

SOUTH AFRICA / JUDGMENT

Onah v Ogu (18286/2018) [2019] ZANCHC 49 (27 May 2019)

[2019] ZANCHC 49

COURT

Northern Cape High Court, Kimberley

BEFORE

BM Pakati

CASE / FILE NUMBER

18286/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1828/2018

Heard on: 08/02/2019

Delivered on: 27/05/2019

In the matter between

Dr EVERESTUS ONAH

Applicant

And

HYACINTH CHINEME OGU

Respondent

JUDGMENT

PAKATI J

[1] The applicant, Dr Everestus Onah, seeks an interdict against the respondent, Mr Hyacinth Chineme Ogu, in the following terms:

‘1. An order directing and compelling the respondent to return to the applicant keys to and all accessories of Erf 2375 Kimberley, commonly described as No. 6 Wharton Terrace Court Belgravia, Kimberley ;

2. An order interdicting and prohibiting the respondent from entering Erf 2375 Kimberley, commonly described as No. 6 Wharton Terrace Court Belgravia, Kimberley;
3. An order directing and compelling the respondent to refrain from acting and/or parading as the manager of the aforesaid property and/or as the agent of the applicant;
4. An order interdicting and prohibiting the respondent from collecting and/or keeping any rental money due to the applicant from the tenants of the aforesaid property; and
5. The respondent be ordered to pay the costs of this application.'

[2] Mr Ogu the application and seeks the following order against Mr Onah:

1. To sign all necessary and relevant documents to ensure that the sale goes through as soon as practicable within 2019 alternatively.
2. To refund me all the costs incurred with interest should Prayer 1 not to be practicable.
3. Costs of suit on a punitive scale.
4. Further and alternative relief.'

[3] Mr Ogu denies that Mr Onah has made out a case for the relief sought. He alleges that he had other remedies available to him. Mr Ogu does not dispute that he has the rental money in his possession and states that he would pay it to Mr Onah on condition he signs all documents allowing transfer of the property into his name.

[4] The following facts are undisputed:

14.1 That Mr Onah is the owner of the property;

14.2 That the parties signed a deed of sale on 23 October 2014.

14.3 That the written agreement inter alia, contained the following terms:

'2. PURCHASE PRICE

The purchase price is the sum of R 750 000 (seven hundred and fifty thousand Rand) (exclusive of Value Added Tax) payable by the purchaser to the seller as follows:

THE PURCHASER SHALL WITHIN 14 (FOURTEEN DAYS AFTER BEING CALLED UPON TO DO SO FURNISH THE SELLER'S CONVEYANCER WITH AN ACCEPTABLE

GUARANTEE FOR PAYMENT OF THE PURCHASE PRICE UPON REGISTRATION OF TRANSFER.

(N.B. VAT IS ONLY APPLICABLE IF THE SELLER IS REGISTERED AS A VENDOR UNDER THE VALUE ADDED TAX ACT)

OCCUPATION

...

6.2 If occupation is given to the purchaser before the date of transfer:

6.2.1 The purchaser shall not be entitled to make any alterations on the property before transfer without the prior written consent of the seller which consent is at the seller's sole and absolute discretion.

6.2.2 The purchaser shall be obliged to vacate the property upon cancellation of this agreement for whatsoever reason, no tenancy

being created by any such prior occupation.

8. VOETSTOETS

The property is sold as described in the existing title deed or deeds thereof, and subject to all conditions and servitudes (if any) attaching thereto or mentioned or referred to in the said title deeds or prior deed. The seller shall not be liable for any deficiency in extent which may be revealed on any re-survey, nor shall [the] seller benefit by any surplus in extent.

9. WARRANTIES

The property is sold "voetstoets" and as it stands, the seller gives no warranty in regard to the buildings and any

improvements upon the property or the rights attaching thereto. The seller shall not be liable for any defects in the property, either latent or patent.

10 OCCUPATIONAL RENTALS

If the date of occupation and possession does not coincide with the date of transfer, the party enjoying occupation and possession of the property while it is registered in the name of the other party, shall in consideration thereof for the period of such occupation, pay to the other party occupational rental of R 4 600-00 (four thousand and six hundred rand) per month or a pro rata share thereof for any portion of a month.

11. BREACH

Should the purchaser fail to pay for guarantee any portion of the purchase price referred to in clause 2 above or fail to comply with any other obligations imposed on him in terms of this agreement, and remain in default for a period of ten (10) days after the date of delivery or dispatch by prepaid registered post of written notice requiring the purchaser to make such payment, provide a guarantee, or carry out the obligation in question, the seller shall be entitled (in addition to and without prejudice to any other rights available to the seller at law);

11.1 To cancel the sale and recover such damages as the seller may be able to prove that the seller has sustained, in which event the seller be entitled to retain all amounts paid by the purchaser until the actual amount of damages has been determined by a court and there upon to set-off such damages against the amounts retained; My underlining

12 MORTGAGE BOND

12.1 This agreement is subject to the suspense (sic) condition that a loan of R750 000-00 (seven hundred and fifty thousand rand) secured by a mortgage bond to be registered over the property is obtained by the purchaser on the normal terms and conditions of any Registered Commercial Bank within a period of 30 (Thirty) days from the last [day] of signature hereof or such extended period as the parties may agree to in writing.

12.2 In the event of the aforesaid bond not being granted within the period stipulated in Clause 12.1 above alternatively within such extended time period as the parties may have agreed to in writing, then and in such event this agreement shall lapse and shall have no force and effect and the seller shall be obliged to refund to the purchaser together with interest all monies paid by the purchaser hereunder in reduction of the purchase price.' My underlining

THE APPLICANT'S CASE IN THE FOUNDING AFFIDAVIT

- [5] During 2015 Mr Onah and Mr Ogu entered into an oral agreement in terms of which Mr Ogu was to manage Mr Onah's property by entering into a lease agreement with a prospective tenant. In terms of this agreement Mr Ogu would collect monthly rental from the tenant in the amount of R7 000-00, remit R6 000-00 to Mr Onah and keep R1 000-00 for himself. Mr Ogu leased the property to a tenant and concluded the lease agreement in his personal capacity in terms of which the tenant deals with him directly.
- [6] Since October 2017 Mr Ogu has failed/declined and or refused to remit the rent which he collected from the tenant in terms of the agreement. Mr Onah says that Mr Ogu breached the agreement and informed him that he did not want to continue with the agreement. He asked him to return his house keys and refrain from collecting rental from the tenant. Despite his requests Mr Ogu refused to return the keys to the house. He continued to collect the rental and kept the money to himself.
- [7] Mr Onah worked for the Department of Health, Kimberley Hospital ("the department") and alleges that he had known Mr Ogu since 2006. At the time Dr Enwerem, his friend and colleague, stayed in the property for about three years. The department paid rent in the amount of R4600-00 on his behalf. Because of their friendship Mr Onah did not increase the rent to R6 000-00 per month like other lessors in the same complex.
- [8] Mr Onah's attorneys of record, Mwim Attorneys, addressed a letter dated 19 October 2017 to Mr Ogu and demanded the return of the keys to him and all accessories of the property within five days. He was also asked to refrain from entering the property, acting as and/or parading himself as the manager of the aforesaid property and from collecting and/or keeping any rental from the tenant. He was further requested to remit the amount of R6 000-00 for October 2017 rental to Mr Onah within five days.

- [9] Mr Onah states that his attorneys of record forwarded several letters to Mr Ogu instructing him to hand over the keys to the property and remit the money already collected for rental. However, Mr Ogu failed to comply with Mr Onah's demands. Mr Onah alleges that Mr Ogu continued to collect rental and kept it. Notably, Mr Onah attached one email, Annexure "EC 2", to the founding affidavit from his attorneys of record demanding the keys as alluded to earlier.
- [10] Mr Onah says that the refusal of Mr Ogu to comply with the demand is prejudicial to him. He requests the Court to grant him the relief he seeks as he has no other remedy available to him.
- [11] According to Mr Onah when he visited the property he was refused access and would not be recognised as the owner of the property. He alleges that Mr Ogu has 'hijacked' his property. He acknowledges that he would not just terminate the lease agreement concluded by Mr Ogu. He states that he has a bond registered over the property which requires to be serviced. Mr Ogu is enriching himself unjustifiably with the rent money collected and keeps it for himself.
- [12] Mr Onah contends that as the owner of the property, he has a right to the use and enjoyment of it which includes the patrimonial benefits that accrue as a result. From October 2017 Mr Ogu has in total collected an amount of R63 000-00 in rental. He argues that Mr Ogu has no right to occupy his property, restrict his access, collect and keep money for rent paid by the tenant. He argues further that Mr Ogu's conduct is unlawful encroachment of his rights. He alleges that he would suffer damages if the application is not granted.

THE RESPONDENT'S CASE

- [13] Mr Ogu alleges that after he learned that Mr Onah was selling the property during July 2014, he viewed it and observed that it 'had serious maintenance shortcomings'. The kitchen cupboards were falling apart, the roof was leaking, and the passage and bedrooms were not tiled but covered with carpets which were in a very bad state. He was nevertheless prepared to buy it. After he and Mr Onah signed the deed of sale he applied for a bond amounting to R750 000-00 from Absa Bank but only R600 000-00 was approved in February
2015. He confirms the email sent by Mr Onah to the transferring attorneys dated 09 April 2015 regarding the passing away of his wife.
- [14] Mr Ogu further confirms Mr Onah's version that during May 2015 he advised him that he was experiencing delays with the finalisation of his wife's estate and requested him to lease the property pending finalisation of the estate and transfer of the property. He disputes that he did not discuss the repairs with Mr Onah. He says that he informed him that the property needed some renovations before it could be leased. Mr Onah in response permitted him to do the repairs as he was experiencing financial constraints at the time and that he would reimburse himself from the monthly rental, so he argues. He then approached Elela Construction (Pty) Ltd and the repairs were done and that he paid R 30 793-45. He thereafter

advertised the property in the Diamond Field Advertiser Newspaper (“the DFA”) and secured a tenant who occupied the property from July 2015. He charged monthly rental of R 7 000-00 and remitted an amount of R5 000-00 to Mr Onah and retained R2 000-00 for services as manager. In July 2016 he increased the monthly rental to R7 700-00 as well as the remittance to Mr Onah to R 5 500-00. This was despite the fact that occupational rent payable was R4 600-00 per month in terms of clause 10 of the deed of sale, so he says.

[15] From August to October 2016 Absa Bank enquired from the transferring attorneys about the progress of the loan of R600 000-00 approved earlier. The bank was informed that Mr Onah intended to cancel the agreement. On or about 31 October 2016 he indeed cancelled the agreement for the following reasons:

15.1 Mr Ogu failed to pay occupational rent from October 2014 to July 2015 and was indebted to him in the amount of R41 400-00;

15.2 He denied Mr Onah access to the property;

15.3 The ‘frivolous repairs’ done to the property without Mr Onah’s consent;

15.4 Lack of transparency and the alleged mala fide dealings by Mr Ogu;

15.5 The fact that the value of the property had increased from R750 000-00 to R900 000-00 and;

15.6 The persistent financial loss at the hands of Mr Ogu which made it impossible for him to service his bond.

[16] On 10 November 2016 the transferring attorneys informed Mr Ogu and Absa Bank that Mr Onah had cancelled the agreement. Mr Ogu alleges that he told Mr Onah that he owed him for the alleged repairs as well as the costs of attorneys. On 03 December 2016 he forwarded an email to Mr Onah setting out the details and extent of his claim. He argues that he and Mr Onah discussed the cancellation of the agreement and his claim. Mr Onah requested time to reconsider his position.

[17] On 04 January 2017 Mr Onah advised Mr Ogu as well as the transferring attorneys that he would proceed with the transfer of the property. Between 20 and 26 January 2017 the parties signed an addendum to the deed of sale (Annexure “CHO 6”). Clause 9 of same reads:

‘9. It is hereby specifically agreed as follows:

9.1 Dr Onah confirmed that he has signed all the documents for the transfer of the property with the attorneys in Johannesburg and will ensure that the documents are delivered to Towell and Groenewaldt Attorneys in Kimberley;

9.2 Dr Onah shall provide any document, and/or sign any document, relevant to the transfer, as requested by the attorneys until the finalization of the transfer;

9.3 Mr Ogu remit an amount of R12 000-00 to Dr Onah for the December 2016 and January 2017 rentals upon the signing of this addendum by both parties;

9.4 Mr Ogu shall liaise with his bank to resuscitate the bond earlier approved by the bank upon the signing of this addendum by both parties; [and]

9.5 Mr Ogu shall provide any document, and/or sign any document, relevant to the transfer, as requested by the attorneys until the finalization of the transfer.'

- [18] Mr Ogu alleges that on 26 January 2017 he paid an amount of R12 000-00 to Mr Onah for December 2016 and January 2017 rentals as per the agreement. He again approached the bank for a loan of R750 000-00. He does not disclose the date on which he approached the bank for the second time but state that the loan was approved on 27 February 2017. On 13 April 2017 he received confirmation from Duncan & Rothman Attorneys that they would register the bond. On 08 May 2017 they confirmed receipt of the draft deed and guarantee from Towell & Groenewaldt Attorneys.
- [19] Towell & Groenewaldt forwarded an email to Duncan & Rothman Attorneys dated 28 July 2017 and 11 August 2017 informing them that the application in terms of section 42 (2) of the Administration of Estates Act[1] filed by Mr Onah was rejected by the Master of the High Court due to his failure to list the property in the inventory. On 26 September 2017 Towell & Groenewaldt enquired from Mr Onah about the possibility of amending the inventory. In response he cancelled the agreement on 27 September 2017.
- [20] Towell & Groenewaldt blame Mr Onah for the delay and state that when he sold the property it was worth R750 000-00 and not R950 000-00. They warned him that he could not use the value of the property to his advantage. Mr Onah did not yield to that, hence the application. On 09 May 2018 Nedbank withdrew its approval of the loan of R750 000-00. According to Mr Ogu, Mr Onah allowed him to take possession of the property since May 2015 while he was busy winding up his wife's estate although he did not physically stay in it.
- [21] Mr Ogu contends that Mr Onah does not approach this Court with clean hands as the application is intended to frustrate the alleged binding sale agreement. He persists that he would pay the monthly rental due to Mr Onah when he signs the transfer documents and pays for his claim for repairs. He states that he does not accept the cancellation of the agreement because it is not based on legal grounds. He denies that he has breached the agreement as the occupational rent is based on a secondary oral agreement and Mr Onah is the one in breach of the sale agreement. He insists further that he is entitled to the transfer of the property.
- [22] Mr Ogu alleges that Mr Onah envisaged a dispute of fact and should have instituted a claim by way of action. He claims that Mr Onah owes him money to the value of R82 542-52 for the losses he allegedly incurred. He maintains that he kept the rentals in order to cover for the alleged costs of repairs. He argues that he had to pressurise him in order to continue with the sale in order to cover for the losses should the sale of the property fails.

THE APPLICANT'S REPLYING AFFIDAVIT

- [23] According to Mr Onah during his stay at the property Dr Emwerem complained that ‘some things’ needed to be fixed and that there was no lock-up garage. Mr Onah states that he duly attended to the unnamed items except for the lock-up garage. As he was about to attend to it Dr Emwerem left Kimberley. At the time the property’s evaluation was between R750 000-00 and R880 000-00. On 23 October 2014 Mr Onah and Mr Ogu entered into a written deed of sale. Soon after taking control of the property Mr Ogu informed Mr Onah that he had made some repairs amounting to R30 000-00. This came as a surprise to Mr Onah as he was unaware of any repairs that had to be done. He says that Mr Ogu neither informed him of a need to do the alleged repairs after viewing the property and before signing the deed of sale nor did he discuss it with him prior to effecting the said repairs/alterations and/or renovations.
- [24] Mr Onah demanded invoices pertaining to the material used and labour costs for the alleged renovations. Mr Ogu refused and alleged that he was not entitled to it. Mr Onah expressed some doubt about this, the argument goes. During that period his wife passed away.
- [25] On 09 April 2015 Mr Onah forwarded an email to Messrs Towell & Groenewaldt, the transferring attorneys, and informed them that the delay of the sale and transfer of the property was as a result of finalising his wife’s estate. At that stage Mr Ogu had not paid occupational rent of R4 600-00 per month in terms of clause 10 of the deed of sale, the argument goes.
- [26] Mr Onah says that Mr Ogu leased the property to a tenant who paid R7 000-00 per month and Mr Ogu in turn paid an amount of R5 000-00 to him and kept an amount of R2 000-00 to himself. This arrangement was not verified with him and was therefore done without his knowledge. This, according to Mr Onah, was done in bad faith.

THE FIRST CANCELLATION

- [27] Mr Onah alleges that Mr Ogu was compensating himself for the alleged repairs and/or renovations using the money for rental. In this process Mr Ogu collected about R34 000-00, an amount more than what he alleges he had paid for the so-called renovations, argues Mr Onah.
- [28] It later transpired that Mr Ogu had collected R7 700-00 from the tenant and without telling Mr Onah, kept R700-00 for himself over and the above the agreed R1 000-00, the argument goes. Mr Onah cancelled the agreement and advised Mr Ogu to cancel the lease agreement with the tenant because he wanted assistance of professional property managers to manage the property. However, Mr Ogu refused alleging that he had a right to the property.
- [29] Mr Onah denies that the property needed repairs and/or renovations as it was in good condition. He alleges that Mr Ogu fabricates the alleged damages to the kitchen cupboards and the roof in an attempt to justify the purported repairs. In trying to reach an amicable solution, he unwillingly and under pressure, agreed to pay Mr Ogu for the alleged repairs, the argument goes. He alleges that Mr Ogu has not paid any monies towards the purchase

price since the deed of sale was signed. He alleges further that Mr Ogu has failed to allege or prove any loss or damages as a result of the cancellation of the agreement.

THE SECOND CANCELLATION

- [30] On 26 September 2017 Towell and Groenewaldt addressed an email to Mr Onah requesting him to advise when he would be filing the amended inventory list with the office of the Master in Pretoria. He informed them that he had decided to cancel the sale as the deeds office valuation of the property was R950 000-00 and that it was not worth his while to sell at R750 000-00. Moreover, he had to pay executor's fees on the amount of R900 000-00 and not R750 000-00. He addressed a letter to Towell & Groenewaldt confirming cancellation.
- [31] The crucial question to be determined is whether Mr Onah is entitled to the relief sought in the papers as they stand. He insists that he has made out a proper case for the relief sought. Mr Ogu urges me to dismiss the application with costs and grant its orders although its application is not before me.
- [32] Mr Onah denies that Mr Ogu informed him of repairs to the property otherwise he would have requested for 'a cost estimate of the repairs' before it commenced. He denies further that Mr Ogu forwarded a letter to him setting out the details of his claim. When he requested for an invoice Mr Ogu sent Annexure "CHO 3" which records:

'Tiling and repairs of Wharton Terrace Court, flat 5, No. 7 Park Road, Belgravia, Kimberley

Item	Description	Unit	Quantity	Rate	Builders Works	Sub-Total
1.0	Work Done: Remove carpet in main lounge; Tiling of main lounge; Tiling of main bedroom, Repair of leaking roof; Replace ceiling of one room; Painting; Repairs of Kitchen cupboards.					
1.1.1	Cost of Materials					
1.1.2	Labour					
Item 1	1	17	793.45	13 000.00	R 17 793.45	R 13 000.00
SUB-TOTAL VAT @ 14%						TOTAL INVOICE AMOUNT R 30 793.45
						R - R 30 793.45'

- [33] Mr Lobi, for the respondent, submits that Mr Onah does not approach this Court with clean hands. He submits further that he has an alternative remedy and the application should be dismissed with costs.
- [34] According to Mr Lobi argues that there is a dispute of fact in this matter and Mr Onah is not in a position to disclose how much is owed to him by Mr Ogu. He states further that the application is an abuse of process.
- [35] Mr Mongala, on behalf of the applicant, argues that the application is unopposed because Mr Ogu has not applied for the dismissal of the relief sought. He argues further Mr Ogu is not entitled to keep Mr Onah's keys to the property as he is the owner of same. According to Mr Mongala the oral agreement was terminated when the letter of demand dated 19 October 2017 was forwarded to Mr Ogu.

AUTHORITIES

[36] The rule is that the necessary allegations upon which the applicant relies must appear in the founding affidavit, as the applicant will not generally be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit. This means that all the necessary allegations upon which the applicant relies must appear in his founding affidavit.

[2] In *BETLANE v SHELLY COURT CC*[3] Mogoeng J had this to say:

‘[29] It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time. It was for this reason that some of the allegations made in the replying affidavit, such as the unlawfulness of the writ of execution, were challenged.’

[37] In *NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS v OPENSHAW*[4] Mhlantla AJA held that:

‘[29] It is trite law that the applicant in motion proceedings must make out a proper case in the founding papers. Miller J

in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*, puts the matter thus:

‘In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet.’

The same cannot be said in casu. Mr Onah seeks a final interdict.

EVALUATION

[38] Mr Mongala submits that Mr Onah relies on an oral agreement and the issue therefore is whether same was validly cancelled when the letter of demand was received by Mr Ogu. On the other hand Mr Onah in reply gives a detailed account of how he and Mr Ogu entered into a deed of sale in 2014 concerning the same property which was never mentioned in the founding affidavit. It is only after these issues were brought up in answer that Mr Ogu that Mr Onah mentioned it in his replying affidavit.

[39] Mr Mongala submits that the deed of sale lapsed due to the fact that Mr Ogu failed to fulfil a suspensive condition in terms of the deed of sale, hence Mr Onah now relies on the oral agreement. It might be so that the suspensive condition was not fulfilled at the time but it does not end there. There was also an addendum that was signed by the parties in an attempt to revive the said deed of sale. Mr Mongala argues that the addendum did not resurrect the deed of sale which is disputed by Mr Ogu.

[40] In my view, Mr Mongala's argument cannot stand because there is no order of court to the effect that the alleged cancellation of the deed of sale was valid or not taking into account that Mr Ogu disputes that it committed any breach. The validity of the said cancellation has therefore not been tested in court.

[41] I take into consideration that Mr Onah did not mention the deed of sale in its founding affidavit. Had Mr Ogu not mentioned it in reply I would never have known about true facts of this matter. Obviously Mr Onah did not play open cards with this Court. In my view it is important that the principal agreement, the deed of sale and its alleged cancellation, should be dealt properly with in a court of law.

[42] Mr Mongala submits that one of the questions that need to be resolved is whether or not the deed of sale is enforceable. In actual fact a number of issues need to be dealt with around the deed of sale and its alleged cancellation. For example, issues like whether or not:

42.1 the respondent should pay occupational rent;

42.2 the applicant signed the addendum with the intention to be bound by the agreement; and

42.3 the respondent is entitled to claim for repairs allegedly done to the property. This list is not exhaustive.

REQUIREMENTS FOR A FINAL INTERDICT

The requirements for the right to claim a final interdict are: (a) a clear right; (b) an injury actually committed or reasonably

apprehended; and (c) the absence of similar protection by any other remedy.[5]

CLEAR RIGHT

[42] Mr Mongala argues that Mr Onah has a clear right as the owner of the property. He argues further that Mr Ogu's right to occupy, possess or lease the property was terminated by cancellation of the deed of sale, breach of contract alternatively by the letter of demand dated 19 October 2017. It is undisputed that the applicant is the owner of the property as indicated earlier.

AN INJURY ACTUALLY COMMITTED OR REASONABLY APPREHENDED

[43] It is clear from the founding affidavit that harm that Mr Onah alleges he suffered relates to the money for rental that was kept by Mr Ogu and that he has no access to the property. Mr Onah says that he still has to service the bond and therefore is prejudiced that Mr Ogu keeps rental money and keys to himself.

THE ABSENCE OF SIMILAR PROTECTION BY ANY OTHER REMEDY

[44] Mr Onah argues that he has no alternative remedy and is therefore entitled to the relief sought. Mr Ogu disputes this.

[45] Mr Onah seeks rental money kept from him by Mr Ogu. He decides to approach this Court and seek an interdict. It is unclear how much is due to him. In the notice of motion he indicates that Mr Ogu should be interdicted from 'keeping any rental money due to the applicant'. The founding affidavit also does not disclose how much is involved.

- [46] In my view, the applicant fails to mention the deed of sale in his founding affidavit because he wants to take a short cut in order to regain control of the property without having to deal with the question whether the deed of sale was validly cancelled or not. He could have approached court and claim all the rental monies due to him. In my view, he did not take this Court into his confidence and tell it about the deed of sale signed before the oral agreement was entered into. Even though it is not a rigid rule that an applicant makes its case in the founding affidavit it is preferable for the applicant to come clean in its founding affidavit so that a court should not find itself in difficulty trying to sort out the facts, as in this case. Moreover, Mr Ogu also has to know what case the applicant has against him/her in order to prepare his defence.
- [47] For the reasons advanced supra I am not satisfied that the applicant made out a proper case for the relief sought and the application has to be dismissed with costs. On the other hand the respondent has no application before me for the relief that he seeks.

COSTS

- [48] Mr Mongala submits that Mr Ogu has, nowhere in the papers, opposed the granting of the interdict sought by Mr Onah. He submits further that the application should succeed with costs.
- [49] Mr Lobi argues that Mr Onah does not approach this Court with clean hands as his application is intended to frustrate a valid sale agreement between the parties. He urges me to dismiss the application with a punitive costs order. However, this argument was not pursued during hearing of the matter. Instead Mr Lobi argues that Mr Onah should be compelled to sign the agreement to allow for transfer of the property into the name of Mr Ogu in the absence of a formal application.
- [50] The purpose of an award of costs to a successful litigant is to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled to initiate or defend litigation.[6] An award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.[7] The court may order the payment of attorney and client costs when a party is guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives or committed a grave misconduct.[8]
- [51] The matter of costs is a matter wholly within the discretion of the court but this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at. Costs on attorney and client are punitive in nature. In my view, an award of costs on a party and party scale is one that is justified in the circumstances.

In the circumstances I grant the following order:

1. The application is dismissed with costs on a scale as between party and party.

BM PAKATI

JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant: Adv JK Mongala

Instructed by:

C/O Mjila and Partners

On behalf of the Respondent: Adv L Lobi

Instructed by:

Lulama Lobi Inc

[1] Act 66 of 1965; Section 42 (2) provides: 'An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists.'

[2] Rule 6 of the Uniform Rules of Court

[3] 2011 (1) SA 388 (CC) at 396C

[4]

[2008] ZASCA 78; 2008 (5) SA 339 (SCA) at 349A-B

[5] Setlogelo v Setlogelo 1914 AD 221 at 227; Masuku v Minister of Justice & Others 1990 (1) SA 832 (A) at 840-841

[6] Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

[7] Jewish colonial Trust Ltd v Estate Nathan 1940 AD 163 at 183-184

[8] Van Dyk v Conradie 1963 (2) SA 413 (C) at 418E-F

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Prepared on 9 October 2026 · Esheria