

SOUTH AFRICA / JUDGMENT

T.K v F.O and Another - Appeal (A52/2023) [2023] ZAWCHC 324 (11 December 2023)

[2023] ZAWCHC 324**COURT**

Western Cape High Court, Cape Town

BEFORE

MJ Dolamo, PAL Gamble, L G Nuku

CASE / FILE NUMBER

A52/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A52/2023

In the matter between: T[...] K[...] Appellant And F[...] O[...] First Respondent CITY OF CAPE TOWN Second Respondent

Judgment

handed down electronically on Monday, 11 December 2023 at 11h00

DOLAMO, J (GAMBLE and NUKU JJ concurring):

INTRODUCTION

- [1] This is an appeal against the judgment of Thulare J in terms of which he dismissed an application for the eviction of the respondent from the premises known as 1[...] R[...] drive, Pinelands, Cape Town (“the property”) in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1], leave to appeal having been granted by the Supreme Court of Appeal (SCA). As the second respondent did not take part in the proceedings, I shall henceforth refer to the first respondent simply as the respondent.

[2] The central issue in the matter is the co-ownership of the property. The appellant claims sole ownership of the property whilst the respondent's contention is that he is a co-owner thereof, that there is an oral agreement between the parties to the effect that the appellant is merely "holding" his half share on his behalf, and that, as such, he is not an unlawful occupier. The issue of ownership of the property resulted in a factual dispute on the papers and, when the matter first came before Binns-Ward J, was referred to oral evidence.

[3] The order by Binns-Ward J, which incorporated principles set out in Metallurgical[2], is in the following terms:

"1. The application is postponed to the semi-urgent roll on the 9th November 2021 for determination after the hearing of oral evidence on the contested question of the alleged co-ownership of Erf 2[...], Cape Town, situate at 1[...] R[...] Drive, Pinelands. Cape Town. (Emphasis added).

2. The evidence shall be that of any witness/es whom the parties, or either of them, may elect to call subject, however, to what is provided in paragraph 3 hereof.
3. Save for witnesses whose evidence is already on affidavit in this application, neither party shall be entitled to call any witness unless:

3.1 That party has served on the other party at least 14 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by the respondent) a statement wherein the evidence to be given in chief by such person is set out; or

3.2 the court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

4. Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not.
5. The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
6. If a deponent or witness is not called to testify, the affidavit or statement of such deponent or witness shall be disregarded in the determination of the issues referred to oral evidence.
7. Each of the parties shall, within 20 days from the date of this order, make discovery on oath of all documents relating to the issue referred to in paragraph 1 hereof, which are or have at any time been in the possession or under the control of such party, and the provisions of Rule 35 with regard to the inspection and production of documents discovered and the making of further discovery shall be applicable as if the discovery made in terms of this paragraph had been made consequent upon a notice in terms of Rule 35(1).
8. The documents discovered in terms of paragraph 7 shall be deemed to be what they purport to be without further proof, subject to the right of any party, on five days' written notice, to require the party discovering any specified document/s to prove such document/s.

9. The issue of liability in respect of the costs of suit incurred to date is stood over for determination by the court deciding the eviction application as contemplated in terms of paragraph, 1 of this order.”

[4] On 9 November 2021 the matter came before Thulare J who, after hearing oral evidence and without in any way determining the contested question of co-ownership of the property, dismissed the application with costs. The court a quo stated rather that the issue referred to oral evidence concerned the intention of the parties when they signed the deed of sale in terms of which the appellant purchased the respondent’s half share in the property, which they had purchased jointly and was registered in both their names.

[5] In upholding the respondent’s version that the deed of sale was a sham and that there was an underlying oral agreement in terms of which the parties agreed that they would sign the deed of sale that provided for the transfer of the respondent’s half share in the property to the appellant in order to protect it from his creditors, the court a quo held that the fact that the respondent was to continue to pay for the bond instalments, amongst others, showed that the deed of sale did not present the full picture. The court a quo found that the fact that the parties did not disclose to the attorneys who drafted the deed of sale, was a deliberate withholding

of vital information as regards the true nature of the transaction.

[6] The court a quo went on to reject the appellant’s version that the deed of sale represented an arm’s length transaction which resulted in the transfer to her of the respondent’s half share in the property and held that[3]:

“[28] Mr Parker and Mr Mohamed were credible and reliable witnesses and their versions are probable. There was prior negotiations between the parties, which were very material to the agreement that they reached. These prior negotiations included material issues which should have formed part of the substantive agreement between the parties and should have formed part of the deed of sale. The applicant specifically told an untruth about it to Mr Mohammed and both parties did not disclose it to Mr Parker. If this had been told to Mr Mohammed, and disclosed to Mr Parker, the deed of sale would have clarified, interpreted and conveyed, in language facile enough to record the true agreement between the parties.

[29] I have serious doubts about the inherent credibility of the applicant’s factual averments. It is susceptible to being a carefully construed afterthought. I am unable to conclude that the allegations of the respondent were so far-fetched or clearly untenable. As a result I am unable to determine that the applicant is entitled to the final relief which she sought in this application. For these reasons I make the following order:

The application is dismissed with costs including the wasted costs of 5 August 2021 and 26 August 2021.”

[7] The approach and findings by the court a quo constitute a material misdirection – the court elected to approach the matter otherwise than it was required to do.[4] In deciding the matter as it did, the court a quo not only disregarded the order of Binns-Ward J but determined issues to which the parties had not been alerted, thus depriving them of adequately addressing the matter, both in evidence and argument. In the circumstances this court is entitled, indeed obliged, to interfere and determine the matter afresh and in so doing may disregard any findings on credibility and make its own assessment of the veracity and reliability of the witnesses.[5]

[8] Recently, in Mtyido[6] the Supreme Court of Appeal (SCA) restated the approach and it is useful, in the circumstances of the present matter, to have regard

thereto.

“[23] A court of appeal will generally not interfere with findings of credibility made by a trial court, because the trial court would have had the benefit of observing the witnesses when testifying, unless those findings are clearly wrong. Similarly, an appeal court will not lightly interfere with the factual findings made by a trial court. As was said in Mashongwa v Passenger Rail Agency of South Africa ...

‘It is undesirable for this court to second-guess the well-reasoned factual findings of the trial court. Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitutes those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong. Otherwise trial courts are best placed to make such findings. (Emphasis added)

The circumstances of this case are just that – a material misdirection and a conclusively wrong finding.

[9] A court of appeal approaching the matter before it along those lines may thus disregard any findings on credibility made by the court a quo and may make its own assessment of the veracity and reliability of the witnesses.[7] The latter task is made all the more easy when the evidence on record is readily capable of being assessed by the court of appeal.[8]

[8] The appeal against the judgment is mainly on the basis that the court a quo erred in failing to make a determination, after hearing oral evidence on the contested question of the ownership of the property; in not finding that no agreement existed providing for the respondent continuing to be a co-owner of the property; in holding that the agreement between the parties was partly oral and partly written; erred in its credibility findings against the appellant and

in its application of the techniques used to resolve two irreconcilable versions; and finding that the parties withheld vital information from the attorney who drafted the deed of sale which information could have assisted him in the clarification and interpretation of their intentions so as to record their true agreement.

- [9] The following are matters of common cause between the parties, or where they are disputed, such disputes are not material: The appellant is the only registered owner of the property. The parties, who were married according to Muslim rites, purchased the property in November 2015 for R2.4 million and was initially registered in both their names. The appellant, out of the proceeds of a loan received from her father, paid the deposit of R300 000-00, the transfer costs in the sum of R121 714-60, and the bond registration costs. The parties agreed that the respondent would, at some future date, repay the appellant for half of this costs[9]. The balance of the purchase price was financed through a loan secured with a mortgage bond registered over the property. The mortgaged bond was held by Standard Bank which later ceded it to SB Guarantee Company (RF) (Pty) Ltd. The respondent was responsible for the bond payments.
- [10] The parties did not immediately after the purchase the property move in but first embarked upon its extensive renovation and continued to reside in their rented accommodation in Kenilworth, where the respondent was solely liable for the payment of rent. This was in accordance with the Muslim principle of nafaqah in terms of which the husband is solely liable for putting a roof over his wife's head. The respondent operated a "Build it" hardware franchise store and contributed to the renovation costs by supplying building material which he sourced from this business. The appellant's uncle, as a gift to the parties, provided a builder who demolished the walls, removed the rubble from site, and supplied the labour for the new building works. The renovation of the property lasted from May to December 2016.
- [11] The respondent ran the Build it franchise through a company called Buildchain (Pty) Ltd, of which he was a director and for which he had signed as a surety. At the beginning of 2017 the respondent started to experience financial problems in his business. During this period the appellant received a distressing telephone call from an attorney representing Standard Bank who informed her that the respondent had signed as surety for his company and that as a result of its financial difficulties Standard Bank was on the brink of taking legal action which may result in respondent's half share in the property being attached and sold in execution at an auction to third parties to settle the amount owing to the bank.
- [12] The discovery that the investment in the property was at risk caused anxiety to the appellant. Consequently, the respondent sought legal advice from his attorney, Mr Edwin Petersen (Petersen). The latter's advice was that the parties should do nothing about the situation as there was not much equity in the half-completed structure, and nobody would be interested in purchasing a half share in such a property. The parties also sought legal advice from another attorney, Mr Nazir Parker (Parker), with whom they discussed various possibilities, including transferring the property into a trust but the appellant was not in favour of such an option. They eventually settled on the option to sell and transfer the respondent's half share in the property to the appellant, resulting in her becoming the sole owner thereof.

- [13] Having agreed on the option to sell and transfer the respondent's half share in the property to the appellant the parties proceeded to have it evaluated. On the strength of these evaluations, which perked the value of the property at approximately R2 400 000-00, the parties were of the view that, because the outstanding balance of the loan was approximately R2 100 000-00, the equity in the property was minimal. As a result, they agreed that the purchase price of the respondent's half share would be R1 200 000-00. Parker prepared a draft deed of sale, which the parties signed on 15 February 2017. The deed of sale reflected in clause 1 that the purchase price had already been paid. The agreement further provided a non-variation clause which stipulated that it was the whole agreement regarding the sale and that there were no other agreements, guarantees, or representations, whether verbal or in writing, upon which any party relied in concluding the agreement and that no variation of the agreement or other agreement between the parties which has the effect of varying the provision of the agreement will be of any force or effect unless in writing and signed by the parties.
- [14] Parker, who was also on the panel of attorneys for Standard Bank, was in terms of the deed of sale, appointed the conveyancer who would attend to the transfer. After the conclusion of the agreement the appellant paid the transfer duties in the sum of R52 950-00, as well as for a clearance certificate in the sum of R31 901-71 and applied to be substituted as the sole mortgagor. Standard Bank, however, refused to consent to the substitution and this necessitated that Parker hand over the matter to Mr Esack Mohammed (Mohammed) to avoid any conflict of interest. Mohammed managed to negotiate and conclude an agreement with the bank in terms of which it accepted payment of the sum of R50,000-00, whereupon it consented to the substitution. This paved the way for the registration of the transfer which occurred on 29 January 2019, after the appellant paid a further sum of R13 415-00 to obtain an up-to-date clearance certificate.
- [15] After the property was registered in her sole name the appellant secured further loans of R2 500 000-00 from her father and uncle to complete the renovations. Although the respondent made no further substantial contributions, he, however, testified under cross-examination that he had made contributions in the form of tiles and paint after the transfer of his half share of the property into the appellant's name, a version which was never put to the latter when she testified.
- [16] The marriage relationship between the parties was a tumultuous one and progressively deteriorated until their separation during or about July 2019 when the appellant moved out of the common home. They were eventually divorced on 5 March

2020. The respondent remained in occupation of the property and continued to make the full mortgage bond repayments and the municipality account payments, although both these accounts were in the name of the appellant. This continued until November 2019 when he started to pay half of the monthly bond repayment amounts. The respondent however, continued to pay in full the municipal account and went as far as to make a payment arrangement with the City on the arrear amounts.
- [17] Notwithstanding notice, the respondent failed, refused, and/or neglected to vacate the property. Consequently the appellant launched the application for his eviction from the property on or about 8 August 2020 and the respondent countered by instituting action proceedings in which he claimed an order declaring that a partnership, in equal shares, existed between the plaintiff (the respondent in casu) and the defendant (appellant herein) in respect of the property, dissolving the said partnership, alternatively, confirming the dissolution thereof and appointing a receiver or liquidator to deal with the partnerships assets. Although pleadings have been closed the matter had not yet been enrolled as at the time of the hearing of the appeal.
- [18] The issue for determination in this court, as was the case in the court a quo, is whether the appellant is the sole owner of the property, which will entitle her to an order for the eviction of the respondent as an unlawful occupier as defined in the PIE Act, or she is merely “holding” the respondent’s half share in the property on his behalf. The appellant testified and led the evidence of two other witnesses, Parker and Mohammed, in support of her version that she is the sole owner of the property whereas the respondent was the only witness in his case. I proceed to summarise and analyse the evidence of these witnesses.

The Oral Evidence

- [19] Appellant’s evidence was mostly in line with the common cause facts. She confirmed that after receiving the call from the Standard Bank’s attorney she became concerned that she could lose her investment in the property. The respondent first went to consult with his attorney and thereafter the parties went to consult with Parker. After considering various options they agreed that the respondent’s half share in the property would be sold and transferred to the appellant for the sum of R1 200 000-00 but since there was no equity in the property no amount of money would be paid to the respondent. The agreement was that the appellant would become the sole owner of the property and will be substituted as the sole mortgagor. The purchase price was accordingly recorded in the deed of sale as having been paid. The parties further agreed that the respondent would pay an amount equivalent to the bond instalments into the bank account of the appellant each month, which he did, except for December 2019 when

he started to pay half the amount of the monthly payments into appellant’s account and between April to June 2020 when no

payments were made. The respondent was paying the bond in line with his obligations as a husband in a Muslim marriage that requires him to provide his wife with a roof over her head.

- [20] Appellant denied that there was an agreement between them that the respondent would retain any ownership rights in the property. She, however, admitted that what they had discussed was that if, at some point in the future, the first respondent would have recovered financially, he could buy back from her his half share in the property at market value. She denied that the sale of the respondent's half share to her was a simulated agreement or that there was an agreement between them that the first respondent will continue to be a co-owner.
- [21] Parker testified that he was consulted by the parties during or about May 2017. The consultation was about the threat to the parties' property posed by the respondent's precarious financial position. He was aware that the appellant had received a disquieting telephone call from Standard Bank's attorneys. The parties consulted him in order to find the best way forward. His advice to the parties, which they accepted, was that the respondent must sell and transfer his half share in the property to the appellant and that she takes over the bond repayments from him. To protect her interest in the property he advised the appellant not to spend any further monies in the property until the matter was resolved and the property was registered in her name. Consequent upon the parties accepting his advice he prepared a deed of sale which provided for the sale of respondent's half share in the property to the appellant for the sum of R1 200 000-00 which amount was recorded as having already been paid. He confirmed that the reason for this was that there was little equity in the property as against the balance of the outstanding debt secured by the mortgage bond. The transfer was registered at the end of January 2018.
- [22] Parker was not aware of any agreement between the appellant and the respondent in terms whereof the respondent would have retained any right, title, or interest to the property. He denied the respondent's version that this was a simulated transaction and stated that it was an arm's length agreement between the parties and that he would not have made himself a party to any collusive dealings between the parties. He was not aware of any discussions between the parties regarding who would be making payments of the bond instalments. Although he did not recall it, it was possible that he was informed that respondent would continue to make payment of an amount equivalent to the monthly bond instalments into the appellant's bank account. This would have been according to the Muslim faith in terms of which the respondent was responsible for nafaqah. According to Parker the respondent would have had no further interest in the property after his half share had been transferred to the appellant.
- [23] Mohammed testified that Parker referred the matter to him in order for him to assist in obtaining Standard Bank's consent to the appellant being substituted as the sole mortgagor. He was informed by the appellant about the telephone call she received from Standard Bank's attorney. Standard Bank's attorney informed him that the bank will require some form of compensation before they would consent to the substitution of the appellant as the

sole mortgagor. After negotiations, Standard Bank accepted payment of R50 000-00 which the appellant paid directly to the bank. Upon receipt of Standard Bank's consent, he referred the matter back to Parker to attend to the transfer.

- [24] In his correspondence with Standard Bank Mohammed made use of the phrase "estranged husband" because of the instructions he had received from the appellant at the time, but he never inquired into the circumstances of the appellant's estrangement from her husband. He had no information regarding who was going to be liable for the monthly bond repayments and simply assumed that the appellant would be paying these instalments.
- [25] The respondent testified that after the purchase of the property the appellant placed pressure on him to do the renovations all at once and not piecemeal, as was suggested by his father. According to the respondent, the appellant's father agreed to assist with the renovation. The respondent had supplied building material through his business, built it, by raising this against his loan account. He confirmed that he started experiencing financial problems with his business and later the franchisor, Spar, perfected a material covering bond that was registered over the business' movable property. Consequently, he spent more time at home and had to disclose his financial position to the appellant. He aware of the telephone call from Standard Bank's attorney to the appellant and which consequently caused him to consult with his attorney and thereafter, together with the appellant, with Parker.
- [26] The respondent further testified that his intention when he concluded the agreement was not to sell his half share in the property to the appellant but rather that he transfers his half share to her to hold it on his behalf. He denied that there was any agreement with the appellant that he would buy back from her his half share of the property at a market related price. According to him the deed of sale was a simulated agreement and that the transfer of his half share in the property to the appellant was not an attempt to hide the property from his major creditors being Spar and Standard Bank, were aware of the property. His half share in the property was transferred to the appellant for them to commence with further renovations.
- [27] The respondent confirmed that according to nafaqah he was responsible for putting a roof over his wife's head. He did this by paying the rental in respect of the Kenilworth apartment and that, from January to July 2019 when he was still residing with the appellant in the property, it would have been his responsibility to pay for the mortgage on the bond. He did not regard himself as having been estranged from the appellant during November 2017 at the time when Mohammed mentioned estrangement in his correspondence with Standard Banks attorneys.

Analysis

of The Evidence

- [28] The evidence presented two contradicting and irreconcilable versions which require the court to examine the reliability and credibility of the witnesses on both sides. In this respect the court will be guided by the technique enunciated and applied by the SCA in *Stellenbosch Farmers' Winery*[10] which requires that for the court to come to a conclusion on the disputed issues it must make findings on (a) The credibility of the various factual witnesses; (b) Their reliability and (c) the probabilities.
- [29] In assessing the credibility or veracity of a witness a variety of factors must be taken into consideration. This would include, inter alia, the general quality of the witness' evidence as compared to that of the conflicting witness, the witness' consistency, both within the content and structure of his own evidence and with the objective facts, the witness integrity and candour. Absent a material misdirection, one would ordinarily defer to the court a quo's credibility findings and be slow to interfere therewith unless one is convinced that on a conspectus of the evidence, that the trial court was clearly wrong[11]. But where a finding of fact does not essentially depend on the personal impression made by a witness demeanour but predominantly upon inferences and other facts and upon probabilities, and armed with a full record, an appeal court may often be in a better position to draw inferences.[12]
- [30] Counsel for the respondent was critical of the appellant's evidence citing several instances of what he regarded as material contradictions and improbabilities. I deal with what I regard as the most trenchant of these criticisms. Counsel argued that the appellant grudgingly acknowledged that the parties originally had a partnership in respect of the property. This criticism is not borne out by the record. Without specifically using the term partnership the appellant has always acknowledged that, although they were not married in community of property, she only has a half share therein. She also acknowledged that she would have had to buy out the respondent's half share of the property if she were to be the sole owner thereof. The passage in the record referred to by counsel, and the preceding paragraphs thereto, do not reflect any reluctance on the part of the appellant to admit that she jointly owned the property with the respondent be it in partnership or otherwise. Be that as it may it is immaterial whether she admitted or disputed that a partnership existed, the objective facts point to the parties having been joint owners of the property until she purchase his half share therein. Her acknowledgment that before the signing of the agreement respondent had an interest in the property which he could protect, supports this conclusion. After that she became the sole owner of the property any such partnership, if it existed, was dissolved tacitly, if not expressly, the sale and transfer of the respondent's half share to her.

- [31] Conversely, there is nothing in the record to support the contention by counsel for the respondent that the appellant initially disputed that there was an oral agreement supplementing the written one but was later forced to concede the existence of such an agreement. That the parties had discussed the possible return to the respondent of his share in the property, but in line with its market value, is not an admission of the existence of an oral or allied agreement.
- [32] Counsel further raised the question of khula as a pointer towards joint ownership. The submission that the respondent attempted to protect his interest in the property by offering the appellant a khula in terms of which appellant would have bought his half share in the property for the sum of R1,5 million occurred in the cause of attempting to reach a settlement. This can hardly be elevated to an admission that the respondent was a joint owner of the property. In any event the appellant rejected the proposal. Also, the fact that the respondent refused to vacate the property and instituted an action after the launch of this application is no proof that he still owns half a share in the property: that action, if it is proceeded with, would be determined on its own merits.
- [33] The evidence of Parker corroborated the appellant's version in all material respects. In the first place he confirmed that the agreement was not a sham as contended by the respondent. Whilst there was an acceptance that Parker was a good, credible, and reliable witness there was an oblique reference to the fact that he is related to the appellant, as if this would have compromised his professional objectivity. Any such insinuation is not justified. A review of Parker's evidence shows that he testified dispassionately without any hint of slanting his evidence in favour of any of the parties.
- [34] The court a quo doubted the inherent credibility of the appellant's factual averments and consequently rejected her version based, inter alia, on the use of the phrase "estranged husband" by Mohammed in his correspondence with the attorney for Standard Bank, a phrase which Mohammed ascribed to the appellant. The court a quo found that the appellant lied to Mohammed about the status of her relationship with the respondent as at that stage she was not estranged from her husband. The court a quo went further and held that the appellant was not an innocent party who was unaware of the true position, who would be entitled to

rely on the appearance of liability created by the deed of sale and that Parker should have been informed of the totality of the intended terms of the agreement, as the underlying terms to the deed could not reasonably have been expected to be in such a contract. It was primarily on this basis that he rejected the appellant's version.

- [35] Respondent's counsel argued that whilst the appellant accepted Mohammed's version that she had informed him that she was estranged from the respondent she admitted, under cross examination, that, within three months of the conclusion of the deed of sale, she had a miscarriage, that shortly thereafter they tried for another child and that she had shared a bedroom and bed with the respondent. This was said to be a contradiction which goes to the root of her credibility.
- [36] The appellant, in my view, was a credible and reliable witness, and aside from the court a quo's obvious misdirection on the issue for determination, I am of the view that the credibility findings are in any event misplaced. For example, it was argued that the appellant had stated in her founding affidavit that she was having to pay rent for the room that she occupied in her parents' home but under cross-examination admitted that the payments she was making to her parents were not in terms of a rental agreement but only made from a moral obligation's point of view. The difference if any, in my view, is immaterial and merely a matter of quibbling about semantics.
- [37] Counsel mentioned other discrepancies, which in my view were given undue prominence. These, however, do not affect the veracity or cogency of her evidence. The appellant's WhatsApp messages to the respondent that the respondent can stay for half a month and she can stay for the other and that she would be using the house over the next few weeks as needed is not a contradiction to her statement in the founding affidavit that she has been deprived of her right to the property. Nor is it a material contradiction that she knew at the time of paying the R50 000-00 that this was towards the respondent's debts whereas in her evidence in chief she stated that she had just recently discovered this fact.
- [38] The respondent's version, on the other hand, is teeming with contradictions and improbabilities. In the first place, he lied to the sheriff of the court when he came calling with a warrant of execution against his property and denied having any assets worth attachment in execution of the judgment against him, yet he claims to be the joint owner of the immovable property. His capitulation to admit that he had lied was not a genuine contrition but one forced by the fact that he was confronted with documentary proof and his attempts to justify why he lied does not change the fact that he had lied.
- [39] The respondent denied that the appellant received loans from family members but admitted that in his discussions with the appellant's father that the latter mentioned to him that "if the money can't be paid back then leave it, it's fine". Even with this admission, his counsel insisted that the appellant has not produced any documentary proof of these loans. When he unilaterally decided to pay half the amount of the monthly repayments, his argument being that he is half owner of the property, he continued to pay the full amount of the municipality accounts. The respondent never asked the appellant to pay half of the municipality accounts. The argument that he was paying the full amount of the municipality accounts because he was the only person who was utilising the services is self-contradictory given that he had decided to pay half of the bond repayments, though he is the only person in occupation of the property.

- [40] The respondent contradicted himself on the alleged oral agreement, the foundation of his claim to co-ownership of the property. He alleged that Parker was aware of the retransfer agreement prior to the parties going to consult with him and it was only when Parker was testifying in court that he realised that he was not aware of this agreement. When pressed why he did not explain to Parker that he and the appellant had this retransfer agreement, he said that there was no agreement as such.
- [41] He was vague as to when this agreement was allegedly concluded stating that it was reached over a series of discussions between the parties. He could not provide details of the terms of this agreement save to say that they agreed to put the property temporarily into the appellant's name until he had sorted out his "stuff". Plainly, the respondent was not forthright in his assertions about the alleged oral agreement. Ultimately, he had to concede that there was no such agreement.
- [42] The respondent further contradicted himself as to whether he was in a position to contribute to the renovations after the property was transferred into the name of the appellant. On the one hand he maintained that he made contributions to the renovations post registration of his half share in the property into the name of the appellant by supplying tiles, paint, air conditioner, and a stainless steel leg, and on the other, that he was unable to make any contributions due to his financial position.
- [43] If the oral retransfer agreement was indeed concluded, it is improbable that the respondent would have simply assumed that Parker was aware of it and not bring it up in their consultation, so that Parker can give advice on how to deal therewith. This, after all, was the only protection of his half share in the property. Instead, what he did was to sign the deed of sale which contained a non-variation clause without bothering to find out how this agreement would be implemented. It is no defence to allege that he was unaware of the non-variation clause, especially from a businessman with his knowledge of contracts.
- [44] The appellant paid the R50 000-00 to Standard Bank, the rates clearance costs in the sums of R31 901-71 plus R13 415-00, and the transfer duty in the sum R52 950-00, without a contribution from the respondent or an agreement of how he was going to reimburse her. These costs are always borne by the purchaser but if it was a simulated transaction as respondent allege, they would have shared these costs or at least agreed as to how the appellant was to be reimbursed. The absence of such an agreement is a further indicator that the deed of sale was the only agreement between the parties.
- [44] The version of the respondent is so improbable, it has to be rejected in favour of the appellant. The acceptance of the version of the appellant, founded on her credibility, the reliability of her evidence which is objectively corroborated and the probabilities that the deed of sale was the only agreement between the parties, leads to the conclusion that there was no underlying oral agreement which preserved his half share in the property. The court a quo was clearly wrong in finding that there was a partnership between the parties and an underlying oral agreement in terms of which the respondent retained his half share in the

property.

[45] It goes without saying, in the circumstances, that the question of the co-ownership of the property is decided in favour of the appellant, and the appeal falls to be upheld. Consequently the appellant has established that the respondent is an unlawful occupier as defined in the PIE Act and it would be just and equitable to order his eviction. In my view it would in the circumstances be further just and equitable to afford the respondent two and a half months to give up occupation of the property.

[45] The order I propose is the following:

45.1 The appeal is upheld with costs;

45.2 The order of the court a quo is set aside and substituted with the following:

“1. The first respondent and all those holding occupation through or under him (the occupants”), are to vacate the property known as 1[...] R[...] drive, Pinelands, Cape Town (“the property) on or before 29 February 2024.

2. In the event that the first respondent and/or any other occupants fail to voluntarily vacate the property, then the Sheriff of the Court and/or his/her deputy is hereby authorised and directed to do all things necessary so as to evict him and/or any other occupants from the property on or after 1 March 2024.
3. The first respondent is hereby ordered to pay the costs of this application, including all costs associated with the referral to oral evidence.”

MJ Dolamo

Judge of the High Court

I agree and it is so ordered.

PAL Gamble

I agree.

L G Nuku

APPEARANCES For the Appellant: Ms. E Nel Instructed by Tim Du Toit Inc. Cape Town. For the Respondent: Mr. K Warner Instructed by Moosa, Waglay & Petersen Inc Cape Town.

[1] Act 19 of 1998.

[2] Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Company (Pty) Ltd 1971 (2) SA 388 (W) at page 396 H – 397B.

[3] Record page 678 paragraphs [28] and [29].

[4] Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) at para [14].

- [5] R v Dhlumayo and another 1948 (2) SA 677 (A) at 705-6.
- [6] City of Cape Town v Mtyido
- [2023] ZASCA 163 (1 December 2023)
- [7] R v Dhlumayo and another 1948 (2) SA 677 (A) at 705-6.
- [8] Mans v Union Meat Co 1919 AD 268 at 271.
- [9] Record volume eight, page 595 lines 23 to 25, page 599 lines 16 to 19.
- [10] Stellenbosch farmers Winery Group LTD and Another v Martell ET Cie and Others 2003 (1) SA 11 (SCA) at para [5].
- [11] Pistorius v S 2014
- (2) SACR 314 (SCA) at para 30. Although the principle was applied in a criminal matter it applies with equal force to the analysis of evidence in civil matters. See also Mtyido supra.
- [12] See Minister of Safety and Security & Others v Craig and Others
- [2010] 1 All SA 126 (SCA) at para [58].

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