**REPUBLIC OF SOUTH AFRICA**

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

**Appeal No: A5049/17**
**Case No 14138/16 &**

**34564/14**

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

**13 September 2022** _____
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DATE SIGNATURE

In the matter between:

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| **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | **FIRST APPELLANT** |
| **CITY OF JOHANNESBURG PROPERTY COMPANY SOC LTD** | **SECOND APPELLANT** |

AND

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| **MOGOROSI IKOPELENG PITSE N.O** | **FIRST RESPONDENT** |
| **REGISTRAR OF DEEDS, JOHANNESBURG** | **SECOND RESPONDENT** |
| **MASTER OF THE HIGH COURT, JOHANNESBURG** | **THIRD RESPONDENT** |
| **SHERIFF, JOHANNESBURG CENTRAL** | **FOURTH RESPONDENT** |

**Coram:** Wepener J, Mudau J *et* Todd AJ

**Heard**: 10 August 2022

**Delivered:** 13 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 13 September 2022.

**Summary:** Law of contract- Alienation of Land Act 68 of 1981 – interpretation of section 27 – right of purchaser to demand transfer –sale agreement subject to certain stipulated conditions– paid purchase price – Breach of contract – purchaser not entitled to demand transfer in terms of section 27 (4) - The provisions of this section shall not apply in respect of a deed of alienation in terms of which the State or a local authority is the seller- proper construction of a written contract

**Appeal:** Upheld with costs

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## ORDER

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**On appeal from:** The Gauteng Division, Johannesburg.

1. The appeal accordingly succeeds, with costs, and the order of the court *a quo* is set aside and the following order is substituted:

   "1. Confirming that the agreement of sale entered into between the first respondent, duly represented by the second respondent. and Abel Ikgopoleng Pitse dated 4 October 2001 pertaining to Stand 6643, Orlando East, was validly terminated by the first and second respondents on 6 August 2015.

   2. That the main application brought by the applicant be dismissed with costs.

   3. That the applicant is to pay the costs of the counter-application".

**MUDAU, J: (WITH WEPENER J AND TODD AJ CONCURRING)**

[1] This is an appeal against a decision of the Gauteng Division, Johannesburg made by Pather, AJ, on 30 October 2017, whereby the first appellant, the City of Johannesburg Metropolitan Municipality ("the City") was directed to pass transfer to the first respondent, of certain landed property pursuant to a written deed of sale. The City of Johannesburg Metropolitan Municipality has been established in accordance with Section 2 of the Local Government: Municipal Systems Act 32 of 2000. It is the successor in title to the Greater Johannesburg Metropolitan Council.

[2] The appeal arose from the following distinct applications. The first, was brought by the appellants, seeking the eviction of the current occupiers of the property - a church. The eviction application resulted in an order by the court (per Baqwa J) that proceedings must be instituted by either party for the first respondent to compel transfer of the property to the deceased's estate alternatively, for the appellants to bring proceedings for the cancellation of the agreement of sale entered into between the deceased and the appellants in these proceedings.

[3] The first respondent subsequently launched an application to compel the appellants to transfer the property in terms of the sale agreement (the second application). The appellants in turn launched a counter application, seeking an order declaring their cancellation of the sale agreement to be valid. The

counter application was dismissed and the main application granted by Pather AJ, who ordered the appellants to pass transfer of the property to the deceased's estate. The eviction application was as a result, also dismissed. The appeal is with leave of Pather AJ.

**Background Facts**

[4] There is no dispute concerning the facts of the case, which may be summarised as follows. Following public tenders invited for the acquisition of a vacant piece of land, stand No 6643 Orlando East, Soweto ("the property") in 2001, the late Mr Ikgopoleng Abel Pitse ("the deceased") submitted a tender to the City, which was accepted to purchase the property for an amount of R108 000,00. On 4 October 2001, the first appellant represented by the second appellant (then called Propcom) concluded an agreement of sale with the deceased. Subsequent to entering into the sale agreement, the deceased took possession of the property. However, transfer of the property was never effected by the first appellant. The deceased passed away in 2006. The first respondent is the executor of his estate. The estate remains in possession and occupation of the property. From the time the sale agreement was concluded, until 30 June 2015, a period of some fourteen years, nothing happened in terms of the agreement.

[5] The agreement provides *inter alia*, in clause 5 that "[t]ransfer of the PROPERTY into the name of the PURCHASER shall be effected by the COUNCIL's conveyancers. The PURCHASER shall be liable for all costs in connection with such transfer…". Clause 7.1 provides as follows:

"[t]he PURCHASER shall commence the erection on the PROPERTY of a building, for business purposes within l (one) year from date of signing of this Agreement by the COUNCIL and at least the first phase of the said building shall be ready for occupation and operation within 18 (eighteen) months from the date of signing of this Agreement by the COUNCIL failing which reasons for such Failure shall be submitted to the COUNCIL in writing for consideration".

[6] Clause 7.2 records that "[t]he COUNCIL reserves the pre-emptive right to repurchase the PROPERTY at the cost of the PURCHASER, should the provisions of clause 7,1 above not be complied with…".

[7] Clause 7.3 provides as follows:

"[t]he PURCHASER shall not dispose of the PROPERTY before a building(s), specified in clause 7.1 above, has been erected thereon except to the COUNCIL at a price to be determined in terms of clause 7.2: Provided that the COUNCII. may in such event compensate the PURCHASER for any improvements effected to the PROPERTY, the value of which shall be determined by the COUNCIL's Executive Officer: Valuation Services or an independent valuer appointed by the Council. All costs in connection with the re transfer of the PROPERTY into the name of the COUNCIL, shall be borne by the PURCHASER".

[8] Clause 8 made provision that, should the purchaser fail to comply with any obligation imposed on the purchaser in terms of this agreement, after having been given 14 (fourteen) days' written notice by the council in the manner prescribed by the agreement, then the council shall have the right, in addition and without prejudice, to use any other remedies available in law to terminate the agreement and withdraw from it; to cancel the agreement and claim and recover such damages; or to claim specific performance.

[9] On 30 June 2015, pursuant to having instituted eviction proceedings against the tenants on the property, the appellants' attorneys addressed a letter including a notice pursuant to clause 8 of the sale agreement to the first respondent. The letter pointed out that the deceased had, during his lifetime, breached clause 7.1 of the agreement, which required the deceased to erect buildings on the property. The letter called upon the first respondent to remedy the breach within fourteen days of the date of service of the letter.

[10] The first respondent, on 17 July 2015, through its attorneys addressed a letter to the City's attorneys' denying that there had been a breach of the agreement by the deceased. The letter pointed out that it was the appellants who had breached the agreement in that they had failed, within a reasonable time, to transfer ownership of the property to the deceased estate. The letter also pointed out that the prior approval of the local authority was required before any building construction could commence and that building plans had to be submitted for approval to the local authority by the registered owner of the property together with the title deed and if no title deed was available, proof that transfer of the property had commenced.

[11] The appellants refused to transfer the property to the deceased estate and purported to cancel the agreement in terms of a letter dated 6 August 2015. The letter pointed out that:

"Clause 7.1 of the agreement … was and is totally unrelated to the transfer of ownership of the property in question …. Furthermore, that, the deceased and/or his estate and/or an executor of the estate and/or anybody else on their behalf never took

any steps to have the property transferred or to comply with the provisions of clause 7.2 of the contract".

[12] The letter of 6 August 2015 went on to point out that, "[t]he National Building Regulations Act 103 of 1977, the regulations promulgated thereunder or any practice did not and does not require the passing of ownership prior to the submission of any plans before the commencement of the building operations envisaged in clause 7.1 of the contract". In addition, no attempts were made to have the property registered nor were any building plans submitted or any steps taken whatsoever so as to comply with the Act. The appellants further tendered to refund the purchase price of R108 000.00 to the deceased estate. As a result of the alleged breach of clause 7.1 of the contract which the respondents failed to remedy despite due notice in terms of clause 8 of the contract, the appellants terminated the contract and withdrew from it in terms of clause 8.1 thereof.

[13] The first respondent's attorneys addressed further correspondence to the appellants' attorneys rejecting the validity of the purported cancellation of the agreement in a letter dated 2 September 2015, further persisting with the claim for transfer of the property to the deceased's estate. The developments led to the applications before the court *a quo*. The first respondent sought to enforce a contractual obligation to transfer the property into the estate. The City resisted this, on the basis that it had validly cancelled the agreement.

[14] The first respondent contended before the court below and in this appeal that as the deceased had paid the purchase price at the time of conclusion of the agreement, an obligation arose on the part of the appellants to transfer the

property to the deceased. In respect of the parties' reciprocal duties, the court *a quo* and this court was referred to the case of *Botha v Rich NO*[1] wherein the Constitutional Court stated that:

"… It is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own perfonnance by a claimant is a requirement for the enforceability of her claim for counter performance. This is an instance of the principle of reciprocity … . For the principle to operate the obligations of the parties must be reciprocal in the sense that performance of the one cannot be enforced without performance of the other."

[15] The court *a quo* reasoned in its conclusion for the transfer order that "the agreement in my view required the council to effect transfer of the property before the building commenced. That is the only way in which the contract makes business sense. The respondents were wrong to ask for specific performance before it had complied with its obligation to transfer the property."

**The grounds of appeal**

[16] The various grounds of appeal raised by the City can be distilled into three contentions. First, that clause 7.1 of the agreement was engaged upon the signature date, not transfer. Second, that there was no reciprocity between clauses 5 and 7.1; and 7.3. Third, that the City validly cancelled the agreement.

[17] As regards the principle of reciprocity, the SCA in *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd*,[2] which counsel for the appellants also referred to, put it thus:

[1] 2014 (4) SA 124 (CC) at para 43.
[2] 2018 (3) SA 65 (SCA) at para 20.

"… . The principle of reciprocity (*exceptio non adimpleti contractus*) recognises the fact that, in many contracts, the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performance. Whether there is such an intention must often be determined by an interpretation of the contract (see Van der Merwe et al *Contract: General Principles* 5 ed (2015) at 335 and the references therein). In fact, there is a presumption that interdependent promises are reciprocal unless there is evidence to the contrary (*Contract: General Principles supra*). The common intention is that neither should be entitled to enforce the contract unless he/she has performed or is ready to perform his/her own obligations… ".

[18] But, as counsel for the respondents was constrained to concede during argument before us, *Botha*,[3] on which the court placed heavy reliance, is distinguishable on the facts from the facts of this matter. In that case, Botha had concluded an instalment sale agreement to buy immovable property from a trust. A cancellation clause stated that breach by Botha would entitle the trust to cancel the agreement and retain all payments made.

[19] When Botha, having paid three-quarters of the purchase price, began to default on the instalments, the trust successfully sued for cancellation and eviction. Botha, citing s 27(1) the Alienation of Land Act ("the Act"),[4] demanded the transfer of the property into her name. The Constitutional Court held in Botha,[5] as to the forfeiture clause and cancellation, that granting cancellation and therefore forfeiture in circumstances when more than three-quarters of the purchase price had already been paid, would amount to a disproportionate

[3] Botha above n 1.
[4] Act 68 of 1981.
[5] Botha above n 1 at paras [50]–[51].

penalty for Botha's breach. In such circumstances, the trust would not be entitled to cancellation. Botha, as the Constitutional Court found, was entitled to transfer against registration of a bond in favour of the trust, provided all arrears were brought up to date at or before transfer.

[20] However, what makes Botha distinguishable on the facts is that section 27 (4) of the Act specifically provides that, “The provisions of this section shall not apply in respect of a deed of alienation in terms of which the State or a local authority is the seller”. In this case, the seller of the property is the City, a local authority, which is exempted.

[21] The City contends that the obligations in clauses 5 and 7 were not reciprocal. That is, the parties did not contemplate that they would be performed in exchange for one another. I am persuaded to agree. It would seem to me that nothing in the writing of the agreement suggests that the obligation to build was linked with the obligation to effect transfer. In my view, if it was, the milestones in clause 7.1 would have been dependent upon transfer, not signature. From the written agreement all that was necessary for the obligation to erect a building to arise, was possession of the property, which had been given.

[22] In my view, the obligations in clause 7.1 arose upon signature of the agreement, and not on transfer and in this regard, I am fortified for the following reasons. Clause 7.1 set two milestones, both of which were in reference to the signature date. The milestone for the first phase was one year from the signature date. The second, was 18 months from the signature date. Transfer of ownership was, I find, neither a factual nor legal requirement to commence

building. On the first respondent's version, a power of attorney from the City would, in any event, have sufficed. The first respondent did not allege that he failed to achieve transfer with a power of attorney. The City's own breach, if it was such, is of no consequence as there was no demand made for it to remedy any breach.

[23] As for the allegation regarding existence of the building plans, there was no evidence in support thereof, except for the bold allegation that they were available, which the appellants denied, either at the time of the breach, or before the court *a quo*. The first respondent did not attach the alleged building plans or any proof of submission of those building plans to the City for its consideration. In my view, in the light of the first respondent's breach, the City was entitled to demand performance, which it did. With the first respondent having failed to comply with the terms of the contract in relation to clause 7.1, the City was accordingly entitled to cancel the agreement by virtue of clause 8 thereof.

[24] In determining the intention of the parties as 'expressed' in their contract, the Court is of course primarily concerned with a difficult construction. There are no grounds in this case on which to adopt the purposive interpretation for which the court *a quo* relied upon in its reasoning. I find myself unable to construe the contract in the manner contended for by the first respondent. It must be remembered that the property was sold for the deceased to construct business premises, in contrast with the purpose for which it was subsequently leased out. A local authority is bound to comply, and enforce compliance, with zoning schemes. The use of the City property as a church in contravention of the

Town-Planning legislation of the City of Johannesburg Land Use Scheme of 2018 also constitutes an offence.

[25] Our courts have affirmed the role and duty of local authorities to regulate and enforce "with the requisite degree of vigour and efficiency" land use in their areas of responsibility.[6] The purpose of zoning or town planning and its concomitant restriction on the use rights attaching to land is to provide for the orderly, harmonious and effective development of the affected area.[7]

[26] It is trite that the Court does not readily import a tacit term as it cannot make contracts for parties; nor can it supplement the agreement of the parties merely because it might be reasonable to do so.[8] Before it can imply a tacit term, the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.[9]

[27] The purposive or business-like approach adopted by the court *a quo* in its construction of the contract would accordingly, in effect, amount to rewriting the contract for the parties, which the Supreme Court of Appeal specifically warned against in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[10]

"Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between

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[6] See *Chapmans Peak Hotel (Pty) Ltd and Another v Jab and Annalene Restaurants CC t/a O'Hagans* 2001 (4) All SA 415 (C) at para 38.
[7] Id at para 12.
[8] *Alfred Mcalpine & Son (Pty) Ltd v Transvaal Provincial Administr*ation 1974 (3) SA 506 (A) at 532.
[9] Id at 532G-533A.
[10] 2012 (4) SA 593 (SCA) at para 18.

interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made."

[28] In this matter, all the clauses, and in particular, clause 7.1 are stipulations concluded between freely contracting parties which are thus *prima facie* binding and enforceable. When the parties contracted, they were fully alive to the nature of the issues that were likely to arise and with that in mind, they stipulated for terms in the written agreement and should accordingly be held to it. In my judgment, the respondents' submissions cannot, therefore, be sustained, and the appellants' contention that they validly terminated the contract should be upheld.

**Order**

[29] The appeal accordingly succeeds, with costs, and the order of the court *a quo* is set aside and the following order is substituted:

"1. Confirming that the agreement of sale entered into between the first respondent, duly represented by the second respondent. and Abel Ikgopoleng Pitse dated 4 October 2001 pertaining to Stand 6643, Orlando East, was validly terminated by the first and second respondents on 6 August 2015.

2. That the main application brought by the applicant be dismissed with costs.

3. That the applicant is to pay the costs of the counter-application".

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**MUDAU J**

Judge of the High Court
Gauteng Division, Johannesburg

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**WEPENER J**
Judge of the High Court
Gauteng Division, Johannesburg

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**TODD AJ**
Acting Judge of the High Court
Gauteng Division, Johannesburg

**APPEARANCES**

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|---|---|
| For the Appellants: | Adv. M V Chauke (Heads by Adv M Sibanda) |
| Instructed by: | Moodie & Robertson Attorneys |
| | |
| For the 1st and 2nd Respondents: | Adv NL Dyirakumunda |
| Instructed by: | DMB Attorneys |
| | |
| Date of Hearing: | 10 August 2022 |
| Date of Judgment: | 13 September 2022 |