

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 Number: 38707/2020

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

2024

In the matters between: -

AB STEPHEN PHETEDI MOTSEO

FIRST APPLICANT

ROSSIE THLAISHEGO MOTSEO

SECOND APPLICANT

and

LUCY MAKHADA MONAMA N.O.

FIRST RESPONDENT

LUCY MAKHADA MONAMA

SECOND RESPONDENT

NEDBANK LTD

THIRD RESPONDENT

REGISTRAR OF DEEDS

FOURTH RESPONDENT

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

FIFTH RESPONDENT

JUDGMENT

BAQWA, J

Introduction

[1] The application seeks an order:

1.1 Barring the first and second respondents from demanding or threatening the applicants to vacate Erf [...] Doornpoort Extension 34 Township Registration Division JR and also known as [...] Opium Street, Doornpoort.

1.2 That third respondent be ordered not to approve any further loan application by first and second respondent in relation to bond account number [...] which is registered under their names.

1.3 That fourth respondent be ordered to endorse the Title Deed and/or his records for the property Erf [...] Doornpoort Extension 34 Township Registration Division J.R and also known as [...] Opium Street, Doornpoort in favour of applicants to bar first and second respondent from selling the said property to third parties.

1.4 That first and second respondents be ordered to sign all the documents necessary to effect transfer of the property known as Erf [...] Doornpoort Extension 34 Township Registration Division J.R and also known as [...] Opium Street, Doornpoort in terms of the Home Exchange Agreement concluded with applicants.

1.5 That the immovable Erf [...] Doornpoort Extension 34 Township Registration Division J.R also known as [...] Opium Street, Doornpoort be transferred into the names of the applicants once the bond with the respondent is fully settled.

2. That in the event first and second respondents failed or refused to comply with the order in paragraph 1 above, the sheriff be and hereby authorised to sign the transfer documents.

3. Ordering first and second respondent to pay costs of this application on attorney and client scale and any other party who opposes this application to pay the applicants' costs on the same scale.

[2] The application is opposed by the first and second respondents who have also filed a counterclaim.

[3] It has also transpired that the first respondent has since the institution of this application passed away. Any reference to the first respondent in this judgment must be understood to refer to his deceased estate.

The Facts

[4] The applicants resided at [...] Kapa and Mogwane Street Ext [...], Mamelodi East when the first applicant was introduced by his wife, the second applicant to the first and second respondents. They became family friends through the church which they attended together.

- [5] Their relationship grew and they got to share lives as Christians who would help each other and pray together. It was during this period that the applicants found out that the first and second respondents purchased a property through a mortgage bond with the third respondent.
- [6] The property which is the subject of this litigation was registered into their names on 7 May 1998 at the Deeds office Pretoria. The mortgage bond was registered in favour of the third respondent with a subsequent loan agreement which increased the mortgage bond amount to over R323 000. 00.
- [7] First and second respondent could not keep up with the payment of monthly instalments resulting in them being in arrears and they made the applicants aware of their difficulty. They showed them a copy of the letter of demand from attorney Hack Stupel and Ross which showed an outstanding balance in the amount R 37 755.60 with a monthly instalment of R3639.14.
- [8] Summons were subsequently issued against them requiring them to settle the balance outstanding not later than 31 August 2013.
- [9] First and second respondents proposed to the applicants that it would be better if they exchange houses with each other seeing that the applicants were both employed and could afford to service the bond. This proposal followed lengthy discussions and liberations.
- [10] After careful consideration with regard to financial affordability the applicants agreed to take over the bond and to exchange their houses on condition that the applicants would settle the arrears with the attorneys. The first and second

respondent would get someone with a legal background to draft a home exchange agreement to be signed by both parties in order to formalize the agreement.

[11] On 12 November 2013 the applicants paid the amount of R37 755.60 before the exchange agreement was signed to avoid the property being repossessed by the third respondent.

[12] On 16 November 2013 and at Mamelodi the first and second respondent co-signed the Home Exchange Agreement and on 21 November 20213 and at Doornpoort the applicants co-signed the Home Exchange Agreement.

[13] A principle of co-operation included in the agreement was that the parties would respect the democratic and co-operative principles, good governance and the observation of government's overriding authority and that the rule of law would form the basis for cooperation between the parties and constitute an essential element of the agreement.

[14] The agreement provided for the transfer of ownership as follows:

"7. Transfer of Owership

7.1 On a before the exchange periods in December 2018, the Monama family shall take ownership of the second property and the Motseo family shall take ownership of the first property, provided the outstanding bond amount on the first property had been paid in full as stipulated in clause 6.3.2 supra.

7.2 The parties shall be responsible for the costs associated with the transfer of ownership for each property.

7.3 Ownership of the second property will automatically transfer to the Monama family without the formal process of registering the new owner and name change on the title deed with the Deeds Office”

[15] Termination of the agreement was provided for in clause 8 as follows:

“8. Termination of agreement

8.1 Either party may terminate this agreement by giving to the other no less than two calendar months’ written [notice] of termination.

8.2 Notwithstanding any term of agreement, should the parties decide to return to their legally owned properties any amount paid in relation to the settlement of the bond amount, maintenance of the used properties shall be reimbursed by the user to the home of the affected property.”

[16] More specifically clause 9.5 of the agreement provides that should:

“9.5 The Monama family breach the agreement, they will have to reimburse the Motseo family for bond amount paid over the property.”

[17] The applicants continued to pay the instalments after signing of the agreement and on 19 August 2014 they signed a stop order to pay R5000.00 per month which was meant to accelerate the reduction of the remaining bond amount.

[18] During August 2015 first and second respondent decided to vacate the second property and wanted to move into the first property. They abandoned the second property which resulted in it being vandalized.

[19] On 31 August the applicants received an undated letter from the first and second respondent alleging breach by the applicants in that they failed to disclose continued electricity interruptions/power failures and service delivery protects in the Mamelodi area. They demanded that applicants return to the second property and that they return to the first property as per paragraph 8.2 of the agreement giving them seven (7) days to respond.

[20] Following the receipt of the letter attempts were made to address the disputes through mediation, negotiations and consultations. These were all in vain partly due to the first and second respondents wanting to terminate the agreement without complying with the provisions of the agreement as they refused any suggestions to reimburse the applicants for monies expended to save the property from being repossessed by the third respondent.

[21] During 2014 applicants did home renovations and improvements to the first property by installation of a kitchen, construction of a fence and paving the yard as well as the general upkeep to the tune of over R100 000.00.

[22] In terms of the agreement the applicants submit that they are entitled to have ownership of the first property transferred to them and that first and second respondents are obliged to sign transfer of ownership documents as they have settled the outstanding bond amount of the first property.

Law

[23] The basis of the application is that the first and second respondents are the parties in breach of the agreement. They are the ones terminating the agreement based on their own breach.

[24] A sale agreement relating to immovable property is not an ordinary contract in which parties can freely regulate the terms of their agreement as they wish. It is a contract regulated by statute, more specifically the Alienation of Land Act (the Act). See *Geyer and Another v McGregor*.¹

[25] The above case reference further deals with a point raised by the first and second respondent that the signed agreement violates the Alienation of Land Act. Even though the agreement is not a sales contract in the sense where there is a clearly stated price and object of sale (the land) it complies with the requirements of the Act in that it is a written contract which regulates and limits the rights of parties to act against each other as it is a reciprocal agreement which creates rights and obligations for all the parties.

[26] In the matter of *Mia v Verimark Holdings (Pty) Ltd*² it was held

“The conclusion of a contract subject to a suspensive condition creates a ‘very real and definitive contractual relationship ‘between the parties. Pending fulfilment of the suspensive condition the eighble content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its

¹ (unreported decision no:2708/2014[2014] ZAECPEHC 78 heard on 10 October 2014 para 24.)

² (unreported under case number 522/08[2009] ZASCA 99 heard on 18 September 2009).

terms.”

[27] In the home exchange agreement the amount payable by the applicants was specified together with the expected time of settlement of the bond. The agreement between the parties was based on the common understanding between the parties that the bond over the property was for 20 years from 1998. They approximated the end date as December 2018.

[28] In the unreported matter of *Nkengana and Another v Schnettler and Another*³ the court held that it is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, performance of that other party's obligations in terms of the contract.

Analysis

[29] It has not been disputed that the applicant paid off the bond on 22 April 2021, which is the fulfilment of the suspensive condition for the transfer of ownership. First and second respondents have failed to make any offer in compliance with clause 8.2 of the agreement.

[30] In *Jooma and Another v Sekgetho and Another*⁴ the court summarised the issue of sale of land as follows: no sale of land will be of any force and effect unless it is contained in a written deed of alienation signed by the parties or by their agents acting under their written authority.

³ (65/07) [2010] ZASCA 64; [2011] 1 ALL SA 272 (SCA) (7 May 2010).

⁴ [2019] ZAGPJHC 184 unreported case heard on 28 June 2019, see para 14 to 17 of judgment.

[31] In paragraph 15 the court stated that the agreement between the parties had been in writing and signed by the parties and accordingly complied with the Act. The parties to the sale were identified as well as the immovable property subject to the sale and the purchase price. The sale agreement had similarly been validly concluded in the present case and the first and second respondents had not put up any facts that would lead to a different conclusion.

[32] In *Jooma (supra)* the court stated that the applicants had alleged and proved the terms of the contract. They had complied with their reciprocal obligation and the respondent had refused to perform in terms of the contract. Similarly, the applicants had requested the first and second respondent to repay them the monies they had expended to save the property from being sold in execution. The respondents had refused to recompense the applicants and this was in breach of the agreement.

[33] In paragraph 17 of *Jooma* the court stated that the first respondent was clearly in breach of the contract and that an injured party to a contract who has performed his obligation has a right to demand performance of the other contracting party's obligations and that a court will, as far as possible, give effect to the applicant's choice to claim specific performance.

[34] The facts in *Jooma's* case mirror the facts in the present application and it ought not to be treated differently.

[35] The court in *Jooma* went on to quote *Farmer's Society (Reg) V Berry* where Innes JA stated thus "prima facie every party to a binding agreement who is ready to carry out his obligation under it has a right to demand from the other

party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze C.J, in *Thomason vs Pullinger* (1 O.R, at p301) “the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt.” It is true that courts will exercise discretion in determining whether or not decree of specific performance should be made.....”

[36] The applicants are the aggrieved parties. In *Tamryn Manor v Stand 1192 Johannesburg*⁵ the court ruled that *ex facie* the written agreement, all the statutory requirements set out in section 2(1) of the Alienation of Land Act had been met and that the agreement was formally valid.

[37] In *Legator Mckenna Inc & Another v Shea & Others*⁶ Brand JA writing for the court referred to what he termed as a ‘real agreement’ which he explained as follows ‘the essential elements of the real agreement are an intention on the part of the transferor’ to transfer ownership and intention on the part of the transferee to become the owner of the property.

[38] Essentially the home-exchange was two agreements between the same parties involving the first property which is the subject of this application and the second property which was due for transfer to the respondents.

[39] The agreement was a contract of sale as defined in the Alienation of Land Act. It was a consensual agreement through which one of the contracting parties (the seller) bound itself to the other (the buyer) to exchange a thing for a definite sum of money (the price) which the buyer promised to pay to the seller.

⁵ [2016] ZASCA 147 unreported case heard on 30 September 2016.

⁶ 2014 SA 96 (SCA).

[40] It is trite that the essentials of a contract are the merx, the price and the obligation of the seller to deliver the merx to the buyer.

[41] It is true that in the present case parties entered into a home exchange agreement with the intention of transferring ownership to each other of their respective properties. The contract was written and complies with the Act. What also needs to be noted was that the two properties were subjected to two different suspensive conditions. Those conditions were fulfilled with regard to the first property and the applicants could not be deprived of what they were legally entitled to.

[42] The submission that the agreement is either voidable or rescindable in terms of the Alienation of Land Act or the Housing Act is legally not sustainable.

The Counterclaim

[43] The fact of the matter is that in these proceedings there is no material dispute of fact between the parties other than excuses which the respondents put forth to try and avoid their obligations arising out of the Home Exchange Agreement. It is mainly legal considerations that are at issue.

[44] The following facts are common cause between parties:

44.1 A home Exchange Agreement was concluded between the parties and this created reciprocal rights and duties between the parties.

44.2 The applicants paid the arrears owing in respect of the bond registered in the names of the first and second respondents and continued to pay the

bond until its settlement.

44.3 The bond was first registered on 7 May 1998 for a 20 years' period.

44.4 The first and second respondents vacated the second property before a termination notice was sent to the applicants in terms of the agreement.

44.5 The parties attempted to resolve the issues arising out of the vacation of the second property through mediation which was not successful.

44.6 The first and second respondents refused or failed to offer any reimbursements of the money paid by the applicants towards the bond and improvements on the first property.

44.7 The first and second respondents informed the applicants that they are selling the first property despite the disputed termination of the agreement.

44.8 The dispute regarding the termination of the agreement remains unresolved.

[45] Instead of opposing the main application with a clear and concise answering affidavit which contradicts the averment in the founding affidavit, they chose to file a counter application alleging a dispute of fact without any basis.

[46] *The Plascon- evans Rule*⁷ holds that when factual disputes arise in circumstances where the applicant seeks final relief, the relief ought to be

⁷ [1984] (3) SA 623 A.

granted in favour of the applicant if the facts alleged by the respondent in its answering affidavit, with the facts it has admitted to, justify the order prayed for . Conversely the court can make a determination on disputed facts in application proceedings without having to hear oral evidence and on the respondent's written version of events.

[47] In this context any denial by the first and second respondent of factual allegations by the applicants in their founding and replying affidavit must be real, genuine and bona fide before it can be considered prohibitive to the applicants being accorded final relief in the main application.

[48] In *Islamn v Kabir*⁸ the court held that

“when in application proceedings there is a dispute of fact which has to be resolved on the papers and on the basis of the principle enunciated in the Plascon- Evans points matter, the court can only reject the version of the respondent if the absence of bona fides is abundantly beyond question”.

Counsel for the applicants submits, and I accept that the denials of the first and second respondents in opposing the main application by counter application are so far-fetched and so clearly untenable that this court would be justified in rejecting them merely on the papers and without the hearing of oral evidence.

[49] I find that there are sufficient and satisfactory averments made by the applicants

⁸ CA: 280/2010 [2011] ZAECG 9 (11 April 2011) .

and there is sufficient clarity regarding the issues to be resolved for the court to make the order prayed for in the notice of motion.

Declaratory Order

[50] In their counterclaim the first and second respondent are seeking a declaratory order. In *Rank Commuters Action Group v Transnet Ltd t/a Metrorail*⁹ the Constitutional Court stated that

“It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our constitution and its values. Declaratory orders of course, may be accompanied by other forms of relief, such as mandatory orders or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to a declarator, a court will consider all relevant circumstances.”

[51] In this application the first and second respondents have singularly failed to set out any factual or legal any basis for the court to grant relief in the form of a declaratory order.

Eviction

[52] The first and second respondents also seek to evict the applicants from the first

⁹ 2005 (2) SA 359 (CC).

property. They base their cause of action on being the “lawful owners” of the property and in total disregard of the Home Exchange Agreement and the duties and legal obligation arising therefrom.

[53] Under oath, they totally misrepresent the true facts contained in the Home Exchange Agreement in a manner that can only be described as an attempt to mislead the court. They failed to honour the provisions of the Home Exchange Agreement thereby taking away their rights to claim eviction.

[54] A person may be evicted from a property if he/she is considered to be an unlawful occupier. An unlawful occupier is a person who stays on a property without the consent of the landlord or owner; or stays on a property without having any right in law to do so; or is not considered to be an occupier in terms of any law.

[55] In light of the above the applicants cannot be said to be unlawful occupiers. They occupy the first property in terms of the Home Exchange Agreement and they have paid and settled the bond of the property for them to occupy same.

[56] In determining whether or not to grant an eviction order, the court must exercise a discretion based on what is just and equitable. *Bekker and Another v Jika*.¹⁰

[57] The first and second respondent seek to evict the applicants and benefit from property they never paid for. The applicants on the other hand, if evicted would suffer irreparable harm in that they are unlikely to recover the money expended in settling the bond for the first property. It is argued and I accept that it would

¹⁰ 2004 (1) SA 348 (A) para 18.

not be just and equitable to evict them in those circumstances. Moreover, the first and second respondents have not complied with the requirements of section 4 of The Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (the PIE Act).

[58] Both parties filed papers out of time even though the applicants had asked for the indulgence before time. In the circumstances condonation ought to be granted with no order as to costs in respect of both applicants and respondents.

[59] In light of the above, I make the following order;

1. The first and second respondents are barred from demanding or threatening or harassing the applicant to vacate the property ERF [...] Doornpoort Extension 34 Township Registration Division J.R and also known as [...] Opium Street, Doornpoort with immediate effect upon receipt of this order.
2. The third respondent is ordered not to approve any further loan applications by first and second respondents in relation to bond account number [...] which is registered under their names.
3. The fourth respondent is ordered to endorse the Title Deed and/ or its records for the property Erf [...] Doornpoort Extension 34 Township Registration Division J.R and also known as [...] Opium Street, Doornpoort in favour of the applicants and to bar first and second respondent from selling the said property to the third parties.

4. The first and second respondents are ordered to sign all the documents necessary to effect transfer of the property known as Doornpoort Extension 34 Township Registration Division J.R and also known as [...] Opium Street, Doornport in term of Home Exchange Agreement concluded with applicants.
5. The immovable property, Doornpoort Extension 34 Township Registration Division J.R and also known as [...] Opium Street, Doornport be transferred into the names of applicants once the bond with third respondent is fully settled.
6. In the event first and second respondents fail or refuse to comply with the order in paragraph 4 above, the Sheriff Pretoria central is hereby authorised to sign the transfer documents.
7. The first and second respondents are ordered to pay costs on attorney and client scale. Any other party who opposes this application to pay the applicants costs on the same scale.
8. The Counter application is dismissed with costs.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 5 February 2024

Date of judgment: May 2024

Appearance

On behalf of the Applicants

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