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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 33377/2018

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

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SIGNATURE

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DATE

In the matter between:

CASSIM JOOMA

First Applicant

MAHOMED SIDQUE JOOMA

Second Applicant

and

OBAKENG WHYTE SEKGETHO

First Respondent

**THE SHERIFF OF THE HIGH COURT,
JOHANNESBURG NORTH**

Second Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is an application to compel Obakeng Whyte Sekgetho, the first respondent, to take transfer of immovable property pursuant to the conclusion of a written sale agreement.

[2] The applicants are registered owners of certain immovable property situated at Erf [...] Vrededorp Township, Registration Division I.R., Province of Gauteng, measuring 248 (two hundred and forty-eight) square metres, held by Deed of Transfer T41309/2005. On 26 February 2018, the applicants and first respondent concluded a written sale agreement in respect of the property in terms of which the first respondent agreed to purchase the property for the sum of R750 000. An addendum to the agreement was entered into on 24 March 2018.

[3] In terms of the addendum, the applicants agreed to grant to the first respondent occupation of the property from 1 April 2018. The first respondent agreed to pay occupational rental in the amount of R3 000 per month, commencing on 1 April 2018, payable on the first day of each month. It was also agreed that the first respondent would be liable for all sums due to the municipality for electricity, water, sewage, refuse removal, and rates and taxes.

[4] In terms of the agreement, the first respondent paid the purchase price in full in the sum of R750 000 to the applicants' attorneys to be held in trust, pending registration of transfer. The first respondent took occupation of the property in accordance with the addendum and remains in occupation to date.

[5] The first respondent has failed to make payment of the occupational rental and municipal charges due in terms of the agreement.

[6] On 18 April 2018, the first respondent's attorneys addressed correspondence to the applicants' attorneys, informing them that the first respondent was cancelling the agreement and demanding a refund of the purchase price which was being held in trust.

[7] The applicant's received another letter from another firm of attorneys on 18 April 2018, in terms of which the applicants' attorneys were informed that the first respondent does not wish to continue with the transaction and that the purchase price should be refunded, minus the wasted costs.

[8] On 20 April 2018, the applicants' attorney responded, informing the attorneys for the first respondent that he cannot unilaterally terminate the agreement of sale.

Defences

[9] In his answering affidavit, the first respondent has raised the following points *in limine*:-

- a. Mootness – the agreement was invalid and there was no case for the Court to adjudicate upon, as the first respondent had notified the first applicant of the termination of the agreement in regard to immovable property mentioned above.
- b. No cause of action – that the sale agreement does not set out any address for the applicants and the first respondent; or that it lacks the inclusion of a physical address for service of any document or proceedings. This rendered the sale agreement invalid and unenforceable.
- c. Jurisdiction – it is alleged that the sale agreement makes provision for the Magistrate's Court for the district of Johannesburg to adjudicate on the issues between the parties and that the applicants had not set out the facts which would confer jurisdiction on the High Court in respect of the matter.
- d. Joinder – given that the applicants alleged that the first respondent had failed to pay the municipal charges to the municipality, the applicants were obliged to join the municipality to the proceedings.

- e. Interdict – that the applicants failed to satisfy the requirements for a final interdict.

[10] The so-called points *in limine* not only lack merit but betray a worrying lack of basic knowledge of the law on the part of the attorneys acting on behalf of the first respondent. There is no defence advanced in the answering affidavit to the relief sought in the notice of motion.

Points *in limine*

[11] In relation to the question of jurisdiction, the first respondent relies on clause 6 of the sale agreement in terms of which the parties consent to the jurisdiction of the Magistrate's Court for the resolution of any disputes arising from the agreement. This provision does not have the effect of ousting the jurisdiction of the High Court.

[12] As set out in the applicant's founding affidavit, the entire cause of action arose within the jurisdiction of this Court. Furthermore, the immovable property is situated within this Court's jurisdiction, and the respondent resides within the jurisdiction of the Court. Accordingly, the first respondent's submissions on this issue are without merit, and this Court has the jurisdiction to adjudicate on the dispute arising from the sale agreement.

[13] In respect of the issue of non-joinder, it is illogical to suggest that the municipality, who is not a party to the sale agreement, should have been joined to the proceedings. The applicants are not claiming the amounts owed by the first respondent to the municipality; they are not seeking any relief on behalf of the municipality.

Merits

[14] Section 2(1) of the Alienation of Land Act 68 of 1981 provides that 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.

[15] The agreement between the parties is in writing and is signed by the parties and accordingly complies with the Act. The parties to the sale are identified, as is the immovable property subject to the sale, and the purchase price. The sale agreement was validly concluded, and the first respondent has not put up any facts that would lead me to find otherwise.

[16] The applicants have alleged and proved the terms of the contract. They have complied with their reciprocal obligations, and the respondent has refused to perform in terms of the contract.

[17] The first respondent is clearly in breach of the contract, and an injured party to a contract who has performed his obligations has a right to demand performance of the other contracting party's obligations. A court will, as far as possible, give effect to the applicant's choice to claim specific performance but has a discretion to refuse and leave it to the applicant to claim damages. In *Farmers' Co-operative Society (Reg) v Berry*¹ Innes JA stated that:

'*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 *Thompson vs. Pullinger* (1 O. R., at p. 301), "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 decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. . . '

[18] The respondent must allege and prove facts on which the court can exercise its discretion in his or her favour.² De Villiers AJA in *Haynes v Kingwilliamstown Municipality*³ held that:

'It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id*

¹ 1912 AD 343.

² *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A).

³ 1951 (2) SA 371 (A) at 378.

quod interest. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its circumstances.'

[19] The applicants are entitled to the relief that they seek. They have established that they concluded a valid agreement with the first respondent; that the first respondent has repudiated the agreement; that they are willing to carry out their obligations under the agreement; and that they have elected to hold the first respondent to the terms of the agreement.

Costs

[20] The conduct of the first respondent in refusing to take transfer of the property he purchased, coupled with his refusal to make payment of the occupational rental and municipal charges due in terms of the agreement, is unreasonable and warrants a punitive costs order.

In the result the following order is made:

1. The sale agreement concluded on 18 February 2018 between the applicants and the first respondent in respect of the immovable property described as Erf [...] Vrededorp Township, Registration Division I.R., Province of Gauteng, measuring 248 (two hundred and forty-eight) square metres, held by Deed of Transfer T41309/2005 (the 'property'), and the addendum thereto, is a valid and legal agreement which is binding on the parties.
2. The first respondent is ordered to give due effect to the terms and conditions of the sale agreement.
3. The first respondent is ordered to instruct the conveyancing attorneys, namely Magera & Associates or any other conveyancing attorneys of the applicants' choice, to proceed with the necessary work to transfer the property into the name of the first respondent, and that same be registered at the relevant Registrar of Deeds.
4. In the event that the first respondent fails to comply with the order as set out above, the Sheriff of the High Court, Johannesburg North (or its duly

authorised official) may sign such documents necessary to effect the transfer of the property as presented by such relevant attorney to the said Sheriff, and such signature shall at all times be accepted by the relevant authority as a proper signature of such documents.

5. The first respondent is ordered to pay costs on an attorney and own-client scale.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 19 June 2019

Date of judgment: 28 June 2019

Appearances:

Counsel for the Applicants: Adv. Lerato Molete

Applicant's Attorneys: Mangera & Associates

First Respondent's Attorneys: Masike Incorporated Attorneys