REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Not Reportable

Case No: 2021/26561

DELETE WHICHEVER IS NOT APPLICABLE

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

11 April 2023 .....
DATE SIGNATURE

In the matter between:

CHARL NEL **First Applicant**

NICOLETTE LOUISE NEL **Second Applicant**

and

MARIUS MARNUS SLABBERT **First Respondent**

THE UNLAWFUL OCCUPIERS OF THE PROPERTY SITUATE

AT: 98 Grant Street, Lilyvale A.H. Benoni, Gauteng **Second Respondent**

EKURHULENI METROPOLITAN MUNICIPALITY **Third Respondent**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicants seek an order evicting the first and second respondents from its property[1] (“the property”), which is an Agricultural Holding on a vacant piece of land without any infrastructure.

[2] The Prevention of Illegal Eviction and Unlawful Occupation of Land Act[2] ("PIE" Act) finds no application in this matter since the property in question is not utilised as a residential property, nor do the first and second respondents reside on it. As shall be clearer in this judgment, the property is utilised by the second respondent for commercial purposes.

[3] The first respondent has not formally opposed the application. The answering affidavit as deposed to by Mr. Given Mbivzo (‘Mbivzo’) on behalf of the second respondent, was filed and served out of time. Condonation having been sought and not opposed by the applicants, I am of the view that the interests of justice dictate that it be granted.

The background and the parties’ respective cases:

[4] The background to this application is largely common cause save for the disputed facts as shall be pointed out;

4.1 The first and second applicants are married out of community of property, and are the lawful owners of the property in dispute. It might as well be mentioned that in the answering affidavit, preliminary issues were raised regarding the authority of the first applicant to depose to the affidavit on behalf of the second respondent, who had filed a confirmatory affidavit. That preliminary point was however abandoned when the matter was argued before the Court.

4.2 Sometime in 2008 the applicants took a decision to subdivide the property (an Agricultural Holding) into two portions. The subdivisional diagram was approved by the third respondent, (Ekurhuleni Metropolitan Municipality) on 07 October 2008 and by the Surveyor-

[1] Described as PORTION 407 (A portion of portion 406) of the Farm Putfontein 26, Registration Division IR, Local Authority Benoni TLC, Gauteng.
[2] Act 19 of 1998.

General on 11 March 2009. Notwithstanding approval of the subdivision, its registration never took place.

4.3 In November 2011 the applicants and the first respondent entered into a written offer in terms whereof the latter purchased a portion of the property for an agreed amount of R50 000.00. As part of the sale agreement, the first respondent paid an amount of R42 000.00, and the balance of the purchase price was paid in the form of goods and service. He took occupation of the property after the sale.

4.4 Some two years since the sale agreement was concluded, the applicants signed the transfer documents on 30 January 2013, upon being approached by Hugo & Ngwenya Attorneys. Nothing however was done to register or transfer the property to the first respondent.

4.5 Mbizvo, who claims rightful and lawful ownership of the disputed property, avers that in November 2018, he was introduced by an estate agent to the first respondent, who was selling a vacant property, which was purchased from the applicants. At the time, he was informed that the property had not as yet been transferred and registered in the name of the first respondent. He was however assured by the first respondent's transferring attorneys of record at the time, that the process of registration and transfer would take place from the applicants to the first respondent and thereafter to him, and that it was therefore possible for him to purchase the property.

4.6 On the strength of that assurance, Mbivzo then entered into a Deed of Sale of Land Agreement with the first respondent on 5 December 2018 to purchase the property for R500.000.00, which was settled in full. Upon taking occupation of the property, Mbivzo subsequently rented it out to third parties, who it is alleged utilised it as a storage facility for vehicles and trailers.

4.7 Some eight years since the initial agreement with the first respondent, in April 2019, the applicants were approached by Nicholas & Ngwenya Attorneys (formerly Hugo & Ngwenya Attorneys), requesting them to yet again sign the transfer documents. The applicants signed the

documents on 22 May 2019, and further advised the attorneys that this was the last time that they were signing the same documents.

4.8 As at June 2020, the applicants were informed through their attorneys of record that the registration of the property had not been finalised, and a demand was made to the first respondent on 11 June 2020 that the registration be completed within 10 days from the date of the demand.

4.9 When no reply was received, the applicants then on 6 July 2020 cancelled the agreement and demanded that the first and the second respondents vacate the premises by 30 September 2020. It appears that the basis of the cancellation was the failure of the first respondent to take transfer and register the property in his name timeously.

4.10 The applicants' contention is that the first respondent had refused to vacate the premises, and that it had since come to its attention in April 2021 that the property was allegedly utilised by the first respondent and unknown occupiers to conduct criminal activities, including storing stolen and hijacked trucks. It is not necessary to dwell much into the merits of these allegations since nothing turned on them in the light of the issues to be determined. It is sufficient to state that Mbivzo's response to these allegations was that since he had rented out the property to third parties, he could not have been aware of any illegal activities taking place, and that in any event, he had since removed the occupiers from the property.

4.11 The disputes of fact in this case related mainly to the party that was responsible for ensuring that the property was transferred and registered after the sale agreement with the first respondent was concluded. The applicants and the respondents essentially point fingers at each other. The applicants contend Hugo & Ngwenya Inc. Attorneys, was to be appointed by the first respondent to register the subdivision of the property and to facilitate its transfer into the name of the first respondent.

4.12 The first respondent as already indicated, did not formally oppose the application safe to file a confirmatory affidavit in support of Mbizvo's

defence. Mbivzo essentially contends that the applicants and their transferring attorneys have deliberately refused to sign the transfer documents or caused the delays in the transfer and registration of the property into his and the first respondent's name despite having complied with all his obligations under the sale agreement.

4.13 He further denied that it was the responsibility of the first respondent to register the property, it being contended that the responsibility was that of the applicants, since nothing in the annexures referred to in the founding affidavit indicated that the responsibility was that of the first respondent. He further submitted that even if the responsibility was on both parties, the failure by one party could not constitute a material breach of the agreement. He further accused the applicants of deliberately not attending to the sub-division and registration of the property, when only they were in a position to do so.

4.14 Mbivzo also submitted that since the applicants failed to prove various factors, such as that the provisions of the cancellation clause had been strictly complied with, or that the letter placing the first respondent in *mora* ever came to the latter's attention, or further that the purported cancellation letter was properly served, they (applicants) were obliged to seek a declaratory order from the Court that the contract was properly cancelled.

4.15 He further submitted that since there was no breach by the first respondent, and therefore no valid cancellation by the applicants, the sale agreement he had entered into with the first respondent remained in full force and effect, and the occupation of the property was unlawful.

Evaluation:

[5] As a starting point, it ought to be reiterated that it is not in dispute that as at the bringing of this application, the ownership of the property remained in the hands of the applicants. Since the transfer of ownership from the applicants to the first respondent did not take place in the light of absence of the registration of the deed of transfer, two legal points were raised on behalf of the applicants, which were said to be dispositive of the matter in their favour. The issues pertain to the validity, lawfulness and/or enforceability of the sale

agreement between the applicants and the first respondent. It follows that any answer to these questions will be determinative of the second respondents' rights to occupy the disputed property and the validity of the sale agreement with the first respondent.

[6] As a starting point, in *Legator McKenna INC and Another v Shea and Others*[3] and other subsequent authorities, it has since been confirmed that the legal position is that the abstract theory rather than a causal system, is applicable when it comes to the transfer of both moveable and immoveable property. In accordance with the abstract theory, two essential requirements were necessary for the valid passing of ownership, namely, delivery which in the case of immoveable property, is effected by registration in the relevant deeds office. The second requirement is the so-called 'real agreement', the essential elements of which are an intention on the part of the transferor to transfer ownership of the property to the transferee, and the intention of the transferee to acquire ownership of that property from the transferor. In all instances both of these requirements must be complied with for ownership to pass. Ownership will, however, not pass if there was a defect in the real agreement serving as the underlying cause of the transfer[4].

[7] In the light of the above legal approach, there is therefore merit in the applicants' contention that without the property in question having been transferred to the first respondent and registered in the deeds registry, the first leg of the enquiry (*i.e.*, transfer of ownership) was not met, and that accordingly, the first respondent cannot claim ownership of the property. This was notwithstanding the fact that the first respondent had complied with his obligations in regards to the purchase price and subsequently took occupation of the property.

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[3] [2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA) at paras 20 – 22.

[4] See also *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369; *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA); *Malan v Die Gerhard Labuschagne Familie Trust & Another* (Case no 44/2021) [2021] ZASCA 171 (9 December 2021) at para 13; *Strohmenger v Victor* [2022] ZASCA 45 (8 April 2022) at para [21] where it was held that;

> "It is now settled that abstract theory applies to the passing of ownership of property. The theory postulates two requirements for the passing of ownership, namely delivery which in the case of immovable property is effected by registration of transfer in the deeds office coupled with the so-called real agreement. Brand JA in *Legator McKenna Inc and Another v Shea and Others* explained that:
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> > 'The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. . . Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement. . . .'"

[8] This therefore implies that for the purposes of the transaction between the first respondent and Mbizvo, the former could not have transferred more rights than he actually had, since the property in question legally remained in the lawful ownership of the applicants[5]. In essence, in the absence of transfer and registration, what the first respondent acquired was not a real right in the disputed property, but instead, a personal right against the applicants to demand transfer of the disputed property.

[9] This therefore entailed that although Mbizvo was a *bona fide* purchaser, he nonetheless entered into a sale agreement with the first respondent, fully knowing that the property had not been transferred or registered in the latter's name. Mbizvo therefore cannot lay claim to the property since the seller (first respondent) never became the owner of the property and subsequently could not have passed ownership to him, thus making the sale agreement between the two *void ab initio*.

[10] The Court accepts that notwithstanding the above conclusions, there can be no doubt that to the extent that the first respondent paid the purchase price, and further since the applicants had on no less than two occasions signed the necessary transfer documents, it ought to be concluded that indeed there was an intention on the part of the transferor (applicants) to transfer ownership, and the intention of the transferee (first respondent) to become the owner of the property.

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[5] See *Knox NO v Mofokeng and Another [*2012] ZAGPJHC 23; 2013 (4) 46 (GSJ) *('Knox'); ABSA Bank Ltd v Van Eeden and Others* 2011 (4) SA 430 (GSJ) at para 19, where it was held that;

> "The principles of the common-law pertaining to the abstract theory for the passing of ownership have been stated as follows by Brand JA in *Legator McKenna Inc v Shea* (above) at paragraph 22 (and referred to with approval by Shongwe JA in *Meintjes NO v Coetzer* (above) at paragraph 8):
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> > *"In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. … Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement.*
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> This implies that the transferor must be legally competent to transfer the property, the transferee must be legally competent to acquire the property and that the golden rule of the law of property that no one can transfer more rights than he himself has also apply to the real agreement. See Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman's the Law of Property 73".

[11] As already indicated elsewhere in this judgment, the first respondents and the applicants sought to blame each other for the failure to transfer and register the property timeously since the conclusion of the initial agreements in November 2011. The issue arises to the extent that it was Mbizvo's contention that the applicants were not entitled to cancel the sale agreement since they could not prove that a letter was sent to the first applicant, placing him in *mora,* or that such a letter ever came to his attention.

[12] In *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others*[6] (*Crookes*), it was held that;

> "[17] The term *mora* simply means delay or default. When the contract fixes the time for performance, *mora* (*mora ex re*) arises from the contract itself and no demand (*interpellatio*) is necessary to place the debtor in *mora*. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (*interpellatio*) becomes necessary to put the debtor in *mora*. This is referred to as *mora ex persona*. (See *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) paras 11 & 12.) The purpose of *mora* interest is therefore to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking. Here a demand (*interpellatio*) was necessary to place the respondents in *mora*."

[13] Inasmuch as it is appreciated that the facts of this case are distinguishable from those in *Crookes,* the issue remains in this case that the applicants had notwithstanding the extensive delays in having the property transferred and registered, on no less than two occasions signed the necessary transfer documents. Yet despite a demand by the applicants to the first respondent to have the property registered as late as 11 June 2020, this had not been done.

[14] It appears from the facts that the first respondent showed little interest in this matter despite his contractual arrangements with the applicants being central to this dispute. Other than deposing to the confirmatory affidavit in support of Mbivzo, the first respondent chose to be a spectator, and has not proffered his own version of events as to his inaction after the sale agreement was concluded in November 2011, let alone after his sale agreement with Mbivzo in December 2018. The first respondent has also not explained his inaction after the letter of demand of 12 June 2020 to have the property registered was

[6] (590/2011) [2012] ZASCA 128; 2013 (2) SA 259 (SCA); [2013] 2 All SA 1 (SCA).

sent to him, let alone after the cancellation letter of 5 July 2021. Mbivzo could only proffer his version of events insofar as he had sought to vindicate his rights to the property following his sale agreement with the first respondent.

[15] It is in the light of the inaction pointed out that I am in agreement with the submissions made on behalf of the applicants that clearly the first respondent ought not to have been simply contend with merely having paid the purchase price and subsequently entering into a further sale of agreement with Mbivzo without more. At most, and as properly submitted on behalf of the applicants, and to the extent that there was an insistence that the obligation was on the applicants, the first respondent ought to have made demands or instituted legal action to compel compliance in order for the property to be transferred and registered. It is therefore not sufficient for the respondents to complain that the applicants did not want to sign the transfer documents. More was required of the first respondent.

[16] The above conclusions finds equal application in regards to Mbivzo. Thus, having complied with his obligations under the sale agreement with the first respondent, and having taken occupation of the property, it was not sufficient for him to simply aver that the applicant were obstructive and uncooperative with having the property registered. He could easily have made demands to the first respondent, and there is no discernible evidence that he had done so or done anything to protect his rights to the property as against the first respondent. The mere fact that since December 2018 his attorneys of record had sent correspondence to the applicants' attorneys and the transferring attorneys is not in my view sufficient. More ought to have been done given the protracted period since the initial sale agreement.

[17] A further legal hurdle raised on behalf of the applicants in the supplementary heads of argument related to the provisions of section 3 (e)(*i*) of the Subdivision of Agricultural Land[7] Act, ("the SALA Act"). These prohibit the sale

[7] No 70 of 1970. Section 3 provides;

'3 Prohibition of certain actions regarding agricultural land

Subject to the provisions of section 2 –

(a) agricultural land shall not be subdivided;

(b) no undivided share in agricultural land not already held by any person, shall vest in any person;

(c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;

(d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by

of a portion of agricultural land as defined unless the Minister of Agriculture has consented in writing to the sale. It is trite that such a sale without the Minister's prior written consent is *void ab initio*[8].

[18] The property being an agricultural holding, Annexures "CN2" and 'CN3" to the founding affidavit indicates that its subdivision was approved by the Municipality (The Third Respondent). The applicants however contend that even if there was an approval of the subdivision by the Municipality, there is no evidence to suggest that the subdivision was registered in any event, nor was it in dispute that Ministerial consent was not obtained. To this end, I agree that by virtue of the prohibition in section 3(e)(*i*) of the SALA Act, the sale agreement between the applicants and the first respondent could not have been valid and enforceable.

[19] It follows in the light of the conclusions reached in paragraph 14 above, that any arguments surrounding the delays in the registration of the sub-division allegedly caused by the applicants do not assist the respondents' case, in similar fashion as were the allegations in regards to the delays in registering and transferring the property after the initial sale agreement.

[20] Equally so, and to the extent that the issue became moot once the sale agreement between the applicants and the first respondent was invalid for reasons already pointed out, the fact that the cancellation is sought without a tender of a refund to the first respondent is not an issue that the Court ought to even consider. This is further so since various remedies remain available to the first respondent against the applicants as much as they are available to

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the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into;

(e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act 27 of 1956); and

(ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956;

(f) no area of jurisdiction, local area, development area, per-urban area of other area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in Section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;

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unless the Minister has consented in writing."

[8] See *Geue & Another v Van der Lith & Another* 2004 (3) SA 333 (SCA); *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC and another* [2015] ZASCA 121; 2016 (1) SA 257 (SCA).

Mbivzo against the first respondent, to the extent that they complained of any prejudice suffered as a result of entering into the sale agreements.[9]

[21] The above conclusions in the light of the invalid nature of the original sale agreement equally apply to the further argument raised on behalf of Mbizvo, that the applicants failed to prove that the provisions of the cancellation clause have been strictly complied with. Be that as it may, the applicants correctly submitted in reference to *Telcordia Technologies Inc v Telkom SA Ltd*[10], that it is trite law that if a party is entitled to cancel, the notice of cancellation of an incorrect ground or of one particular ground does not preclude the party from relying on other grounds if they in fact existed at the time of the cancellation. To this end, I agree that to the extent that the sale agreement between the applicants and the first respondent was invalid in view of the provisions of section 3(e)(*i*) of the SALA Act, nothing precluded the applicants from obtaining an ejectment order against the respondents and reclaiming possession of the property with the *rei vidicatio*. It is equally not necessary for the Court to determine whether the applicants failed to prove that the letter of cancellation was properly served on the first respondent.

[22] In the light of the above conclusions, and further to the extent that it was common cause that the disputed property is merely utilised for renting out as a storage facility, any occupation thereof is without any rights, and the applicants are entitled to the relief that they seek.

[23] In regards to costs, the normal approach is that costs should follow the results. As already indicated, the first respondent did not formally oppose the application other than to file a confirmatory affidavit. I have already also

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[9] See *Knox* at para 30.

[10] [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) at para 166, where it was held;

> "In any event Telkom's argument is unsound in law. Telkom prayed in aid the *falsa causa non nocet* principle laid down in cases such as *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] ZASCA 82; 2001 (2) 284 (SCA). Those cases hold that: 'Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given'. But this principle has no application in a case such as the present, where it is the other party who has cancelled the contract. In such a case, the party who repudiated cannot put the clock back and undo the valid cancellation by relying on a ground that he legitimately could have, but did not, advance, in substitution for the ground that he did advance and which resulted in the cancellation of the contract. Once cancelled, the contract is irrevocably at an end. The rule exists for the protection of an innocent party and does not enure to the benefit of a party guilty of a breach of contract: it does not entitle the latter to claim that, since it could have done something similar without breaching the contract, its breach had no adverse legal consequences."

indicated that Mbivzo, despite entering into the sale agreement with the first respondent knowing that the property was not transferred or registered in the latter's name, is nonetheless a *bona fide* purchaser, and I have already alluded to his recourse against the first respondent should he so wish. In the end however, and without commenting much on whether the applicants approached the Court with clean hands or not, I am of the view that to mulct Mbivzo with costs would not be appropriate and therefore, each party must be burdened with its own costs.

[24] Accordingly, the following order is made;

Order:

1. The late filing of the Second Respondent's answering affidavit is condoned.
2. The Respondents and all parties occupying the property known as 98 Grant Street, Lilyvale A. H. Benoni, Gauteng, more fully described as: Portion 407 (A portion of portion 406) of the Farm Putfontein 26, Registration Division IR, Local Authority Benoni TLC, Gauteng ("the Premises"), are to within 30 days from the date of this order, be evicted from the said premises.
3. Should there be a need, the Sheriff is authorised and required to carry out the eviction order referred to in paragraph 2 above, by removing from the Premises, the Respondents and all persons who occupy the property by, through or under it.
4. Each party is to pay its own costs.

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Edwin Tlhotlhalemaje
Acting Judge of the High Court
Gauteng Local Division

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 11 April 2023.

Heard: 25 January 2022 (Via Microsoft Teams)

Delivered: 11 April 2023.

APPEARANCES:

For the First – Second Applicants:	Adv. V. Vergano, instructed by Casper Le Roux Incorporated
For the Second Respondent:	Adv. L. Norman, instructed by Diemieniet Attorneys