

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2018/40589

Date of Judgment?	10 November 2023
Reportable?	No
Of interest to other judges?	No

In the matter between:

THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	Applicant
and LAPA PROPERTY INVESTMENTS (PTY) LTD	First Respondent
NGOU PHILLEMONT LEBELOANE	Second Respondent
JACOB BOANE MOGAFE Respondent	Third
MATTHEWS SEKGWENG MOGAFE Respondent	Fourth
MESHACK RAPHALANE MOGAFE Respondent	Fifth
THOMAS KAIZER POOE Respondent	Sixth
THOZAMA RENETH SKOSANA N.O. Respondent	Seventh

VELAPI SKOSANA N.O. Respondent	Eight
ROBERTO JORGE MENCHONCA VELOSA Respondent	Nineth
IPROTECT TRUSTEES (PTY) LTD Respondent	Tenth
MASTER OF THE HIGH COURT Respondent	Eleventh
DEEDS REGISTRY	Twelfth Respondent

JUDGMENT

GREEN AJ:

Ian Green AJ

- 1 The City of Ekurhuleni Metropolitan Municipality (“**the City**”), and Lapa Property Investments (Pty) Ltd (“**Lapa**”) entered into a written Agreement for the sale of 11 erven in Sonneveld extension 4 Township, Brakpan (“**the Properties**”). The Agreement for the sale of the Properties was concluded pursuant to a tender process, and the award of the tender to Lapa Properties was made on 27 July 2006.

2 Clause 7 of the agreement provides:

7. The property is currently zoned " Residential I", "Residential III" and "Business II" in terms of the Town-planning Scheme, and is subject to the conditions contained in the Town-planning Scheme, and the conditions of the establishment of the township concerned. The Municipality resolved that the entire township be rezoned to provide for "Residential II" purposes and that the erven shall not be smaller than 700m² in extent. It will therefore be necessary to consolidate and subdivide the erven concerned.

7.1 It is a condition of this agreement that the PURCHASER shall, within six (6) months after date of transfer of this property, take the necessary steps to consolidate, subdivide and rezone the property for the envisaged purpose and within eighteen (18) months after date of registration, commence with the development of said property.

3 Clause 8 of the agreement provides:

8. Should the Purchaser breach any term of this contract or fail or neglect to pay any instalment of the purchase price or interest thereon on the due date, or should he fail or neglect to pay assessment rates or any other levies on the property on due date thereof, the Council may in its absolute discretion :

8.1 claim from the Purchaser of such arrear instalment, interest, rates or levies : or

8.2 claim from the Purchaser the full balance of the purchase price, interest thereon and assessment rates that might be due : or

8.3 cancel this agreement summarily without further notice to the Purchaser, and in such event the Council shall retain as "rouwkoop" or pre-estimated damages all amounts paid by the Purchaser to the Council in terms of these conditions of sale.

4 It is common cause that the Properties have not been rezoned, and that the development of the Properties has not commenced. From the papers it appears that after having purchased the Properties, Lapa requested the City to alter clause 7 so that the zoning of the Properties would be different, and so that the sub-divisions could be smaller. It is not entirely clear what the sequence of events was but what is clear, and is common cause, is that the City has not agreed to adjust clause 7.

- 5 In the absence of the rezoning of the Properties or the commencement of the development thereof, the City contends that it was entitled to cancel the Agreement, and did so. Following cancellation of the Agreement the City now claims return of the Properties. The City did not tender return of the purchase price.
- 6 Lapa opposes the City's application and has brought a conditional counter application.
- 7 In opposition to the City's claim alleges that the City's claim has prescribed and that the City has not cancelled the Agreement. In the absence of the Agreement being cancelled Lapa alleges that the City's application must fail. Lapa builds its non-cancellation defence on the absence of the production of a resolution of the Council of the City to cancel the Agreement.
- 8 The conditional counter application is brought in the event of it being found that the City's claim has not prescribed and is built on the basis of what is styled as the "second point in limine". This is a reference to various grounds upon which Lapa alleges that the Agreement is invalid for want of compliance with statutory requirements. In the conditional counter application, and following a declaration of invalidity Lapa seeks repayment of the purchase price and tenders to return the Properties.

- 9 Lapa has also raised a defence that if the City is allowed to retain the purchase price and insofar as the City relies on clause 8.3 of the agreement, which is a *roukoop clause*, that would be penalty stipulation and disproportionality would arise. The City did not raise clause 8.3 in its affidavits and in the City's heads of argument the point that the city has not relied on clause 8.3 is underscored.¹
- 10 The readers of this judgement will appreciate that the City's claim and Lapa's counterclaim both lead to the position where the Properties are returned to the City. The point of difference in the result is that the City has not tendered return of the purchase price.
- 11 Matters are however complicated somewhat because whilst the Properties were registered in the name of Lapa a mortgage bond was registered over the Properties in favour of a partnership constituted between Lapa and the Skosana Family Trust.² That mortgage bond was registered simultaneously with the transfer of the Properties to Lapa and is for an amount equivalent to the purchase price of the Properties.
- 12 Whilst the fact of the mortgage bond was established, no facts were provided to indicate what the outstanding balance is of

¹ See para 4.4 of the City's heads of argument.

² The trustees are cited as the seventh and eighth respondents.

the loan that is secured by the mortgage bond is, nor what the terms of that loan are.

- 13 Against the general background I turn now to consider the several discreet issues.

THE VOIDNESS ISSUE

- 14 I deal with the voidness issue first because logically the first question to be answered is whether there is an agreement.

- 15 The voidness issue arises from Lapa's second point in limine, and is the basis of its conditional counter claim.

- 16 Lapa alleges that the City has not complied with section 79(18) of the Local Government Ordinance (No 17 of 1939) ("the Ordinance"), and section 14 of the Municipal Finance Management Act No 56 of 2003 ("the MFMA"). But Lapa has not sought an order to review or set aside the decision of the City to sell the Properties.

- 17 Lapa did not make a positive averment that either the Ordinance or the MFMA had not been complied with. In respect of the Ordinance Lapa said: "*The applicant is invited to provide proof of its compliance with section 79 (18) of the Ordinance prior to conclusion of the deed of sale.*"³ and in respect of the MFMA Lapa said "*As far as I am aware, the applicant did not do so. The applicant is invited to provide*

³ Answer para 19.3.

proof of its compliance with section 14 of the M FM act prior to conclusion of the deed of sale.”

18 Lapa’s approach was what I would call a negative challenge, and to ask the City to prove compliance. Lapa did not put up any facts to show non-compliance with either the Ordinance or the MFMA. Lapa needed to prove the facts on which its defence of voidness was based and the allegations in the answering affidavit do not reach the required threshold.

19 It is correct that Lapa invited the City to prove compliance, and that the City’s response is wanting. But that does not prove non-compliance, after all absence of evidence is not evidence of absence.

20 Because of the view to which I have come on the evidential issue which is dispositive of the voidness defence and of the counter claim it is unnecessary for me to engage in the somewhat thorny issue of whether the voidness defence is permissibly raised as a collateral challenge to an administrative act,⁴ and the *Ferndale Crossroads*⁵ case on which Lapa relied.

PRESCRIPTION

⁴ See: *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 35.

⁵ *Ferndale Crossroads Share Block (Pty) Ltd and Others v Johannesburg Metropolitan Municipality and Others* 2011 (1) SA 24 (SCA)

- 21 If the agreement is not void, as I have found, then the next logical point to deal with is prescription.
- 22 The prescription defence was not pressed by Lapa either in its heads of argument nor in oral argument.
- 23 Lapa's defence of prescription is built on the contention that because development of the properties was to commence within 18 months of transfer, which occurred on 15 February 2008, prescription of the City's claim began to run on 16 August 2009 and prescribed in 2012. Because this application was only served in 2018, so the argument goes, the City's claim has prescribed.
- 24 Prescription operates in respect of "debts" and begins to run from when the debt is "due". The claim arises from a breach that was on going each day beyond the 18 month period allowed for the commencement of development of the Properties. It follows that because the breach was ongoing and the City had not yet made an election following the continuing breach there was nothing for the City to claim at that point. Once the City elected to cancel the agreement then something is due.
- 25 There is no dispute that this application was launched within three years of the date of the City's cancellation. On this basis the prescription defence cannot succeed.

THE CANCELLATION ISSUE

26 The point that Lapa makes in raising the non-cancellation defence is that there is no resolution by the Council of the City resolving to cancel the Agreement. The point is not that there were no grounds to cancel the Agreement, after all non-rezoning and non-commencement with development are common cause.

27 The City's case on cancellation is explained as follows in the founding affidavit:

"On 30 March 2017, Council resolved for the cancellation of Sonneveld and this is recorded in correspondence dated 29 June 2017, marked as annexure "COE 11" ⁶

28 Annexure COE 11 is a letter of 29 June 2017 drafted by one of the City's employees. This letter provides *inter alia*:

"Cancellation of Sonneveld – this report was approved at Council on 30/03/2017, the minutes extract is attached."

There is however nothing attached to the letter that is part of the City's founding affidavit.

29 Annexure COE 12 is a letter addressed by the City's attorneys to Lapa on 16 October 2018. Paragraph 5 of this letter, after having recounted the terms of the Agreement records:

⁶ Founding Affidavit para 36.

“This letter serves to notify you that our client has elected to forthwith terminate the contract of sale of the property on the basis of the abovementioned breach as well as the lack of compliance with the extension that have (sic) been granted to you on (sic) previously.”

- 30 Lapa Properties delivered a notice in terms of Rule 35(12) calling on the City to produce the resolution where the Agreement had been cancelled. The City responded to that notice and provided documents. The documents which the City provided plainly do not relate to the Properties, and deal with different properties. The City’s response is clearly wrong.
- 31 Whilst the City has not provided that resolution of its Council to cancel the Agreement, Lapa has not been able to put up any primary fact to show that the Council did not resolve that which is recorded in annexure COE 11, and as is recorded in the founding affidavit. The City’s wrong reply to the rule 35(12) notice founds grounds for an index of suspicion to be raised, but that does not, in my assessment, go so far as to prove that the Council did not resolve to cancel the Agreement.
- 32 There is in my view another answer to Lapa’s cancellation point. Having entered into a contractual relationship with the City the relationship between Lapa and the City must be regulated by that contract. The contract does not stipulate that it can only be cancelled if the Council of the City resolves

to cancel the Agreement. Instead, the Agreement refers indiscriminately and non-specifically to the City deciding to cancel the Agreement.

33 The City's founding affidavit deposed to by the Divisional Head: Legal and Corporate Services avers that the Agreement was cancelled. That averment is supported by the letter that was sent by the City's attorneys electing to cancel the Agreement.

34 In my view, and I find this to be so, the City is entitled to cancel the Agreement when an authorised official makes that election on behalf of the City. That election is to be found in the letter sent by the City's attorneys to Lapa.

35 I therefore find that the city cancelled the Agreement.

CANCELLATION AND RESTITUTION

36 In its application the City alleges that it has cancelled the Agreement and seeks return of the Properties. As I have already mentioned, the City did not in its application tender return of the purchase price.

37 During the argument of this matter the absence of a tender of return of the purchase price by the City was raised with Mr Tsatswane SC who appeared for the City. The issue was also raised with Ms de Villiers Golding who appeared for Lapa.

Both counsel were invited to submit supplementary heads on the issue of restitution following up on cancellation and did so.

38 The City's claim is one for restitution following cancellation.

39 When restitution is claimed the performance that has been rendered by both parties must generally be returned.⁷ Whether restitution is the result of an implied term, or is the result of an enrichment action is an issue that, on my reading of the law, is something on which there seems to be no agreement. What is clear is that the reason for restitution being required is that unjust enrichment should be avoided.

40 A tender of restitution is not a requirement for a valid cancellation of an agreement, instead it arises only when restitution is claimed. The point being that there is a difference between cancellation and a claim for restitution.

41 In the supplementary submissions filed by the City it persisted with the position that it was not required to tender return of the purchase price and adopted the position that return of the purchase price was a matter to be decided in an enrichment claim which may yet be brought by Lapa. In my view the City has elevated the reason for the rule (to avoid unjustified enrichment) to the rule. Lapa's supplementary submissions

⁷ For the purpose of this judgment I do not deal with the circumstances where a party may be relieved of tendering return of its performance.

adopt the approach that where restitution is claimed then it must be effected by both parties.

- 42 The position analogous to that of the City was set out in *Prefix*⁸ as follows:

*“Where a contract is cancelled as a result of breach and where the innocent party claims return of their performance under the agreement, the general position is that a tender to return the performance of the guilty party is necessary. As was said in Feinstein v Niggli and Another: ‘that the parties ought to be restored to the respective positions they were in at the time they contracted is founded on equitable considerations.’”*⁹

- 43 That position accords with the position adopted by *Christie* when he said:

*“Thus in a cancelled contract of sale the buyer is entitled to the return of any of the purchase price he has paid and the seller is entitled to the return of the property.”*¹⁰

- 44 What is now required is to apply that position to this matter.

- 45 The City has not tendered return of the purchase price to Lapa in its claim for return of the Properties. On the other hand Lapa has not raised as a defence to the City’s claim the absence of a tender of the return of the purchase price. But in

⁸ *Prefix Properties (Pty) Ltd and Others v Golden Empire Trading 49 CC and Others 2011 (2) SA 334 (KZP)*

⁹ Para 20.

¹⁰ Christie, *The Law of Contract*, 8th ed. p.540

the conditional counter claim Lapa has claimed return of the purchase price. So the issue of return of the purchase price is an issue that was squarely raised on the papers. In its supplementary submissions Lapa has suggested that in the absence of a tender of return of the purchase price the City's application should be dismissed. Because restitution is founded on equitable considerations, and because the issue of repayment of the purchase price is squarely raised in the papers, albeit somewhat inelegantly, I find that the City's claim should not be dismissed because it did not tender return of the purchase price.

46 Because restitution is founded on equitable considerations my view is that in assessing what is equitable I should assess the matter sensibly and wholistically, rather than technically and narrowly.

47 Neither party has placed facts before me to dislodge the obvious and mathematical consequences of retaining or repaying the purchase price. If I were to order that the City is entitled to return of the Properties, but at the same time leave the City with the purchase price, the City would without more enjoy a windfall and Lapa would suffer a double loss. That cannot be an equitable result.

48 For these reasons I find that the City is, when claiming restitution of the Properties, as it does, required to repay the purchase price to Lapa.

49 To be clear and so that I am not misunderstood, by finding that the City is required to repay the purchase price to Lapa, I make no finding whether either the City or Lapa has a damages or enrichment claim against each other and expressly leave that question open.

SECTION 6 OF THE DEEDS REGISTRY'S ACT

50 The City relies on section 6 of the Deeds Registry Act¹¹ to give effect to the relief which it seeks. By invoking section 6 of the Deeds Registry Act the City seeks the cancellation of the Deed of Transfer recording Lapa as the owner of the Properties, and the revival of the Deed of Transfer that existed prior to the Lapa Deed of Transfer, the effect being that the City will revert to being the registered owner of the Properties. There was no dispute between the parties that would be the effect of an order directing the Registrar of Deeds to cancel the Lapa Deed of Transfer and there was no dispute between the parties that I am able to make such an order.

51 The issue of some debate was whether section 6 permits me to order the cancellation of the mortgage bond. In this regard Ms de Villiers Golding pointed out that section 6(1) operates in

¹¹ No. 47 of 1937

respect of “*other than a mortgage bond*”. On this basis the submission was that section 6 does not permit me to order the cancellation of the mortgage bond. I do not agree with this submission.

52 It is important to place section 6 in its correct context. Section 6 is not an empowering section which affords a court the power to do certain things. Instead it is a section which imposes a restriction on the Registrar of Deeds so that a Deed of Transfer may only be cancelled upon an order of court. But that prohibition does not operate in respect of a mortgage bond, and hence why the section uses the phrase “*other than a mortgage bond*”. The reason for this may be because mortgage bonds are dealt with in section 56 of the Deeds Registry Act to which I return below.

53 The reach of section 6 was considered by the Supreme Court of Appeal in the *Kuzwayo*¹² matter. The court said:

*“Section 6 is not an empowering provision, however. It provides only that the registrar of deeds may not cancel any deed of transfer except upon an order of court.”*¹³

54 The court then went on to deal with the court’s powers when issuing an order contemplated by section 6 and said:

¹² *Kuzwayo v Representatives of the Executor in the estate of late Masilela* [2011] (2) All SA 599 (SCA)]

¹³ Paragraph 25

“The court has the inherent power, implicit in section 6 of the Deeds Registry’s Act, to order cancellation of rights registered in the Deeds Register: Ex Parte Raulstone N.O. 1959 (4) SA 606 (N); and Indurjith and Others v Naidoo and Another 1973 (1) SA 104 (D)”.¹⁴

- 55 In *Indurjith* referred to by the court in *Kuzwayo*, property had to be transferred but two caveats were registered against the property in favour of execution creditors who could not be traced. The report of this case is particularly short in that it records only the argument for the applicant and the order that was granted. What is however clear is that the court found that it has an inherent power to order the removal of the caveats against the Title Deed.
- 56 *Ex Parte Raulstone* which was also referred to by the court in *Kuzwayo* is further authority for the proposition that a court has an inherent power to order the removal of an encumbrance on a title deed.
- 57 There is support to be found for a court’s authority to direct the removal of an encumbrance against a title deed in section 56 (1)(c) of the Deeds Registry’s Act. Section 56 deals with the transfer of hypothecated immovable property and provides that no immovable property shall be transferred unless a mortgage bond registered against the property has been cancelled. There is then a proviso to that prohibition to the

¹⁴ At para 26

effect that no cancellation shall be necessary if so ordered by a court.

58 On the basis of what is said in *Kuzwayo* and the cases referred to, read together with the provisions of section 56 (1) (c) of the Deeds Registry's Act, I find that a court has an inherent power to order the cancellation of a mortgage bond when granting an order in terms of section 6 of the Deeds Registry's Act. The exercise of such a power is necessary to ensure that a commercially sound and sensible result is achieved, and this is demonstrated by the debate that was had during the hearing of the matter which is set out in paragraph 65 above.

THE BOND

59 Having found that the City is entitled to reclaim the Properties but must repay the purchase price I turn now to consider the issue relating to the mortgage bond.

60 Lapa has raised as a defence to the return of the Properties the existence of the mortgage bond. The argument is, as I understand it, that a court cannot order the cancellation of the mortgage bond, and therefore the Properties cannot be returned to the City. As an alternative the argument was that if the Properties are to be returned to the City then the mortgage bond must remain in place.

- 61 I have already mentioned, the mortgage bond was registered over the properties simultaneously with the registration of the Properties in the name of Lapa.
- 62 The mortgagee is a partnership consisting of Lapa and the Skosana Family Trust.
- 63 In the answering affidavit delivered on behalf of Lapa there is a statement that the mortgagee does not consent to the cancellation of the mortgage bond. But this is taken no further, and no explanation is provided for why consent to the cancellation of the mortgage bond is refused.
- 64 The mortgage bond operates to establish security in respect of a loan agreement that Lapa entered into. The security provided by the mortgage bond operates in respect of a loan amount of R6,3 million and interest thereon. The interest that is secured by the mortgage bond is described as being interest “... *calculated in the manner and at the rate agreed upon between the Mortgagor and the Partnership or failing such agreement in the manner and at the rate usually required by the partnership for the kind of transaction in question*”. This is the loosest of clauses, and it is not clear whether any interest has been agreed to, and there is no indication of what might be usually required.
- 65 During argument the issue relating to the mortgage bond was raised with Ms de Villiers Golding and the point was made that

unless the mortgage bond is cancelled the City would receive return of the Properties together with the encumbrance of the mortgage bond whilst at the same time having to repay the purchase price to Lapa. The result of that would be, in practical terms, that the City would have to pay a further R6.3m to discharge the mortgage bond whilst Lapa would enjoy the benefit of the purchase price being returned to it by the City, but which it had borrowed from the mortgagee. The end result would be that the City would be out of pocket by R6.3m and Lapa would enjoy a windfall of R6.3m. I understood Ms de Villiers Golding to accept that could not be the result.

- 66 The mortgage bond provided security for the purchase price of the Properties. To ensure that the rights of the mortgagee are protected as far as possible, I will order that the return of the purchase price that is to be paid by the City is to be paid first to the mortgagee, and only to the extent that there is an amount remaining after the amount owing by Lapa to the mortgagee has been discharged is that balance to be returned to Lapa. This will ensure that the mortgagee enjoys the benefit of the security that it had obtained in the form of the mortgage bond and will at the same time avoid Lapa receiving an undue windfall.

67 Given that Lapa is one of the members of the mortgagee partnership there ought not to be a dispute about what amount is owing to the mortgagee. To the extent that such a dispute does arise I will deal with that in the order that I will make by directing that in the event of a dispute arising between the mortgagee and Lapa as to the amount which is to be paid to the mortgagee, then the City's attorneys will be required to take into their trust account the amount which the City is required to pay, and to issue an inter-pleader summons so that the dispute between the mortgagee and Lapa as to who should be paid what amount can be resolved.

68 I am mindful that relief relating to how payment is to be made was not specifically claimed by either party, but take the view that this relief is necessary to give effect to the relief that was claimed by the parties – the restitution – and that I am therefore free to issue this structural order.

INTEREST

69 The City's claim is based on its cancellation of the Agreement. That cancellation operates *ex nunc*.

70 Although the City notified Lapa of its cancellation of the Agreement on 18 October 2018 in the letter sent by its attorneys that letter does not attach any consequence to the cancellation. There is no indication of whether the City will be claiming damages or restitution, or both.

- 71 The City first claimed return of the properties when it commenced this application and that was on 1 November 2018.
- 72 Restitution is an equitable remedy and it follows that interest which might be payable as part of an order for restitution should reflect the equitable nature of the relief.
- 73 It is a matter of speculation what would have transpired if the City had tendered return of the purchase price in the application. But Lapa did not take the point that a tender of return of the purchase price was missing from the City's claim. Instead it mounted the prescription defence and the non-cancellation defence. Those are defences that are unrelated to the absence of a tender of repayment of the purchase price.
- 74 It is not clear why this application which was launched in 2018 has taken so long to get to court. The replying affidavit was filed in August 2019. Lapa filed its heads of argument in June 2022, in May 2023 Lapa brought an application to compel the City to file its heads of argument (a requirement for an application to be enrolled) and the City filed its heads of argument on 6 October 2023.
- 75 The delay in the application does not seem to lie at the feet of Lapa and that is relevant to the question of interest as part of an equitable remedy.

76 Because I have found that the City is required to tender return of the purchase price and because that was first claimed by the City when this application was launched on 1 November 2018 I find that the City is liable to pay interest to Lapa from 1 November 2018.

77 Lapa has suggested that the rate of interest should be fixed at the date that it commences to run. Given that interest is bound up with the restitution my view is that the better approach, reflecting more accurately an equitable result, would be to order the interest to run at the rate fixed in terms of section 1(2)(b) of the Prescribed Rate of Interest Act of 1975.

COSTS

78 Both the City and Lapa have been partially successful, and conversely they have both been partially unsuccessful.

79 The City has succeeded in securing an order for the cancellation of the Lapa Title Deed, and Lapa has been successful in securing the repayment of the purchase price.

80 Given that both parties have achieved some measure of success and in the exercise of my discretion in respect of costs I will order that each party is to pay its own costs. That order will, in my view reflect the partial success that each party has achieved.

ORDER

81 For the reasons set out above I make the following order:

- 1 The agreement concluded between the applicant and the first respondent, annexure COE 5 to the founding affidavit, is cancelled.
- 2 The Registrar of Deeds is directed to take all steps necessary to cancel Mortgage Bond B009512/08.
- 3 The Registrar of Deeds is directed to take all steps necessary to cancel Deed of Transfer T006649/08 and to revive Deed of Transfer T47523/95.
- 4 To the extent that any documents are to be signed to give effect to the orders in 2 and 3 above the conveyancer appointed by Divisional Head: Legal and Corporate Services of the City of Ekurhuleni Metropolitan Municipality is authorised to sign those documents.
- 5 The applicant is to pay R6.3 million together with interest calculated from 1 November 2018 at the rate fixed in terms of section 1(2)(b) of the Prescribed Rate of Interest Act of 1975 from time to time ("the restitution amount") as follows:
 - a. The applicant is to pay so much of the restitution amount as is required to discharge the indebtedness secured by Mortgage Bond B009512/08 to the mortgagee, and to pay the balance, if any, to the first respondent.

- b. The mortgagee, represented by the seventh and eight respondents, is to submit to the applicant's attorneys, within three days of the date of this judgment, the amount which it alleges is owing to it by the first respondent and which is secured by the mortgage bond.
- c. The first respondent is to submit to the applicant's attorneys, within three days of the date of this judgment, the amount which it alleges is owing by it to the mortgagee and which is secured by the mortgage bond.
- d. In the event of the mortgagee and the first respondent agreeing on the amounts owing to, and by, them the first respondent is to pay the restitution amount first to the mortgagee and any balance to the first respondent.
- e. In the event of the mortgagee and the first respondent not agreeing on the amounts owing to, and by, each of them then the applicant is to pay the restitution amount into the trust account of its attorney who shall forthwith issue an interpleader summons on the mortgagee and the first respondent to resolve which to them is entitled to what part of the restitution amount, and the restitution amount will thereafter be dealt with in terms of the interpleader summons proceedings.
- f. The applicant's attorneys will be entitled to recover their costs of the interpleader proceedings as a first charge against the restitution amount, such costs to be taxed on an attorney and client scale.

6 Each party is to pay its own costs of this application.

Ian Green
Acting Judge of the High Court
8 November 2023

On behalf of the Applicant:

K Tsatsawane SC

Instructed by:

Mohamed Randerer and Associates

On behalf of the First to fourth and
sixth the Respondents
(collectively referred to as "the Respondents")

C de Villiers-Golding

Instructed by:

Melvin Neale Attorneys

