REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/6723

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

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SIGNATURE **DATE** __ November 2023

In the matter between:

HASSEN, MOHAMED AABID	Applicant
and	
GOVENDER, PRESHNEE N.O. (As duly substituted for the first and second respondents)	First Respondent
BOOLEY, MUMTAZ	Second Respondent
HASSEN, HASMET	Third Respondent
HASSEN, NAZIMA KHATUN	Fourth Respondent
HASSEN, HASIENA DAWOOD	Fifth Respondent
HASSEN, NIESAR AHMED	Sixth Respondent
MASTER OF THE HIGH COURT	Seventh Respondent
REGISTRAR OF DEEDS	Eighth Respondent

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

[1] The dispute, essentially between heirs of a deceased estate, turns on the interpretation and validity of a written agreement ("agreement") for the sale of immovable property ("property") concluded on 1 November 2018 between the applicant, as purchaser, and his late grandmother shortly before her death ("deceased").

[2] The second to sixth respondents are children of the deceased and heirs in her estate. In terms of the deceased's will of 11 April 1994 and but for the agreement, the property would have passed in equal shares to her five children, the second to sixth respondents.

[3] The second and third respondents are former joint executrixes of the estate and were removed by order of court and substituted by the first respondent. The third respondent, acting in her then-representative capacity, opposed the application at the outset, whilst her co-executrix filed a notice to abide by the court's decision. The first respondent, in her capacity as the substituting executrix, persists in opposing the application and is the only respondent to do so.

[4] It is common cause that the agreement is an instalment sale in terms of the Alienation of Land Act, 1981 ("Act"), the material terms of which are the following (I transpose the deceased for "seller"; and the applicant for "purchaser"):

[4.1] The purchase price was the sum of R775,000-00 payable in instalments of R5,000-00 per month, which amounts shall be paid immediately upon request of the conveyancer and prior to registration being affected.

[4.2] The applicant shall pay all costs incurred in connection with the transfer of the property.

[4.3] Transfer of the property shall be passed by the deceased's conveyancer Dockrat Jassat attorneys.

[4.4] Possession and vacant occupation of the property shall be given to the applicant on transfer from which date it shall be at his sole risk, loss or profit.

[4.5] The applicant is liable for the payment of arrears rates taxes, municipal service fees and other charges in respect of the property up to date of transfer as well as thereafter.

[4.6] If the date of occupation and possession does not coincide with the date of transfer, the party in occupation whilst it is registered in the name of the other party, shall not pay occupational rental.

[4.7] In the event of the applicant failing to fulfil on due date any of the terms and conditions of the agreement, the deceased shall have the

right either to cancel the sale by registered letter in which event the applicant shall at the option of the deceased and without prejudice to any other rights which the applicant may have, either forfeit all monies paid to the deceased alternatively be liable to the deceased in damages; or claim immediate payment of the whole of the purchase price and the fulfilment of all the terms and conditions thereof.

[4.8] No legal proceedings may be instituted by the deceased against the applicant on account of the applicant's default or breach of any provisions of the agreement unless the deceased has given the applicant notice specifying the nature of the default, demand that the default be rectified within 30 days and indicate to the applicant the steps that the deceased intends to take if such breach of contract is not rectified.

[4.9] The contract is subject to the provisions of the Act which supplements any omission or material provisions in the agreement and are deemed to be incorporated in the agreement by reference, and in the event of a conflict between the terms of the agreement and the provisions of the Act, the latter will prevail.

[4.10] The agreement constitutes the entire agreement between the parties and no modification, variation or alteration thereof shall be valid unless in writing and signed by both parties.

[5] The relevant facts were either common cause or not disputed:

[5.1] The deceased implemented the agreement by signing a power of attorney in favour of the conveyancers on 13 November 2018 to transfer the property to the applicant.

[5.2] Mr Jassat initiated the transfer process on the same day by submitting a transfer duty declaration form to the South Africa Revenue Service.

[5.3] The applicant was born and grew up in the property and continued to occupy the property with knowledge of the deceased.

[5.4] The applicant paid the municipal rates and taxes.

[5.5] The deceased passed away on 8 December 2018 and the transfer process was put on hold pending the appointment of the joint executrixes nominated in the will.

[5.6] The executrixes were appointed on 23 May 2019.

[5.7] During August 2020 the third respondent, purporting to act in her capacity then as joint executrix (but without the approval of her co-executrix), wrote to the applicant and refused to recognise the agreement because it was "*rendered invalid on many clauses*" and advised the applicant that he could purchase the property for R2,950,000.00, failing which it would be put up for sale and sold to the highest offeror in order to wind up the estate. (It is worth noting that the municipal valuation of the property at the time was R760,000.00)

[5.8] Further correspondence did nothing to resolve the dispute; nor did the introduction of the first respondent. Hence the present application.

[6] The applicant essentially seeks a declaration of validity, together with the usual and necessary ancillary relief that will enable him to take ownership of the property.

[7] The answering affidavit raises three defences:

[7.1] The agreement should be declared void in terms of section 24(1)(c) of the Act, for non-compliance with sections 6(1)(h), 6(1)(p) and 6(1)(q) thereof.

[7.2] The agreement is void for vagueness because it does not expressly state that the instalments were payable on demand.

[7.3] The applicant repudiated the agreement by failing to pay any of the monthly instalments.

Non-compliance with the Act

[8] It is well-established that section 24(1) of the Act affords the applicant as purchaser the right to approach the court for appropriate relief in the event the agreement does not substantially comply with section 6 thereof. But the first respondent, as executrix of the deceased state, is afforded no rights under section 24(1) of the Act and cannot avail herself of the provisions thereof in the event of non-compliance with the provisions of section 6 thereof.[1]

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[1] *Mulder v Van Eyk* 1984(1) A 204 (SE); *Chetty v Erf 311, Southcrest CC* 2020 (3) SA 182 (GJ) at [36]-[38]

[9] Mr Desai, who appeared for the applicant, initially attempted to persuade me not to follow precedent, for the reason that the protection afforded to a purchaser endures only for two years and that a seller may thereafter approach the court for relief under section 24(1) of the Act. I am not persuaded by the argument, which ignores the fact that section 6 in its terms and having regard to the context of the Act and its precursors, is aimed at protecting a purchaser.[2] It is, however, a moot issue because Mr Desai fairly conceded that not one of the sub-sections referred to by the first respondent is applicable *in casu* and that section 24 and non- compliance with section 6 is not an issue that in itself supports dismissal of the application for non-compliance with the Act.

[10] Instead, Mr Desai sought to argue that non-compliance with the Act in the circumstances rendered the agreement void; an issue which I shall consider next.

Void for vagueness

[11] In an argument not raised on the papers and not foreshadowed in his heads of argument, Mr Desai suggested that the agreement is vague because it does not objectively identify a place where payment should take place as required by section 6(1)(l) of the Act. Mr Van der Vyfer, appearing for the applicant, rightly objected to this argument being raised for the first time before me. It can, however, be dispensed with without too much ado.

[12] The argument appears to me to be merely another way of relying on non-compliance with the provisions of section 6 of the Act. However, accepting

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[2] *Sarrahwitz v Maritz* NO & Anor 2015(4) SA 491 (CC)

that it does merit consideration as a self-standing argument in support of the vagueness defence, I am mindful that the agreement was a commercial document executed by the deceased and her grandson with a clear intention that it should be given effect to, and I must not lightly hold it to be ineffective. Rather, I should attempt to find therein, with reasonable certainty, the terms necessary to constitute a valid contract.[3]

[13] I can find no uncertainty as to where payment wasto be made – payment of the purchase price would be made to the deceased (and she could readily inform her grandson whether she would take all the instalments or any particular instalment in cash or to the credit of an account to be provided); payment of transfer costs would be made to the conveyancer and payment of rates and taxes would be made to the municipality.

[14] The other argument on vagueness was directed at the fact that the agreement did not expressly provide for a date of payment. But, as Mr Desai accepted, the general rule laid down a century ago,[4] is to the effect that in instances where no date is stipulated for payment of a monetary obligation, to be in mora (i) there must be a valid and enforceable claim and (ii) the debtor must have failed to perform timeously. If no date for performance is stipulated, there must be a demand made on the debtor to place him/her in mora *ex persona*. It is common cause that no demand was made on the applicant to perform in terms of the agreement.

[15] The absence of a demand and failure to record the agreement were a consequence of the co-executrixes not being *ad idem* as to the validity of the

[3] *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670G-H
[4] *Breytenbach v Van Wijk* 1923 AD 541 at 549

agreement. They were required to act jointly and not independently of one another. Theirs was a dual position no different to co-trustees, co-liquidators and other persons who are appointed jointly to hold a representative capacity.[5] Should they lock horns (as they did), the co-executrixes were obliged to approach the court to cut the Gordian knot.

[16] I referred above to the second respondent's letter of August 2018, which contained no demand for payment.

[17] The applicant immediately responded through his attorney and advised that instalments were to commence on demand by the deceased and that this accords with the legal position where a date of payment is not stipulated; and tendered payment of the first instalment on demand.

[18] Nothing further appears to have happened for some 18 months, when the second respondent, continuing to act in her representative capacity without the consent of her co-executrix, penned a lengthy letter *inter alia* raising various reasons for her contention that the agreement was "*null and void and cancelled*" and unless the applicant paid rental of R10,000.00 per month, he had to vacate the property. This letter also did not contain a demand that the applicant should commence payment in terms of the agreement.

[19] It was common cause that the first respondent, who is the only person authorised to act as sole custodian of the estate, has not made a payment demand on the applicant.

[20] The *lex commissoria* in the agreement is applicable in the event the deceased (or the executrix of her estate) intended to institute legal proceedings against

[5] *Van den Heever NO & Anor v Poulos NO & Others* 2023 JDR 1208 (GJ) at [62]; *Thorpe & Others v Trittenwein & Anor* 2007 (2) SA 172 (SCA) at [12]

the applicant. As the applicant initiated the litigation, it is not applicable in the present instance.

[21] However, the agreement incorporates in express terms the provisions of the Act, which provides in section 19 for a statutory *lex commissoria*, failing compliance with which a seller (*i.e.*, the first respondent) is precluded from enforcing acceleration of the payment of any instalment of the purchase price or to terminate the agreement or claim damages.

[22] In any event and in terms of section 26 of the Act, the deceased was not entitled to receive any payment in terms of the purchase price until the property is registerable and the recording of the agreement has been affected. It is common cause that the second of these conjunctive requirements has not been met.

[23] In my opinion the agreement contains the essential terms of a contract for the sale of land, *i.e.*, the parties, the price and the subject matter, which must be in writing and defined with sufficient precision to enable them to be identified.[6]. The defence is not that the agreement was void for vagueness for non-compliance with the requirements of section 2(1) of the Act.

[24] That the leaves the issue of the applicant's repudiation of the agreement.

Repudiation

[25] Mr Desai argued that the applicant repudiated the agreement by failing to make payment of any instalments. In doing so and relying on *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* and *Taggert v Green*,[7] he

[6] *Mulder supra* at 205*in fin*
[7] *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (AD) at 652D-653F and *Taggert v Green* 1991 (4) SA 121 (WLD) at 125E-126J

contended that applicant's conduct amounted to an anticipatory breach of the agreement and therefore did not require the contractually agreed notice to purge the default. I have already indicated that the contractual *lex commissoria* is only applicable in the event the deceased/executrix instituted legal proceedings. However, in the event I am wrong in this, I shall deal with the argument.

[26] *Tuckers* chronicles the doctrine of anticipatory breach, finding that the duty not to commit an anticipatory breach of contract flows from the implied requirement of *bona fides* which underlies our law of contract, and held that a repudiation is a well-recognised form of anticipatory breach by conduct measured by having regard to an objective test based upon the reasonable expectation of the promisee.

[27] In *Taggert*, there was a continued failure to pay to the creditor what had already fallen due, and it was conceded that the debtor's conduct amounted to a repudiation in communicating that he was not bound by the agreement and that the creditor was at liberty to take such action as he deemed fit. The court held that, viewed objectively and when faced by a clear repudiation, the party not in breach is entitled to bring the agreement to an end without further delay. The party who repudiated the agreement, cannot simultaneously rely on a term of that very agreement to insist on notice before cancellation.

[28] In my opinion, the submission that the applicant repudiated the agreement by his conduct has no substance.

[29] A letter from Mr Jassat on 13 June 2019 to the then joint executrixes (shortly after their appointment) evinces a clear intention by the applicant to adhere to

the terms of the agreement. Mr Jassat informed them that the applicant had contacted him regarding payment of the instalments, and requested details of the estate banking account once opened so that the applicant could commence with payment of the instalments. The response was the unlawful attempt by the second respondent to cancel the agreement by means of her letter of 20 August 2019.

[30] On 26 August 2019 the applicant, as it was entitled to do, tendered payment of the first instalment on demand. The response came from the second respondent some 18 months later, on 8 December 2020, alleging that the applicant had repudiated the agreement and that she had cancelled the agreement. She subsequently threatened to forcefully take possession of the property.

[31] The applicant in his founding affidavit tendered to pay the full purchase price within 14 days from the granting of the order sought herein. He advises in his replying affidavit that he has not been furnished with the estate account details but that he paid the full purchase price into the trust account of Docrat Jassat attorneys on 1 September 2021.

[32] There is, in my view, no basis upon which the second respondent could have formed the reasonable expectation that the applicant did not intend to be bound by the terms of the agreement and in particular, that he repudiated the obligation to make payment in terms thereof.

[33] In any event, neither *Tuckers* nor *Taggert* is an answer to the failure to comply with the statutory-required section 19 breach notice.

Costs

[34] Mr Van der Vyfer sought a punitive costs order. The original relief included costs against the third respondent personally (then cited in her capacity as the first respondent *nominee officio*), but this was abandoned in argument. I should perhaps add that the third respondent may consider herself fortunate in this regard.

[35] It is agreed that, should I find for the applicant, only the first respondent would be liable for costs (in her representative capacity as cited, of course).

[36] Mr Desai attempted to defend against a punitive cost order and suggested that this was a family dispute involving a problematic agreement, and that it would be appropriate in the circumstances not to make any order as to costs.

[37] I disagree. The conduct of the second respondent (acting as she did at the time in a representative capacity as appointed co-custodian of her mother's deceased estate) was nothing short of shameful and her opposition to implementing the agreement and granting the applicant ownership of the property against the express wishes of her mother and decision of her co-executrix, is deserving of the court's opprobrium. It is apparent from the evidence that the other respondent-heirs are not without blame (excluding the second respondent).

[38] Although valiantly argued by Mr Desai, his case was doomed from the first letter, and he fairly and properly conceded several of the main arguments that had underpinned the defence. It is quite apparent that the defence was stillborn, and the first respondent's continued opposition to the application vexatious (whether of her own volition or that of the other respondents).

[39] It appears to me that the applicant at all times acted reasonably and that he has been mulcted in costs that were wholly unnecessary in the circumstances. I intend that my order shall ensure that he is properly compensated.

[40] I consequently make the following order:

1. The agreement of sale of immovable property known as Erf 415, Dadaville Township, Registration Division IQ, Province of Gauteng, measuring 847m² and held by Deed of Title T28945/1991 concluded between the late Halima Hassan and applicant on or about 1 November 2018 is valid and binding.

2. The executrix of the estate of the late Halima Hasson, being the first respondent, shall take all steps necessary to give effect to the sale agreement and to sign all documents reasonably required to allow the conveyancer to give effect to the transfer of the property into the name of the applicant or his nominee.

3. Directing Dockrat Jassat Attorneys, upon transfer of the property being affected, to pay the purchase price R775,000.00 held in their trust account, into the trust account held by the first respondent for the deceased estate.

4. Should the first respondent fail to comply with any provision of this order, then and in that event the Sheriff of the Court, *alternatively* his deputy, is authorised and directed to sign all documentation and to do all things necessary and to bring all necessary applications, on behalf of the first respondent to give effect to the transfer of the property.

5. The costs of the application shall be paid out of the deceased estate, such costs to be taxed on the scale as between attorney and client.

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P STAIS

Acting Judge of the High Court

Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 24 November 2023.

APPEARANCES:

Applicant: Adv Van der Vyfer

Instructed by Ayoob Kaka attorneys

First Respondent: Adv Desai

Instructed by Shamla Pather Attorneys

Date of hearing: 6 November 2023

Date of judgment: 24 November 2023