IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO. 1710/2019

In the matter between:

SINESIPHO DLAKAVU **First Applicant**

OTTO CURNICK DLAKAVU **Second Applicant**

and

MTHATHA NINE (PTY) LTD **Respondent**

JUDGMENT

LAING J

[1] There are two applications before the court. The first is for the removal of the matter to the High Court in Mthatha; the second is for the rescission of a judgment given in relation to an option agreement concluded by the Second Applicant and the Respondent with regard to the lease of land described as erf 583 Ncise, in the district of Mthatha ('the property').

[2] The parties were not in agreement, initially, about what exactly was before the court but argued both applications on the implicit understanding that if the rescission application was unsuccessful then there would be no need for the court to deal with the removal application. The court proceeds accordingly.

Background

[3] On 31 January 2018, the Second Applicant granted a written option to the Respondent to lease the property, which could be exercised with effect from the date upon which the Second Applicant received a notice in that regard from the Respondent. In such an event, a notarial lease was to have been concluded within seven days upon the terms and conditions stipulated therein.

[4] Subsequently, the Second Applicant, represented by Graham Mpeto & Associates, requested the Respondent not to proceed at any stage with the registration of the notarial lease until the parties had held further discussions about the terms thereof. The Respondent engaged with the Second Applicant, resulting in the conclusion on 3 July 2018 of a number of addenda to the notarial lease. These varied the sum payable on registration, as well as the monthly amounts payable for rent; granted the Respondent additional time (two years) within which to transfer the property to a family trust; and extended the period within which to exercise the option to 28 February 2019.

[5] The Respondent exercised the option on 29 January 2019. At the same time, the Respondent entered into a sub-lease with Spar Group Limited for the use of the property and agreed to construct buildings thereon for such purposes. On 4 March 2019, the Respondent concluded a JBCC contract with Nichol Projects (Pty) Ltd for the necessary construction works. The sub-lease would commence on 1 April 2020.

[6] Notwithstanding, the Second Applicant refused to sign the notarial lease and to give vacant occupation of the property, prompting the Respondent to approach the court for a declaratory order in relation to the validity of the option agreement and addenda, and the exercise of the option itself. The Respondent also sought an order directing the Second Applicant to sign the option agreement, failing which the sheriff would be authorised to do so, and an order directing the Second Applicant to vacate the property. On 27 June 2019, the court granted the relief sought.

Applicants' submissions

[7] The First Applicant alleges that she brings the rescission application in her capacity as a trustee of the Jwara Otto and Sons Trust and on behalf of the remaining

trustees. She avers that the trustees were never informed about or included in the processes leading up to the development of the property and had no knowledge of the notarial lease and its various addenda. The facts only came to light at a meeting with the Second Applicant on 20 October 2019. If the trustees had been involved from the outset, then more acceptable terms would have been negotiated.

[8] For his part, the Second Applicant states that several years ago he had dealings with representatives of the Respondent, including a Mr Ian Aitken, informing them that he was interested in the development of the property but would not sign any documents prior to the creation of a trust, for which he had given instructions to his erstwhile attorney, Ms Claire McFarlane. He goes on to allege that, on or about 18 October 2016, he was misled into signing a memorandum of understanding ('MOU'), stipulating the terms that would form the basis upon which the property would be leased, and alleges, too, that Ms McFarlane failed to act in his best interests and failed to advise him properly when he eventually entered into the option agreement and notarial lease. Finally, he alleges that the Respondent was established with the intention of defrauding him and to strip him of his rights to the property.

Respondent's submissions

[9] In response, the Respondent takes issue with the *locus standi* of the First Applicant. The Respondent also points out that the sheriff has already signed the notarial lease by reason of the Second Applicant's refusal to do so, that it has been registered, that the development of the property was far advanced, and that various financing arrangements have been made on the strength of the notarial lease itself. If the order granted on 27 June 2019 were to be rescinded, then it would affect the interests of other parties, including Spar Group Limited, the Standard Bank of South Africa Ltd, and Nichol Projects (Pty) Ltd. None of the above parties have been joined in these proceedings.

[10] The Respondent firmly denies that the Second Applicant was not involved in the preparation of the option agreement or notarial lease. It asserts that the transfer of the property to the trust will not affect the notarial lease and the rights arising therefrom. Overall, the conclusion of the option agreement followed a period of extensive negotiations. This was followed by a further period of negotiations, which

ultimately resulted in the deferral of the Respondent's pre-emptive right to purchase the property so as to allow the Second Applicant to establish the trust and to transfer the property thereto, as apparent from the relevant addenda. Throughout this time, the Second Applicant was represented by attorneys and later a business consultant, Mr Jack Mdeni. There was never any suggestion or complaint that the Second Applicant was being defrauded.

Issues for determination

[11] The primary issue for determination is whether the Second Applicant has satisfied the requirements for the rescission of the order granted on 27 June 2019. A secondary issue is whether the First Applicant has *locus standi* in the matter. The remaining issue is whether, in the event that the rescission application is successful, the matter should be removed to the High Court in Mthatha.

[12] Before dealing with the issues directly, it is necessary to address the Respondent's application for leave for the filing of a supplementary affidavit. In that regard, the affidavit in question merely updated the court on developments subsequent to Mr Aitken's having deposed to the answering affidavit in the rescission application. The affidavit was of benefit to the court and there was no opposition to the application; there is no reason why leave should not be granted.

Discussion

Locus standi

[13] The question of *locus standi* was raised squarely by the Respondent. Neither the First Applicant nor any of the other trustees was party to the main application. Whereas the provisions of rule 12 allow a party such as the First Applicant to intervene, the leave of the court must first be obtained. The test remains whether a party has a direct and substantial interest in the subject matter of the case. See *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) at 5A-D.[1]

[1] A more recent authority is *Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom* [2020] 4 All SA 226 (KZP) at [18].

[14] Here, the First Applicant states that the notarial lease failed to address various concerns but does not succeed in demonstrating, convincingly, how the trust itself has been prejudiced by the Second Applicant's granting of the option and the Respondent's exercise thereof. This is especially so where the trust was only created after the order of 27 June 2019 and where the Second Respondent has yet to transfer ownership of the property to the trust.[2] At a more basic level, however, no application has been made for joinder. In the absence of a proper application to that effect, the First Applicant cannot be treated as a party to these proceedings.

Basis for rescission

[15] Turning to the main issue, a litigant would usually apply to court in terms of rule 42 for the rescission of a judgment. The Second Applicant has not relied on the provisions thereof but has expressly applied for rescission on the common law ground of fraud. The decision in *Schierhout v Union Government* 1927 AD 94 remains good authority for such an approach.[3] For a party to do so successfully, the applicant must allege and prove that the successful litigant was a party to the fraud, that the evidence was in fact incorrect, that it was made fraudulently and with the intent to mislead, and that it diverged to such an extent from the true facts that the court would have decided otherwise were the true facts to have been placed before it. See *Robinson v Kingswell* 1915 AD 277 at 285, *Makings v Makings* 1958 (1) SA 338 (A) at 344H-345A, *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166I, and *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020 at [16].[4]

[16] In the present matter, the Second Applicant alleges that he was misled into completing the option agreement, having already signed the memorandum of understanding in the belief that it amounted to his consent to the installation of water services infrastructure on the property. A supporting affidavit deposed to by his wife, Ms Lindiwe Matshaza, makes the same allegation. In that regard, the Second Applicant suggests, too, that his erstwhile attorney, Ms McFarlane, was in fact acting

[2] To complicate matters further, the First Applicant's name is not included in the list of trustees indicated in the letters of authority issued by the Master of the High Court on 17 September 2019.

[3] See, too, *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465D and, more recently, *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021 at [27].

[4] The subject is also discussed in DE van Loggerenberg *Erasmus: Superior Court Practice* (Jutatstat e-publications, RS 17, 2021) at D1-563.

in the interests of the Respondent, resulting in the predicament in which he finds himself.

[17] The allegations are far-fetched. The nature of the MOU, which is contained in a letter from Mr Aitken to the Second Applicant and signed by both parties, clearly stipulates that a lease of the property was intended and that the document could in no way be construed as consent to the installation of water services infrastructure. In the unlikely event that Ms McFarlane was indeed acting in the interests of the Respondent rather than her own client for purposes of the completion of the option agreement, then the Second Applicant fails to explain how he could have been subsequently misled by his new attorney, Mr Mpeto, into signing not one but three separate addenda that amended the terms of the notarial lease, none of which having created any visible prejudice. He also fails to explain how his business consultant, Mr Mdeni, could have been party to such an attempt to have misled him.

[18] The Respondent has narrated the history of its engagement with the Second Applicant and the steps that were taken in reaching the conclusion of the option agreement and subsequent addenda. This took place over a period of approximately two years, during which time there is no evidence at all that the Second Applicant was unaware of what was happening or that the various parties involved were conspiring to strip him of his land, as he alleges.

[19] The Second Applicant bears the onus of demonstrating that the signed MOU, option agreement and addenda thereto were induced by the Respondent's fraudulent conduct and that if this had been known to the court in the main application then the order of 27 June 2019 would not have been granted. Overall, the court is satisfied that the onus has not been discharged. There is, moreover, no real dispute of fact; the Second Applicant's allegations are so clearly untenable and so palpably implausible as to allow the usual principles to apply and for such allegations to be rejected merely on the papers. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197C, and, more recently, *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 (1) SA 368 (CC) at [16].[5]

[5] Op cit, RS 17, 2021, D1-74-6.

[20] What appears to have occurred, from the papers, is that the Respondent's exercise of the option only became a problem once it was brought to the attention of the trustees at the time that the trust was created. They may have disagreed with the wisdom of the Second Applicant's having concluded the various underlying agreements in relation to the property but to avoid the consequences thereof by alleging fraudulent conduct on the part of the Respondent requires considerably more compelling evidence than what has been presented.

[21] In the circumstances, the court is not persuaded that the Second Applicant has satisfied the common law requirements. He has not proved that the Respondent and others misrepresented the nature of and circumstances under which the MOU, option agreement (and addenda) and notarial lease were signed, such that the Second Applicant was deprived of his rights, as alleged. There is simply no indication of fraud on the papers.

Notice to interested parties

[22] A further, possibly more serious, hurdle for the Second Applicant is his failure to have provided notice of the application to at least two other parties: the sub-lessee (Spar Group Limited) and the provider of development finance for the project (Standard Bank of South Africa Ltd).[6] For the sub-lessee, the rescission of the order would mean that it no longer had any right to the use of the property; for the bank, it would mean that it no longer had adequate security for its loan to the Respondent. These are potentially serious consequences for both parties.

[23] Prior notification is a requirement under rule 42 in relation to rescission applications brought in terms thereof.[7] The same principle must be applied to an application made in terms of the common law, provided that the parties in question have a legal interest. See *De Villiers v GJN Trust* 2019 (1) SA 120 (SCA) at 128A-129C. That is clearly the situation here; the Second Applicant has not given notice to either the Spar Group Limited or to the Standard Bank of SA Ltd.

[6] The Respondent argues that the contractor, Nichol Projects (Pty) Ltd, ought to have been notified, too, but this may not have been strictly necessary where the construction of the works was to have been completed before the commencement of the sub-lease on 1 April 2020.

[7] See rule 42(3).

Relief and order to be granted

[24] The Second Applicant has not met the requirements for the rescission of the order granted on 27 June 2019. There is no evidence of fraud; it has failed to provide the necessary notice.

[25] An unsuccessful application for rescission means that the order stands. Consequently, there would be no point at all in permitting the removal of the matter to the High Court in Mthatha. Unless the Second Applicant attempts to bring an appeal or to explore such other avenue as may be open to him, the matter must be considered as *res judicata*. The application for removal cannot be entertained.

[26] On the question of costs, the parties disputed liability for the wasted costs occasioned by the postponements on 14 and 28 May 2020. At the heart of the matter was the condition of the court file. This court has no intention of delving into the various allegations made, other than to observe that the Second Applicant, as *dominis litis*, ultimately bears responsibility for ensuring that the papers have been properly paginated and indexed before the matter is heard. Consequently, the wasted costs for the dates in question must follow the result. It is apposite to remark that the condition of the court file was still far from satisfactory at the hearing itself.

[27] The Respondent has sought costs on an attorney-and-client scale in relation to the rescission application. Whereas the application is badly deficient in many respects and the conduct of the Second Applicant may well have been a source of great irritation to the Respondent, the court sees no real grounds upon which to make a punitive costs order. The Second Applicant was entitled to have at least approached the court for the relief sought and the deficiencies in the papers were not necessarily of his own doing; he was certainly not directly responsible for the earlier postponements.

[28] In the circumstances, the following order is made:

(a) leave is granted to the Respondent for the filing of its supplementary affidavit, dated 26 January 2022;

(b) the application for rescission of the judgment granted on 27 June 2019 is dismissed;

(c) the application for the removal of the matter to the Eastern Cape Local Division, Mthatha, is dismissed; and

(d) the Second Applicant is liable for the costs of both applications on a party-and-party scale, including the costs reserved on 14 and 28 May 2020, but excluding the costs of the Respondent's application for leave.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the 1st and 2nd applicants:	Adv Marasha, instructed by L. Mthambo Attorneys, Mthatha.
Counsel for the respondent:	Adv Paterson SC, instructed by Wheeldon, Rushmere & Cole Inc., Makhanda.
Date of hearing:	03 February 2022.
Date of delivery of judgment:	19 April 2022.