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

(1) NOT REPORTABLE (2) NOT OF INTEREST TO OTHER JUDGES **7 APRIL 2020** **MODIBA J**	CASE NO. 2016/13293

In the matter between:

CEBOLAKHE ZONDO AND 299 OTHERS

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
JOHANNESBURG SOCIAL HOUSING (PTY) LIMITED	**SECOND RESPONDENT**
DILUCULO (PTY) LIMITED	**THIRD RESPONDENT**
PENNYVILLE HOUSING (PTY) LIMITED	**FOURTH RESPONDENT**
ERF 238 STORMILL X9 (PTY) LIMITED	**FIFTH RESPONDENT**
REGISTRAR: DEEDS REGISTRY JOHANNESBURG	**SIXTH RESPONDENT**

JUDGMENT

MODIBA J:

[1] The applicants seek an order declaring the agreement entered into between the City of Johannesburg Metropolitan Municipality ("the City") and Diluculo (Pty) Ltd ("Diluculo") on 25 September 2008, unlawful and

void *ab initio*. They are desirous to have the agreement set aside. They also seek an order cancelling lease agreements concluded between Diluculo and its successors in title and the applicants, as well as other ancillary relief.

[2] The City and Johannesburg Social Housing (Pty) Limited did not oppose the application. Only Diluculo, Pennyville Housing (Pty) Ltd ("Pennyville") and ERF 238 Stormill X9 (Pty) Ltd ("Stormill") did.

[3] The court heard oral argument on behalf of Diluculo. Pennyville aligned itself with Duliculo's written and oral argument. Absurdly, Stormill had no appearance; neither did it align itself with Diluculo's submissions, yet it filed opposing papers jointly with Pennyville. A Windeed search document annexed to Diluculo's heads of argument evidences that Stormill does not exist. This is another absurd development, given that Stormill is opposing the application. The applicants did not object to the document being admitted into court in this informal manner. In any event, given the basis on which the issues that arise in this application stand to be resolved, Stormill's existence or otherwise pales into irrelevance.

[4] The City and Diluculo concluded the impugned agreement of sale in respect of certain immovable properties that are described in detail in the

founding papers, situated in Pennyville. The property in dispute is one of these properties. It comprises of residential rental units occupied by the applicants. For brevity, I simply refer to the latter property as ("the property").

[5] The applicants brought the application in two parts, A and B. They brought Part A on the basis of urgency. There they sought to interdict the City, Diluculo, its successors in title and their agents from collecting rental from the cited applicants and to make available to the applicants several documents relating to the impugned sale agreement, the improvements effected on the property and other ancillary documents.

[6] Part B is brought in respect to the relief set out in paragraph 1 above.

[7] Part A was struck from the roll due to lack of urgency. Part B, in respect of which the application is enrolled in the ordinary course, renders the relief sought in Part A academic.

[8] The basis on which the applicants allege that the impugned agreement of sale was unlawfully concluded is that the City acquired the property in terms of the Land Exchange Development Agreement ("LEDA") solely for the purpose of developing social housing for the benefit of the applicants.

The City would pay to the seller, the agreed purchase price including the cost of developing various residential units against the registration of each residential unit in the name of the respective beneficiaries. The said purchase price shall not exceed the subsidy amount which each beneficiary is entitled to receive from the state. Further, the City will identify the beneficiaries and grant them occupation of the respective residential units.

[9] The applicants further allege that contrary to the terms of the LEDA, the City sold the property and/ or the residential units occupied by the applicants to Diluculo. Furthermore, on 29 May 2015, Diluculo unlawfully onsold the units occupied by the applicants to Pennyville, who since September 2015 has been fraudulently collecting rentals from the applicants through Stormill, its managing agent. The applicants also detail various unlawful actions allegedly perpetrated by Diluculo and Pennyville's respective property management agents.

[10] The applicants further alleged that this conduct on the part of the City resulted in the applicants losing their constitutional right of access to housing without due process.

[11] Diluculo raises two preliminary points on the basis of which I find that the application stands to be dismissed with costs.

[12] The applicants allege the existence of an agreement concluded with the City, in terms of which the residential units occupied by each applicant would be transferred to such applicant after a stipulated period. The following provisions in ALA are relevant to determine the applicants' contended right to the transfer of the residential units:

*""**Alienate",** in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and **"alienation"** has a corresponding meaning."*

*""**Deed of alienation**" means a document or documents under which land is alienated."*

***"Land"**—*
(a) includes—
(i) Any unit;
(ii) any right to claim transfer of land;
(iii) any undivided share in land;
(iv) initial ownership referred to in section 62 of the Development Facilitation Act, 1995;

(b) includes, in Chapters I and III, any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967);

Section 2 –

(1) 'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by both parties thereto or by their agents acting on their written authority.'

[13] The alleged agreement falls within the purview of the Alienation of Land Act[1] ("ALA"), as it involves the transfer of immovable property. Transfer of land falls within the definition of alienate. Residential unit falls within the definition of land. Section 2 (1) prescribes formalities for an agreement for the alienation of land. It is trite that unless an agreement complies with prescribed formalities, it is not legally binding. The alleged agreement ought to comply with the formalities set out in section 2(1) of the ALA. Absent such compliance, the parties' agreement does not give birth to consequences of a legal nature and cannot be enforced.

[14] The agreement allegedly concluded between the applicants and the City ought to be in writing, otherwise it is of no force or effect. It is common cause that such an agreement, if it was concluded, was never reduced to writing.

[15] Even if such an agreement was validly concluded in terms of the statutory provision referred to above, on the applicant's own version, their cause of action arising from such agreement prescribed in April 2015. They only instituted the present application in April 2016.

[16] Section 11 (d) of the Prescription Act[2] provides:

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1 68 of 1981.
2 69 of 1968

"11. Periods of prescription of debts.—The periods of prescription of debts shall be the following:

(*d*) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[17] In *eThekwini* (Constitutional Court),[3] interpreting the above provision, the court held that the dictionary definition of debt – an obligation to pay money, deliver goods, or render services – includes a claim to transfer immovable property. The claim to transfer an immovable property is essentially a claim to deliver goods. It is therefore a debt that satisfies the definition of a debt in the Prescription Act.

[18] I therefore find that even if the applicants were able to prove the existence of a valid agreement with the City as alleged, each applicant's claim for the transfer of the residential unit that they occupy is a debt as defined in section 11 (d). It prescribed three years after the applicants became aware of the cause of action that they rely on in this application.

[19] Even more problematic for the applicants is that they are not party to the LEDA concluded between the City and Diluculo. They derive no rights

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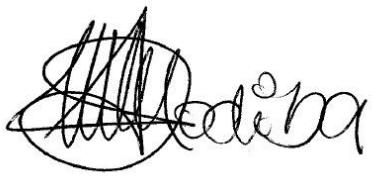
[3] *eThekwini Municipality v Mounthaven (Pty) Limited* [2018] ZACC 43.

from it. Further, the LEDA does not contain any provision relating to the applicants' alleged right to the transfer of the units that they occupy.

[20] I find that the applicants fail to make out a case for the relief sought. In the premises, the application stands to be dismissed with costs.

[21] I record my displeasure with non-compliance with the requirement in the practice directive regarding the pagination, indexing and the size of bundles. Such non-compliance presented a grave difficulty in navigating the voluminous papers filed in this application.



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MS L T MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES:

Counsel for the applicant:	Adv B T Ngqwangele
Instructed by:	HB Mphamba Attorneys
Counsel for the third and fourth respondent:	Advocate NJ Horn
Instructed by:	Tim du Toit (for the third respondent) and CR Bothma and Jooste (for the fourth and fifth respondent)

Date of judgment: 7 April 2020