

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

**Case No: 80013/2018
Case No: 24993/2019
Case No: 8757/2019**

Reportable: No
Of interest to other Judges: No
Revised: No

SIGNATURE

Date: 12 April 2024

In the matter between:

ETIENNE PETER SWANEPOEL

Applicant

and

L[...] K[...] K[...]

First Respondent

M[...] L[...] K[...]

Second Respondent

JUDGEMENT - APPLICATION FOR LEAVE TO APPEAL

MOOKI J

1 The respondents seek leave to appeal orders made in favour of the applicant. This arises out of several related applications by the applicant that were later consolidated.

2 The court ordered that the deed of sale between the applicant and the respondents be rectified. The court further ordered specific performance in favour of the applicant.

3 Ms Sono, counsel for the respondents, argued the following as constituting the bases for the application for leave to appeal:

3.1 The court erred in refusing to grant the respondents a postponement, in that that refusal amounted to a refusal to allow legal representation for the respondents, in breach of the respondents' rights in section 34 of the Constitution.

3.2 The contract in terms of which the court granted rectification was invalid, with the result that the court could not grant rectification.

3.3 The respondents had no opportunity to file an answer to the consolidation application, which the respondents opposed.

3.4 The court erred in granting specific performance in that the contract was invalid, the property belonged to a bank, and the respondents could not render specific performance.

4 The respondents did not seek reasons before launching the application for leave to appeal. This necessitates a longer than usual judgement in an application for leave to appeal, for setting out the court's reasoning in refusing the postponement and granting the orders in favour of the applicant.

5 The respondents are married in community of property. They are joint owners of the property that form the subject-matter of the deed of sale. Standard Bank ("the Bank") had a bond registered over the property. The respondents defaulted on their obligations to the Bank, which then put measures to have the property sold on auction.

6 The applicant, accompanied by Mariaan Kuyper, met the respondents whom they presented with an offer to purchase. The offer to purchase described the property as "Erf [...], Lynnwood...." The respondents pointed out that the description of the property was incorrect; in that they only owned the remaining extent of the property, not the whole property. The respondents then initialed each page and signed on pages 7 and 9. The respondents signed below the words "AS WITNESS." Kuyper signed as a witness, appending her signature above the words "SPOUSE/CO-SELLER" on pages 7 and 9

7 Kuyper, later in the day and in the absence of the respondents, added the letters "RE" in the paragraph describing the property. The proper description of the property is the "Remaining Extent (RE) of Erf [...], Lynnwood, ...". Kuyper also deleted clause 6 to the signed offer to purchase.

8 The deed of sale was conditional. The applicant had to obtain a loan in the specified amount by 25 October 2017 from a bank or building society. The further condition was that Standard Bank had to accept the applicant's offer.

9 The applicant chose not to obtain a loan. He paid cash, transferring funds into the trust account of the transferring attorney. Standard Bank accepted the applicant's offer.

10 The respondents refused to sign documents to effect the transfer of the property to the applicant. The respondents continue to reside on the property. The applicant then brought an application under case number 80013/2018, to oblige respondents to sign all documents to effect transfer of the property into the name of

the applicant. The respondents opposed the relief sought in case number 80013/2018.

11 The respondents raised several objections, including that they did not own the property, that the document relied upon by the applicant did not reflect the true intention of the parties, that the offer to purchase was subject to conditions. They also pointed out that clause 6 had been cancelled. The respondents also raised issues with the description of the property.

12 The applicant dealt with the objections by the respondents, pointing out, for example, that Standard Bank had accepted his offer, that the property was transferred into the name of the respondents on 26 April 2012, that the offer to purchase was in relation to “ERF NR:[...], AREA:LYNNWOOD,” with the words “Remaining Extent” being omitted in the deed of sale. The applicant pointed out that the description of the property would be addressed in a rectification application. The applicant also pointed out that the property was nonetheless identifiable in the deed of sale.

13 The applicant brought a rectification application under case number 24993/2019. The application was essentially to record a formal description of the property in the deed of sale, by changing the description of the property from “Erf [...], Lynnwood”, to “Remaining Extent of Erf [...], Lynnwood township, [...]”.

14 The respondents opposed the application. They raised various objections, including denying signing a contract with the applicant. They also contended that rectification could only be sought by way of action proceedings.

15 The applicant brought a further rectification application under case number 8757/2019. This was to rectify page 7 of the contract, by replacing “AS WITNESS” with “SELLERS”, changing “SPOUSE/CO-SELLER to “WITNESS.” The respondents did not file an answering affidavit.

16 The applicant then brought an application under case number 8757/2020 to consolidate the various applications. The respondents opposed the consolidation, including on the basis that the consolidation would oblige the court to entertain disputed facts.

17 The applications came before the court on 11 August 2023. The respondents sought a postponement, which the applicant opposed.

18 Mr Kawuta Sijako, the attorney for the respondents, deposed to the affidavit in support of the postponement. He justified the postponement essentially on the ground that he was newly instructed to represent the respondents and, for that reason, he required time to familiarise himself with the papers, to better advise the respondents. Mr Sijako also mentioned that the respondents were not ready for the hearing because they did not believe that the matter would proceed. That was because, according to Mr Sijako, the applicant’s previous attorneys did not prosecute his applications.

19 Mr Sijako was briefed on 1 August 2023 to represent the respondents. The postponement application was made on 4 August 2023. The hearing was scheduled for the week of 7 August 2023. The matter was allocated for and heard on 11 August 2023.

20 The applicant opposed the postponement, referencing the following as part of the bases for opposing the postponement.

21 The applicant’s previous attorneys wrote to the respondents’ then attorney on 5 October 2022, stating that there had been several amendments to the matter. The applicant, on 27 January 2023, asked the respondents to furnish a date for a pre-hearing meeting. There was no response. The applicant thereafter served the respondents’ previous attorney with, among other things, the applicant’s submissions and a consolidated index. The respondents ignored the Practice Manual on the filing of heads.

22 The applicant launched an application to compel the respondents to file their heads. Standard Bank put pressure on the applicant. The applicant thereafter sought

an audience with the Deputy Judge President. The meeting was on 13 June 2023. The respondents were invited to the meeting but chose not to attend. The Deputy Judge President directed that the matter be set down for the week of 7 August 2023.

23 The respondents' attorneys were served with the notice of set-down on 21 June 2023. The sheriff served the notice personally on the respondents on 23 June 2023. The respondents did not respond to the service of the set-down.

24 The applicant pointed out, in opposing the postponement, that the respondents instructed a new attorney less than a week before the hearing and that the respondents did not seek a postponement at the first possible opportunity. The respondents were aware of the date for the hearing at least 5 months before the postponement application.

25 The applicant also contended that respondents were not bona fide in their application, and that the postponement was to allow them to remain on the premises for as long as they could, without paying a cent. The applicant also contended that the respondents had no prospects of success on the merits.

26 I refused the postponement. Litigants are entitled to expeditious resolution of disputes. The first application was made in 2018. The respondents knew for months that the matter was set-down for the week of 7 August 2023. There was no credible basis to respondents instructing a new attorney on the eve of the hearing. It bears pointing out that the respondents did not file confirmatory affidavits in the postponement application. This renders averments pertaining to them inadmissible hearsay. The replying affidavit did not even address the substance of the points made in the answering affidavit, including that the respondents refused an invitation for a pre-hearing, declined to attend a meeting with the Deputy Judge President, and that the respondents were served personally with the notice of the set-down for the hearing. The respondents were not denied a right to legal representation.

27 The respondents' opposition to the relief on the merits had no substance. The respondents owned the property that is the subject of the offer to purchase. The fact that Standard Bank had a mortgage on the property, or that the property was to be sold in execution, does not render Standard Bank the owner of the property. Ownership of immovable property is as reflected in a title deed:

'In the case of immovables, however, ownership in the attached property can not pass during the sale in execution. It only passes subsequently upon formal transfer of the property by the deputy sheriff to the purchaser in execution.¹

28 The immovable property was misdescribed. The respondents had no basis to oppose the application to effect the correct formal description of the property, which would make the description in the deed of sale consonant with the title deed. Similarly, the respondents' refusal to agree that the deed be rectified because people signed on the wrong place was wholly unmeritorious.

29 It made sense to consolidate the various applications. They dealt with substantially the same subject matter. There would have been a waste of funds in having the parties litigating in three separate applications. There would equally have been a waste of judicial resources in having three different courts consider the separate applications.

30 There was substance to the applicant's complaint that the respondents' opposition was not made in good faith. The applicant met the conditions in the deed of sale and met all his obligations. He was entitled to relief.

31 I am not persuaded that another court will differ from this court on the facts and the law in relation to this court having granted the orders in favour of the applicant. I therefore decline leave to appeal.

32 I make the following order:

(a) The application for leave to appeal is dismissed.

¹ *Simpson v Klein NO & others* 1987 (1) SA 405 (W), at 411C. Referred to with approval in *Firststrand Bank Ltd v Nkata* (213/14) [2015] ZASCA 44 (26 March 2015), at para 25

(b) The respondents, jointly and severally, the one paying to be absolved, are ordered to pay costs.
Omphemetse Mooki

Judge of the High Court

Heard: 8 April 2024
Delivered: 12 April 2024

For the applicant (respondent in the application for leave to appeal): W Gibbs
Instructed by: Payne Steynberg Inc.

For the respondents (applicants in the application for leave to appeal): M M Sono
Instructed by: T I Mothoa Attorneys