REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 43397/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

4 October 2022

In the matter of:

LUVUYO LUZUKO LUBOBO	First Applicant
BONGANI EMMANUEL MLAMBO	Second Applicant
and	
MUGANDRAN NAIDOO	First Respondent
YUDGENDREE NAIDOO	Second Respondent

UNLAWFUL OCCUPIERS PORTION [....] A PORTION OF

FARM [....], ROODEKRAANS REGISTRATION DIVISION

IQ, GAUTENG PROVINCE, MEASURING ONE (1)

HECTARE Third Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY Fourth Respondent

JUDGMENT

BESTER AJ

[1] The first and second applicants are the co-owners of the property described as Portion [....], a portion of Farm [....], R [....], Registration Division IQ Gauteng Province. They apply for the eviction from the property of the first and second respondents and their minor children, who reside at the property. The application is thus one that must comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

[2] On 21 January 2016 the applicants, as joint sellers, and the respondents, as joint purchasers, entered into a written agreement of sale of land by instalment, as allowed in Chapter II of the Alienation of Land Act, 68 of 1981.

[3] The relevant terms of the agreement were as follows:

a) The applicants sold the property to the respondents for an amount of R4 million. This amount would be payable as follows:

i) A cash deposit of R677 249,00, of which R233 500,00 shall be paid directly into the applicants' Standard Bank mortgage bond account (Standard Bank holds a mortgage bond over the property as security for a loan to the applicants), and R443 749,00, shall be paid directly to the City of Johannesburg in respect of amounts due for rates, taxes, and water services.

ii) Commencing on 29 February 2016, for 24 months, the respondents shall pay an amount of R27 000,00 into the applicants' Standard Bank bond account, by the 30th day of each month.

iii) The balance shall be settled on 30 March 2018.

b) Transfer of the property shall take place upon settlement of the balance of the purchase price, subject to section 27 of the Alienation of Land Act.[1]

c) Upon payment of the deposit, the applicants shall give occupation of the property to the respondents, who shall bear the risk and benefit in the property as from that date.

d) In the event of the respondents breaching the agreement, the applicants may deliver a notice to the respondents describing the obligation which was breached and demanding that it be remedied within a stated period, which shall not be less than 30 days, and provide an indication of the steps which the applicants intend to take if the breach is not rectified.

e) If the breach is not rectified within the stated period, the applicants have various options, including claiming specific performance or cancelling the contract.

[4] It is common cause that the applicants gave the respondents occupation of the property pursuant to the terms of the agreement, albeit that the applicants contend that they had given the permission before the full deposit amount had been paid. Nothing turns on this.

[5] The basis upon which the applicants sought to establish that the respondents were in unlawful occupation of the property, is as follows:

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[1] Section 27 essentially provides that a purchaser who has undertaken to pay the purchase price of land in instalments over the period and has been paid at least 50% thereof is entitled to demand transfer on condition that a first mortgage bond be registered over the property to secure the balance of the purchase price.

a) On about 2 January 2020 the respondent breached the agreement in that they failed to pay the R27 000,00 monthly instalment into the Standard Bank bond account.

b) The respondents did not settle the municipal account in full, given that there was an outstanding amount of R238 226,35 outstanding as at 22 October 2020.

c) On 3 August 2020 the applicants, under hand of the first applicant, caused a notice of breach to be sent to the respondents via courier, which they received on 4 August 2020.

d) The notice does not make any reference to the outstanding municipal account, only referring to a failure to pay the R27 000,00. The applicants demanded that this breach be remedied within 30 days of receipt of the notice. The notice further listed all the possible further steps that the applicants had available to them in terms of the agreement, should the demand not be remedied.

e) The respondents failed to remedy the breach.

f) The applicants terminated the agreement and ordered the respondents to vacate the property, which they refused to do.

[6] The respondents, in turn, admitted that there were some payment difficulties, which they blamed on the Covid pandemic, but deny that they were in breach as stated in the notice, and furthermore denied that there was a cancellation of the agreement subsequent to the notice period. They tendered the arrears that may exist.

[7] The respondents raised a further issue, namely that the applicants had failed to co-operate with them in efforts for them to obtain a bond in order to satisfy the settlement of the final payment. For the reasons set out below, I deem it not necessary to engage with this issue.

[8] The applicants' allegation that they terminated the agreement is devoid of any detail – they do not state when this happened, how it happened, or who communicated it to whom. There is no reliance on a written document. This compelled Mr Shongwe, who appeared for the applicants, to concede that the applicants had not proven a cancellation of the agreement.

[9] Both in his heads of argument and in oral argument, Mr Shongwe pursued a case not pleaded by the applicants. He relied on clause 19 of the agreement, which stipulates that, if transfer had not yet occurred by 1 May 2018, the respondents shall have the right to cancel the agreement on notice by 30 May 2018, failing which it shall be extended to 31 July 2018. If no transfer had been effected by that date, the agreement, according to clause 19.3, shall lapse.

[10] The argument does not fully align with the clause. The respondents contended that the payment date for the balance of the purchase price, which was agreed as the end of March 2018, was extended by agreement to 15 August 2018. Mr Shongwe advanced the case that, accepting the extension to 15 August 2018, the agreement had automatically lapsed on that date when payment was not made. But clause 19 refers to a date for the transfer of the property, which, in terms of the agreement of necessity had to be a date sometime after payment.

[11] Be that as it may, whether the agreement had terminated by virtue of transfer not taking place timeously is not an issue before me. Two related principles prevent the applicants from pursuing this argument. A party may not rely on one issue in its pleadings, and by extension in its affidavits, and then at the hearing seek to rely on another.[2] Our legal system, for good reason, does not allow ambush litigation. Furthermore, the Court must determine the dispute identified by the parties and that dispute alone.[3]

[12] Not only do the applicants not rely on this cause of action in their application, their evidence in their founding affidavit contradicts such a claim. The first applicant's evidence is that the instalment due on 2 January 2020 (presumably the instalment

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[2] *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182 A.

[3] *Fischer and Another v Ramahlele an Others* 2014 (4) SA 614 (SCA) in [13], affirmed in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) in [234].

for December 2019) had not been paid, that in August 2020 a notice of breach was delivered to the respondents, and that subsequent to a failure to remedy the breach the agreement was cancelled. This evidence is wholly inconsistent with the case that Mr Shongwe presented in argument. It appears from the papers before me that the parties treated the agreement as extant well beyond the date of 15 August 2018. In this application the dispute is whether there was a cancellation consequent upon a breach.

[13] It does not behove the applicants to argue that it is patent on the face of the papers that the balance had not yet been paid, and that there is a term in the agreement which determines that the agreement would terminate if the final payment had not been made.

[14] Apart from the disjunct between the argument and the wording of the clause, the issue was not raised by the applicants, and the respondents did not have to deal with it. The respondents cannot be faulted for not having set out a basis upon which the agreement survived in 15 August 2018. I am thus not satisfied that this issue was fully ventilated between the parties in this application.

[15] The applicants have not established a *prima facie* case for the relief that they seek. In the result the application must fail. In the circumstances it is not necessary for me to consider whether the applicants are in breach of the application by virtue of the alleged failure to cooperate with the respondents in ensuring that they are able to obtain a bond for the balance of the purchase price.

[16] There is no reason why the costs should not follow the result.

[17] In the result, the application is dismissed with costs.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Heard: 23 November 2021

Judgment:	4 October 2022
Counsel for the Applicants:	Mr C Shongwe
Instructed by:	Sikunyana Attorneys Inc
Counsel for the First, second and Third Respondents:	Ms Z Kara (The heads of argument were prepared by Mr V Mabuza)
Instructed by:	Amod & Van Schalk Attorneys
Fourth Respondent:	No appearance