sale be declared void or voidable and unenforceable. On the papers there are substantial real factual disputes in regard to the alleged misrepresentations and non disclosures relied upon by first respondent.
- [12] First respondent having opposed the leading of oral evidence cannot now embrace same to save the day. Mr. Jaga, correctly in my view, did not seek a referral to oral evidence. As Applicant, Second and Third respondents deny any misrepresentation or non-disclosure 1 cannot, on the papers, find in favour of First respondent.
- [13] The counter application is therefore dismissed.
- [14] As far as costs are: concerned I am of the view that it would in the circumstances be just and equitable that each party pay his/her own costs. It is so ordered.

L M Olivier, AJ

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