REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/093

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[20 APRIL 2022] **……..**
SIGNATURE

In the matter between:

LOUIS EGNACIOUS MENYATSO	**FIRST APPLICANT**
GABOITSEWE MONICA MENYATSO	**SECOND APPLICANT**

And

YUSUF MKHUSEI E MPHAHLELE	**FIRST RESPONDENT**
PETUNIA SHARON DITLAGONNA MPHAHLELE	**SECOND RESPONDENT**
NOMRED PROPERTIES (PTY) LTD	**THIRD RESPONDENT**
MOSTERT SKOSANA INCORPORATED	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS — JOHANNESBURG	**FIFTH RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] In this application, launched as a matter of urgency on 28 March 2022, the applicant seeks an order in the following terms:

> "that the First and Second Respondents be directed to give effect to the Agreement of Sale, concluded between the Applicants and the First and Second Respondents, dated 13 November 2020, whereby the Applicants purchased from the First and Second Respondents, the property situated at ERF NUMBER".40, PORTION NUMBER: 4, ROBINPARK, GAUTENG, HELD UNDER DEED OF TRANSFER (T52326/2007) hereinafter referred to as "the property" and in particular:
>
> 2.1. The First and Second Respondents shall sign the transfer documents within a period of 3 (three) days from date of this order, failing which the sheriff of this court shall be authorised and is directed to sign the transfer documents for and on behalf of the First and Second Respondents; …
>
> 3. That the Fifth Respondent, the Registrar of Deeds, be directed to give effect to this order and transfer the property from the First and Second Respondents to the Applicants.
>
> 4. That the First and Second Respondents are, pending the transfer of the property from the First and Second Respondents to the Applicants, interdicted from selling, alienating or encumbering, in any manner whatsoever, the property and/or are interdicted from instructing any third party to sell, alienate or encumber the property…"

[2] The applicants contend that this application is urgent, because the first and second respondents are attempting to transfer the property to the third respondent. Transfer of the property is pending to their prejudice. They also contend that they will not be afforded substantial redress in a hearing in due course on account of the pending transfer. Accordingly, the applicants would thus have to satisfy the requirements of urgency so as to convince this Court to entertain the matter outside the ordinary course.

Background facts

[3] The following appear to me to be the essential facts. Most of these are not in dispute. In terms of an agreement concluded on 13 November 2020 between the applicants and the first and second respondents, the applicants purchased a residential property known as ERF NUMBER: 40, PORTION NUMBER: 4, ROBINPARK, GAUTENG, HELD UNDER DEED OF TRANSFER (T52328/2007 for a price of R780 000.00 (Seven Hundred and Eighty Thousand Rand) as per clause 3 and 4 (contract of sale).

[4] It is the applicants' case that they paid the purchase price to the first and second respondents in the following instalments:

(a) An amount of R740 000.00 on the 25 April 2018;

(b) an amount of R13 000.00 on 14 December 2018;

(c) an amount of R22 000.00 on the 28 February 2019; and

(d) an amount of R7 000.00 in cash was paid to the first and second respondent's transferring attorneys.

[5] Clause 4 of the contract of sale is relevant. It records that: “the purchase price payable by the purchasers to the sellers in terms hereof is the amount of R780 000 00 (SEVEN HUNDRED AND EIGHTY THOUSAND RAND) and has been paid to THE SELLERS directly”. My emphasis.

[6] Clause 7.1 provides that “occupation and possession of the property has been given by SELLERS to THE PURCHASERS, and has been taken by THE PURCHASERS. It Is agreed that in the event that the aforementioned date is prior to the date of (registration of transfer in terms hereof, that THE PURCHASERS’ shall at all times occupy THE PROPERTY until the registration date”.

[7] Clause 17 is of equal significance. It records that: “no occupational rent is payable since payment of the full purchase price to the SELLERS”. My emphasis.

[8] According to the applicants, on 3 February 2022, it came to their attention that the first and second respondents sold the same property to the third respondent, Nomred Properties (Pty) Ltd notwithstanding the agreement of sale concluded with them pursuant to a written sale of agreement dated 14 November 2021 (“as per annexure F”). Nomred Properties (Pty) Ltd was in the process of transferring the property into its names as per annexure G. the first and second respondents have, notwithstanding several demands thereto, refused to sign the necessary transfer documents to transfer the property into the names of the applicants.

[9] The applicants assert that they have complied with their obligations under the agreement of sale by making full payment of the purchase price. According to the applicants, the various transfers of money as evidenced by an annexures B, C and D bar the R7 000.00 in cash paid to the transferring attorneys, was paid to a nominated account of a third party via text message that the purchase price needs to be paid into the account of Toonserve (Pty) Ltd at the instance of the first and second respondents. Unfortunately, the applicants on their version, do not have the phone on which the message was sent to, as it has since been lost.

[10] In opposing this application, the first, second and third respondents deny that the matter is urgent since the applicants became aware of the new sale in February 2022. The first and second respondents deny that they were paid the contract price. On their version, in early 2018, the applicants wanted to buy the property in question where after, the first respondent took them to his then attorney, Ms Sunita Bhika of Bhika Calitz Attorneys, who advised that the applicants would not qualify for a home loan. He "*then instructed her to lease the property to the applicants with the understanding that we could later enter into an instalment sale agreement in respect of the property*". According to the opposing affidavit, it is stated: "*The wording in clause 4 to the effect that the purchase price has already been paid is incorrect. When I signed the agreement I did not notice the mistake in that the monies had to be paid to the transferring attorneys, namely Bhika Calitz Inc, in terms of clause 6 of the agreement*".

[11] The opposing affidavit goes on to state that, the applicants abandoned the house in late 2018, and informed the first respondent that they were no longer interested in the sale of the property**,** due to break-ins; although some of their furniture still remained. On their version, when the applicants failed to pay the purchase price they decided to sell the property to the third respondent, had the locks changed, and gave the third respondent occupation of the property.

[12] According to an affidavit deposed to by a director of the third respondent, Mr Khan, on 14 September 2021, Nomred Properties (Pty) Ltd purchased from the first and second respondents the property for a purchase consideration of R400 000,00. Nomred Properties (Pty) Ltd is in the business of buying and selling of properties. Subsequently, on 5 November 2021, the third respondent sold on the property to a third party for the sum of R900 000,00 unaware of the existence of a dispute between the applicants and the first and second respondents subject to the first sale between Nomred, the first and second respondents going through. Security guards were deployed for security at the property “because of the Applicants trying to break into the property without the consent of the First and Second Respondents or the Third Respondent”.

[13] In a replying affidavit, the applicants stated that they had constantly been in contact with the nominated attorneys namely, Bhika Calitz Inc. They constantly requested an update as to the process of the transfer as evidenced by annexure “RA1” in 2021 and 2022. For instance, on 3 December 2020, the transferring attorneys wrote an email to the applicants and advised that they had applied for clearance figures in relation to the municipality clearance

certificate. On 9 December 2020, the first applicant advised the transferring attorneys that he would provide 3 further proof of (municipal) payments.

[14] The applicants admit that there were constant robberies at the said property and the surrounding areas, to the extent that in 2019, their neighbour was shot. It is for that reason that they decided to move out of the property until the incidents of crime and robberies would have subsided. They even paid for security upgrades to the property as evidenced by Annexure "RA2".

[15] It is apparent from the indications given by the first and second respondents that they do not intend to honour their obligations under the contract of sale anymore. According to the applicants, they were left without no choice but to approach this court. In terms of section 19(2)(c) of the Alienation of Land Act 68 of 1981 (Limitation of right of seller to take action), no seller is, by reason of any breach of contract on the part of the purchaser, entitled to (a) enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract; (b) terminate the contract; or (c) institute an action for damages, unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.

[16] Clause 16 of the contract of sale, that deals with breach and remedies makes provision for essential obligations by the parties in this matter, is consistent with the provisions of section 19(2)(c) of the Alienation of Land Act. Wessels

J.A held in *Maharaj v Tongaat Development Corporation*[1] that, in enacting Section 13(1) of the earlier Act, *"the overall intention of the Legislature was to afford reasonable protection to a purchaser who, by reason of a failure on his part to fulfil an obligation under a contract, faces a threat by the seller to terminate it or to institute an action for damages"*.

[17] Friedman JP, in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd*[2] aptly held:

> "When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party"

[18] In this matter, there was no purported notice to cancel the sale agreement, and to sell the property to the third respondent. The applicants demonstrably refuse to accept the validity of the cancellation. There was no preceding notice of demand pursuant to section 19(2)(c) of the Alienation of Land Act.

[19] The first and second respondents as indicated, point out that, they were not paid the purchase price for the property and that any indication to the contrary as per clause 4 was a mistake. They however failed to adequately deal with clause 17 evidencing the full payment of the purchase price. That there was

[1] 1976 (4) SA 994 (A) at 1001A. See also *Glen Anil Finance (Pty) Limited versus Joint Liquidators Glen Anil Development Corporation Limited (In Liquidation)* 1981 (1) SA 171 (AD) at 183H; *Miller V Hall* [1984] 1 All SA 132 (D).
[2] 1996 (2) SA 537 (C) at 542E–F.

agreement to pay purchase price in instalment as per the version of the first and second respondents is consistent with the ad hoc payments made by the applicants.

[20] Moreover, it is trite that a party is entitled to rectification of a written agreement which, through common mistake, incorrectly records the agreement which they intended to express in the written agreement[3]. In this instance, there have been no attempts made by the first and second respondents at rectification of the sale agreement between the parties before the same was sold to the third respondent on account of the alleged error.

[21] It is settled law that a court has a discretion to grant or refuse a decree of specific performance of a contractual obligation. However, the discretion has to be judicially exercised upon a consideration of all relevant facts[4] .

[22] The *Plascon-Evans* rule is that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers. Mindful of the Plascon –Evans approach, the inevitable conclusion that I arrive at is that the factual dispute raised by the first and second respondents in regard to the payment of the contract price is clearly untenable, palpably implausible and can be rejected merely on the papers. All the necessary prerequisites for final

[3] See *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* [2009] 2 All SA 7 (SCA) at para 7
[4] See *Ex parte Neethling & Others* 1951 (4) SA 331 (A) at 335; and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781A–783C.

relief: a clear right; apprehension of harm as well as the balance of convenience have been established.

[23] It is palpably implausible that the applicants would have entered into the sale contract with such a huge sum of money involved, only to pay it to an unrelated account and yet persist over the entire time, to demand the title deed of the property from the first and second respondents' transferring attorneys. Accordingly, it remains open to the aggrieved purchasers to claim specific performance by demanding transfer as amplified by the email correspondences addressed to the transferring lawyers, Bhika Calitz Inc.

[24] Recently, in Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others[5], the SCA stated that contracts freely and voluntarily entered into must be honoured because persons who engage with each other voluntarily and freely take responsibility for the promises they make and must be able to have their contracts enforced. In the premises I am satisfied that the applicants are entitled to the relief claimed. In the premises I am satisfied that the applicant is entitled to the relief claimed.

[25] Order

1. The application is heard as an urgent application and the applicants' non-compliance with the rules of court insofar as it relates to service and time periods is condoned as envisaged in Rule 6(12) of the Uniform Rules of Court;
2. The first and second respondents be directed to give effect to the contract of sale, concluded between the applicants and the first and second respondents,

[5] 2022 (1) SA 100 (SCA) at para 63.

dated 13 November 2020, whereby the applicants purchased from the First and second respondents, the property situated at ERF NUMBER".40, PORTION NUMBER: 4, ROBINPARK, GAUTENG, HELD UNDER DEED OF TRANSFER (T52326/2007) "the property";

3. The first and second respondents shall sign the transfer documents within a period of 3 (three) days from date of service of the order, failing which the sheriff of this court shall be authorised and is directed to sign the transfer documents for and on behalf of the first and second respondents;
4. The fifth respondent, the Registrar of Deeds, be directed to give effect to this order and transfer the property from the first and second respondents to the applicants;
5. The first and second respondents are, pending the transfer of the property from the first and second respondents to the applicants, interdicted from selling, alienating or encumbering, in any manner whatsoever, the property and/or are interdicted from instructing any third party to sell, alienate or encumber the property; and
6. The first and second respondents are ordered to pay the costs of this application, on an attorney and client scale.

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T P MUDAU

[Judge of the High Court]

Date of Hearing: 13 April 2022

Date of Judgment: 20 April 2022

APPEARANCES

For the Applicant: Adv. Advocate G T Pretorius

Instructed by: SSLR Incorporated

For the First and Second Respondents: Adv. Ignatius Lindeque

Instructed by: Mostert Skosana Incorporated