

SOUTH AFRICA / JUDGMENT

Mazibuko and Another v Rampersadh and Others (11440/2013) [2014] ZAKZDHC 22 (3 June 2014)

[2014] ZAKZDHC 22

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Vahed

CASE / FILE NUMBER

11440/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

No:- 11440/2013

In

the matter between:

BONGANI

STANLEY

MAZIBUKO.....First

Applicant

THABILE

PRINCESS

MAZIBUKO.....Second

Applicant

and

DOMAN

BACHOOLAK

RAMPERSADH.....First

Respondent

SAMPOORAM
RAMPERSADH.....Second
Respondent
REGISTRAR
OF DEEDS,
KWAZULU-NATAL.....Third
Respondent

JUDGMENT

Delivered on 03 June 2014

Vahed J:

- [1] Standard form printed pro-forma documents intended to form the basis of binding legal contracts between individuals when completed and signed by them are dangerous instruments in the hands of lay-persons unschooled in the technicalities prescribed by law for contracts required to be in writing before they are regarded as effective for the intended purpose.
- [2] The applicants seek an Order compelling the first and second respondents (hereafter referred to as “the respondents”) to do all things necessary to enable registration of transfer of certain immovable property from the respondents to the applicants, and pending that relief also sought an interdict prohibiting transfer to any other person.
- [3] Interim relief prohibiting transfer of the property to any person other than the applicants was granted by Gorven J on 20 October 2013, such relief to remain in place pending the final determination of the application.
- [4] The respondents own immovable property situate at 5[...] C[...] C[...], A[...] H[...], Durban and described as Erf 4[...] A[...] H[...], Registration District ET, Province of Kwazulu Natal (“the property”). At all material times the property was their residence.
- [5] Wanting to sell the property the respondents put up a “for sale” sign and this attracted the attention of the applicants. A process began which resulted in the signed sale agreement which is the subject of this dispute. Neither estate agents nor lawyers were involved in that process. I proceed to set out the facts and areas of dispute which can be derived from a consideration of all the affidavits delivered by both the applicants and the respondents.
- [6] The first applicant acquired two identical standard form printed pro-forma documents from a stationery supplier. The heading to that document describes it as being an “Offer to Purchase which constitutes a Deed of Sale when accepted”. The document in its original unadulterated condition consisted of four printed pages containing a number of paragraphs of terms and conditions commonly applicable to an agreement for the sale of immovable property with a number of blank spaces making provision for the insertion of other necessary details and option selections to be made when it is completed. Some of the printed paragraphs contained a provision of alternatives with instructions to the user to

“Delete that which is not applicable”.

- [7] On 22 July 2013 the parties (or some of them) met. The first applicant was armed with the set of blank documents I have described. It is not clear whether the second applicant and one Jerome Poobalan (then known to all as Vernon) were also present. It is also not clear whether that meeting took place at the property or at a nearby temple chosen by the respondents as the meeting place.
- [8] At that meeting the set of two documents was partially completed in allegedly identical respects and signed. Those who met then parted, the respondents retaining one copy and the first applicant retaining the other. At that stage it is alleged to be common cause that the document was identical in all respects to the version put up by the respondents with their answering affidavits. That reflects that the first page of the document had the relevant blank spaces completed in manuscript reflecting the full names of both the applicants and both the respondents as well as their respective identity numbers. The first page of the document describes the applicants as offering to purchase the property from the respondents. That first page was also completed with the residential addresses of both sets of parties and with a rudimentary description of the property. The view that it was common cause that the two documents completed on 22 July 2013 were identical in all respects is erroneous. Firstly, the two documents appear to have been

completed in a different hand, at the very least from a comparison of the first page of each. Secondly, the section where the names and identity numbers of the respondents appear are markedly different.

- [9] Numbered clauses commence on page two of the document. In the original format (ie. before the insertion of any details) clauses 1 to 6.1 of the document provided as follows:

‘1. ACCEPTANCE.

This Offer shall become a final and binding sale upon acceptance hereof by the Seller on or before.....on

the Acceptance of this Offer by the Seller shall be effected by the Seller signing one copy of this agreement

and, before the date and time mentioned above, either handing such copy to the Purchaser or his authorised representative or else

posting such copy to the Purchaser by prepaid registered post addressed to him at the address appearing beneath his name at the

commencement hereof.

2. PURCHASE PRICE.

The purchase price is the sum of R.....

(exclusive *inclusive* of Value Added Tax) Payable by the Purchaser to the Seller as follows:

2.1 In cash upon acceptance hereof or on.....20.....

R.....(.....)

to.....or to the *Seller's/*Purchaser's Conveyancer (*delete that which is not applicable), to be held in trust in an interest bearing account for the benefit of the Purchaser until registration of transfer.

2.2 The balance of R.....(.....)

in cash on registration of transfer of the property, to be secured by an approved bank guarantee made payable to the Seller or his nominee and which shall be in the form stipulated by the *Seller's/* Purchaser's Conveyancer (*delete that which is not applicable), on or before.....20.....

(N.B. VAT IS ONLY APPLICABLE IF THE SELLER IS REGISTERED AS A VENDOR UNDER THE VALUE ADDED TAX ACT). (*delete that which is not applicable)

3. COST OF TRANSFER.

The Purchaser shall pay all transfer costs incurred in connection with the registration of transfer of the property, including Transfer

Duty, or Value Added Tax whichever is applicable and the cost of this Deed of Sale which amounts shall be paid immediately upon request by the *Seller's/*Purchaser's Conveyancer. (*Delete that which is not applicable).

4. TRANSFER.

Transfer of the property shall be passed by the *Seller's/*Purchaser's Conveyancer and shall be given and taken upon the Purchaser having complied with his obligations in terms of clause 2 and 3 hereof. (*Delete that which is not applicable).

5. POSSESSION.

Possession of the property shall be given to the Purchaser on registration of transfer or.....from

which date the property shall be at the sole risk, loss or profit of the Purchaser and from which date the Purchaser shall be liable for payment of all Rates and taxes, Insurance Premiums and other charges in respect of the property. The Purchaser shall refund to the Seller any such monies which may have been paid in advance beyond such date.

6. OCCUPATION.

6.1 *Vacant occupation of the property shall be given to the Purchaser on the.....

by which date the Seller or any other person occupying the property by, or through and/or under him shall be obliged to vacate the property.

ALTERNATIVELY

*The Purchaser acknowledges that the property is let to tenants and that occupation of the property will be given to the Purchaser subject to the tenant's rights. The Purchaser acknowledges himself to be fully acquainted with the terms of the Agreement of Lease.

(*Delete whichever paragraph is not applicable)'

[10] When those who met on 22 July 2013 parted that portion of the document read as follows; the aspects in bold italics representing the manuscript insertions made at that stage:

This Offer shall become a final and binding sale upon acceptance hereof by the Seller on or before.....20.....on the ..August 2013.. Acceptance of this Offer by the Seller shall be effected by the Seller signing one copy of this agreement and, before the date and time mentioned above, either handing such copy to the Purchaser or his authorised representative or else posting such copy to the Purchaser by prepaid registered post addressed to him at the address appearing beneath his name at the commencement hereof.

The purchase price is the sum of R650000.00 (six hundred and fifty thousand rand only) (exclusive *inclusive* of Value Added Tax) Payable by the Purchaser to the Seller as follows:

The Purchaser shall pay all transfer costs incurred in connection with the registration of transfer of the property, including Transfer

Duty, or Value Added Tax whichever is applicable and the cost of this Deed of Sale which amounts shall be paid immediately upon request by the *Seller's/*Purchaser's Conveyancer. (*Delete that which is not applicable).

Transfer of the property shall be passed by the *Seller's/*Purchaser's Conveyancer and shall be given and taken upon the Purchaser having complied with his obligations in terms of clause 2 and 3 hereof. (*Delete that which is not applicable).

6.1 *Vacant occupation of the property shall be given to the Purchaser on the.....

by which date the Seller or any other person occupying the property by, or through and/or under him shall be obliged to vacate the property.

[11] None of the other blank spaces nor any of the provisions providing for deletions was attended to.

[12] In addition, and also on 22 July 2013, clause 23, which provided for the insertion of special conditions, contained the following manuscript addition:

‘All rates, electricity, water charges to be paid up by the seller before the purchaser occupies the property.’

[13] At the same time the document was signed in the following manner: it was signed by the first applicant in the space provided for the purchaser to sign. His signature was witnessed by a single signature which has not been identified. Above those signatures, in the spaces provided, the place and date of signature (Durban 22 June 2012) were inserted in manuscript. At the same time the document was signed by both the respondents and their signatures were witnessed by two signatures which were not identified. Above those signatures the spaces providing for the place and date of signature were not filled in. None of the pages bore any initials, either at the foot of each page or alongside any of the manuscript insertions. The document had not been signed by the second applicant.

[14] The copy of the document put up by the applicants with the founding affidavit, and which was relied upon by them as constituting a contract of sale entitling them to the relief sought was markedly different. The first page of each version has been dealt with above.

[15] Clauses 1 to 6.1 in the applicants’ version reads as set out below. Again, the aspects in bold italics represent the manuscript insertions and, in addition, certain words of the original printed document are now deleted.

2.1 In cash upon acceptance hereof or on.....26 August.....2013..... R65000.00.....
(.....Sixty Five Thousand Rand Only.....) to.....Stowell and Company.....or to
the *Seller’s/*Purchaser’s Conveyancer (*delete that which is not applicable), to be held in trust in
an interest bearing account for the benefit of the Purchaser until registration of transfer.

2.2 The balance of R585000.00...(Five Hundred and Eighty Five Thousand Rand Only.) in cash on
registration of transfer of the property, to be secured by an approved bank guarantee made
payable to the Seller or his nominee and which shall be in the form stipulated by the *Seller’s/*
Purchaser’s Conveyancer (*delete that which is not applicable), on or before.....Date of
Transfer.....20..... (N.B. VAT IS ONLY APPLICABLE IF THE SELLER IS REGISTERED AS A
VENDOR UNDER THE VALUE ADDED TAX ACT). (*delete that which is not applicable)

Possession of the property shall be given to the Purchaser on registration of transfer or
Registration of Transfer from which date the property shall be at the sole risk, loss or profit of the
Purchaser and from which date the Purchaser shall be liable for payment of all Rates and taxes,
Insurance Premiums and other charges in respect of the property. The Purchaser shall refund to
the Seller any such monies which may have been paid in advance beyond such date.

6.1 *Vacant occupation of the property shall be given to the Purchaser on the Registration of
Transfer by which date the Seller or any other person occupying the property by, or through and/
or under him shall be obliged to vacate the property.

- [16] In addition, the applicants' version of the document has the initials of each of the applicants and the respondents appearing at the foot of each of the four pages.
- [17] Furthermore, the applicants' version of the document has an additional special condition, in a different hand, countersigned in full by both the applicants and the respondents, reading: 'The buyer has agreed to allow the seller until 31/12/2013 to leave the premises, which related due to unforeseen circumstances (sic)'.
- [18] Still further, the applicants' version of the document reflects the second applicant's signature appearing alongside that of the first applicant as well as a second unidentified witness signature.
- [19] The respondents contend that the version of the document relied upon by the applicants contain additions and alterations that were never agreed to by them. They contend that when the documents were first completed and signed on 22 July 2013 what each had was the version I have described in paragraphs 10 to 13 above. In his answering affidavit the first respondent says, additionally, that:
- '13. [w]hat was further agreed by the parties, but is not evident from [the version described in paragraphs 10 to 13 above], is that the purchaser's (sic) bond would have to be approved before 20 August 2013 as on that date, the purchaser (sic) would be required to pay a deposit to the value of 10% of the purchase price. The reason for this is twofold:
- 13.1. Myself and the Second Respondent, as abovementioned, required certain monies in order to finance the purchase of a different property; and
- 13.2. The First and Second Applicant would only be in a position to pay the deposit once the bond had been approved and paid to them.
14. ...
15. On or about 15 August 2013, the First Applicant telephoned me to advise that the bond was almost approved and that everything was going smoothly. He stated that the approval should be finalised by the 20th of August 2013, as agreed. However, he indicated further that the bank required that all the pages of the agreement were initialed (sic), especially the page containing the purchase price, in order for the bond to be finalised. The First Applicant therefore requested that he attend to my property in order for all the parties to initial every page of the agreement.
16. On the following day, the First Applicant came to the property for the purpose of initialing (sic) the pages of the agreement. I submit that the document which the First Applicant required the parties to sign, was not his original copy, nor was it my original copy, but a photocopy of his original as his original was kept by the Bank.

17. While the First Applicant was at the property we discussed the fact that I may be required to stay on the property after transfer should same occur before 31 December 2013. It was therefore agreed by the parties that even should same occur, myself and the Second Respondent would be allowed to stay on the property until 31 December 2013. As a result of these discussions, we proceeded to add another term under the special conditions clause, at paragraph 23, which stated as follows:

“The buyer has agreed to allow the seller until 31/12/2013 to leave the premises, which related due to unforeseen circumstances. ”

18. The parties duly initialed (sic) at the amendment as well initialling (sic) every page of the agreement as required by the Bank.

I submit that the amendment above was the only amendment made to the agreement and no other clauses were inserted whatsoever.

19. On or about 18 August 2013, the First Applicant telephoned me and advised that the bond approval was taking longer than expected. He requested that I keep the property off the market because he would not make the deadline of 20 August 2013. However, he indicated that I should not be concerned as he would pay the deposit, being 10 % of the purchase price, into my Bank account by 20 August 2013 (as agreed), whether or not the bond was finally approved on that date.
20. On 20 August 2013, the First Applicant again contacted me and promised that the deposit would be in my Bank account by close of business but that it would take a day or two to reflect as he was transferring from one Bank to another.
21. Subsequent hereto and on or about 22 August 2013, the First Applicant came to the property to drop off a copy of the initialed

(sic) agreement as requested by myself. The First Applicant did not personally hand me the copy as I was not available at the time,

however, he left it at the property.

22. I only had an opportunity to peruse the agreement, which had been delivered to the property, later that day being the afternoon of the 22 August 2013. I pause to mention that at this time the deposit had still not reflected in my Bank account.
23. As a result of the above I proceeded to phone the First Applicant, on the evening of the 22 August 2013. I informed the First Applicant that I was extremely upset as, after perusal of the copy which he had provided me with, I noticed that there were certain additions to the agreement which were made unilaterally and without my knowledge whatsoever. The additions concerned the payment of the deposit on 26 August into the account of Stowell & Company as well as choosing Stowell & Co as Conveyancers. These additions were never agreed to by ourselves and I submit that I was always under the impression that I would see to the choosing of a Conveyancer as I was the seller of the property. I further indicated to the

First Applicant that I had not received the deposit as promised and he had therefore breached the agreement. What is evident from the founding affidavit is that the First Applicant had clearly been untruthful as he had never paid the deposit into my bank account but rather, had eventually paid the deposit into the trust account of the Conveyancers. I however deal with this more fully below.

24. Furthermore, I stated that I was cancelling the agreement due to the unilateral changes to the agreement as well as the fact that the First Applicant had breached our agreement by not paying the deposit by 20 August 2013.
25. Later that same day and subsequent to the telephone conversation, I sent an (sic) short message service or text message ("sms) to the First Applicant advising him that due to the material changes and the non-payment of the deposit that the contract had become null and void. Effectively, I cancelled the agreement but, as a lay person, I was uncertain of the correct legal term. I sent another message to the First Applicant, on the same day, again indicating that the sale was null and void and the agreement had lapsed. I again submit that the intention was to cancel the agreement. I attach both messages hereto as annexures "DM2" and "DM3", respectively.

[20] The applicants dispute the cancellation and in reply, the first applicant says that:

- a. the reason that clauses 2.1 and 2.2 was left in blank on 22 July 2013 was because at that stage the applicants were uncertain whether they would obtain a mortgage bond for the full purchase price and that therefore it was uncertain as to the extent to which a deposit would be required (if any) and as a result, when they parted on that day it was still necessary for those clauses and clause 5 to be completed, for the parties to initial the agreement and for the second applicant "...to sign in full...";
- b. the second applicant and he went to the premises to have the agreement initialled and when they did this clauses 2.1, 2.2 and 5 had been completed and "...the second applicant had signed in full...";
- c. the respondents' attention had been "...drawn to the abovementioned clauses which they acknowledged..." and that thereafter the respondents initialled each page of the document.
- d. the document "...that was initialled was the original [and that he is] still in possession of the original as [he] was only required to furnish the bank with a copy...".

[21] That detailed recount of the facts demonstrates that when the parties parted company on 22 July 2013 no binding agreement had been concluded by then for want of compliance with section 2 of the Alienation of Land Act, 68 of 1981("the Act"). That that must be so is evident from the fact that the second applicant had not signed the document and, being identified as an offeror, it was incumbent upon her to have signed the document before her offer could be accepted. In addition, and because at the time of negotiation and first signature both sides placed significant, notwithstanding different, importance on the method of payment, those provisions appear to have been material.

[22] Relying upon the authority in *Just Names Properties 11 CC & Ano v Fourie & Ors* 2008 (1) SA 343 SCA, Mr Naidoo for the respondents contends that the applicants are non-suited for want of compliance with the Act. There, at paras 21 and 22 the court said:

[21] On a proper construction of the Act, the offer had to be complete when the Fouries accepted and signed it, or at least had to be signed by them in its completed form before they released it for delivery to the other party (cf *Standard Bank of SA Ltd v Jaap de Villiers Beleggings (Edms) Bpk*. 1978

(3) SA 955 (W) at 958A - E..) The fact that they signed two blank pieces of paper is fatal to the whole agreement. As Van Winsen J explained in *Van Rooyen v Hume Melville Motors (Edms) Bpk* 1964

(2) SA 68 (C) at 71D – E:

What defendant signed was not an agreement but a piece of paper. It is true that the placing on such piece of paper of a number of terms not embodied therein in writing at the time that the defendant signed the paper might in form turn the piece of paper into an agreement but it was certainly not an agreement when the defendant signed it and accordingly it cannot be regarded as an agreement having force and effect.

[22] The invalidity of the agreement cannot be cured by the fact that the amended clause reflected the intention of the parties. The Fouries' signature did not perform the function which the provisions of the Act required them to perform, namely to signify that the written offer to which the signatures pertained met with their agreement.'

[23] Against that, and relying upon the authority in *Rockbreakers & Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010

(2) SA 400 (SCA), Ms Konigkramer, for the applicants contended that even if the respondents were correct in their recollection concerning clauses 2.1, 2.2 and 5, the agreement was nevertheless perfectly valid because those portions were not material.

[24] Prima facie, I do not accept that the provisions relating to the method and timing of the payment of the purchase price were not material. The evidence clearly reveals that it was apparently important to both, but for different reasons, and it was therefore apparently material to the contract. The respondents are manifestly misguided in their understanding that on 22 June 2013 the document that was signed obliged the purchasers to pay a deposit by 20 August 2013, but that aspect was still important for them. From the purchasers'

perspective, uncertainty prevailed as at that date as to the extent of their mortgage facility and the fact of a deposit and its quantum were still to be determined. Those aspects are seemingly material. Because of the conclusion I arrive at later, I make no finding as to materiality and leave that question open for later determination.

- [25] The respondents may well be correct in their assertion that the agreement does not comply with the Act.
- [26] However, it seems to me that the answer to the problem lies in unpacking, in detail, what transpired during the times that the parties met and precisely what form the document took during the various stages of its construction. I say this because if what the applicants say happened when the document was initialled turns out to be true, it may well be contended, that when the respondents' attention was drawn to the various insertions and they thereafter appended their respective initials to each page of the document, that agreement was reached resulting in an agreement complying with the provisions of the Act. In other words, the act of initialling a document complete and final in all material respects constituted the act of signature.
- [27] The key to unlocking that answer lies in the dispute concerning what was physically produced for the purpose of the initialling. The respondents say that it was a photocopy of the applicants' original version. The applicants say that the document produced for the purposes of initialling was the applicants' original and not a copy, and that they have retained possession of it. If that is so, the applicants are in fact suggesting that they retain possession of a document which, when examined, ought to demonstrate that every manuscript addition thereto is in original form and not a photostatic reproduction. On the respondents' version, the applicants would be unable to produce such a document.
- [28] It seems to me therefore, that the matter must be referred for the taking of oral evidence before a final decision can be made. It seems also that it would be prudent to hear oral evidence on every interaction between the parties so that a complete picture is presented to the court. After that the court would then be in a position to receive argument afresh and evaluate that argument in the context of the evidence received.
- [29] I make the following Order:
- a. The matter is referred for the hearing of oral evidence to ascertain:
 - i. Precisely what transpired and unfolded between the parties from the time the applicants (or one of them) saw the "for sale" notice posted outside the respondents' property insofar as such events and matters are relevant to the alleged conclusion of the agreement of sale which is the subject matter of this application;
 - ii. Precisely where, when and what occurred when each manuscript insertion or alteration and each signature or set of initials was made or appended to any and all documents purporting to constitute the conclusion of aforesaid agreement of sale.
 - b. The aforesaid evidence shall be taken on dates arranged with and by the Registrar for such purpose.

- c. The parties shall be entitled to lead the evidence of any person at the intended hearing, but all the deponents to the affidavits delivered in the matter shall be obliged to make themselves available for examination and/or cross examination.
- d. Upon the conclusion of the evidence the Court shall receive argument on all the issues in the matter and finally determine the matter.
- e. The provisions of Rules 35, 36, 37, 38 and 39 shall apply to the further conduct of the matter.
- f. All questions of costs are reserved for the decision of the Court finally determining the matter.

Vahed J

CASE INFORMATION

Date of Hearing: 21 May 2014

Date of Judgment: 03 June 2014

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