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

CASE NO: 30518/2020

AND 34521/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

17.03.23

In the matter between:

THABIT RAFIQ THEMBA

1st Applicant

THABIT DORIS TEBOGO

2nd Applicant

THABIT KELETSO

3rd Applicant

And

MULAUDZI KHAKHU LUCIE

1ST Respondent

DICHABE ITUMELENG GIFT

2ND Respondent

ABSA BANK LTD

3RD Respondent

REGISTRAR OF DEEDS JOHANNESBURG

4TH Respondent

JUDGMENT

MAKUME, J:

INTRODUCTION

[1] In this matter the Applicants seek an order declaring the agreement concluded between the first Respondent as (Seller) and the second Respondent (as Purchaser) in respect of the immovable property described as Erf 1[...], Johannesburg unlawful, invalid and of no force and effect (Case No.: 30518/2020 (the Declaratory Application)).

[2] In case number 34521/2020 the second Respondent seeks an order evicting the Applicants from the property mentioned in paragraph 1 above. An order was granted to hear the two matters simultaneously for obvious reason (the eviction application).

[3] In the declaratory application the Applicants seeks an order firstly that the transfer of the property from the first to the second Respondents which took place on the 9th April 2019 be declared unlawfully invalid and of no force and effect.

[4] Simultaneously with the setting aside of the transfer the Applicants seek an order setting aside the registration of the mortgage bond number B7854/2020 in favour of Absa Bank the third Respondent.

BACKGROUND FACTS

[5] On the 21st January 2013 the first Respondent Mulaudzi Khakhu Lucie purchased the property which is the subject of this case namely Erf 1[...] Johannesburg (the property) for a purchase price of R250 000.00 (Two Hundred and Fifty Thousand Rand). A bond securing the loan was registered over the property in favour of Standard Bank of SA being bond number B8911/2013. The title deed issued to the first Respondent was number T12320/2013.

[6] During or about October 2013 the first Applicant and the first Respondent concluded a written Deed of Alienation in terms of which the first Applicant purchased the property from the first Respondent for an amount of R250 000.00.

[7] The amount of R250 000.00 was payable in monthly instalment of R3 000.00 (Three Thousand Rands) the first payment due on the 1st November 2013 from which date first Applicant would also take occupation of the property. Clauses 4.3 of the Deed of Alienation specified that payment of the monthly instalments be paid directly into the bond account held at Standard Bank.

[8] The first Applicant made payments directly to the first Respondent and later also made payments to Standard bank.

[9] On the 19th November 2019 the first Respondent accepted the second Respondent's offer to purchase the same property from her for an amount of R490 000.00.

[10] On the 9th April 2020 despite protest from the first Applicant the property was transferred to the second Respondent and a bond registered over it in favour of Absa Bank the third Respondent.

THE ISSUES FOR DETERMINATION

[11] The joint practice note filed by the parties dated the 7th July 2022 succinctly set out the issues for determination and for completion sake I reproduce same as they are.

11.1 The first issue is whether the first Respondent signed the first agreement and thereafter whether the first Applicant has acquired a real right in the property by virtue of the first agreement which would entitle him to claim transfer of the.

11.2 The second issue is whether the first Applicant consented to the sale of the property to the second Respondent or not

11.3 Thirdly the failure by the first Applicant and the first Respondent to record their agreement in the Deeds registry as required in terms of Section 20 of the Alienation of Land Act which precludes the Applicants to rely on the doctrine of fictional fulfilment to claim transfer.

THE FIRST APPLICANT'S CASE

[12] The Applicant's case is that in and around October 2013 and at the offices of Attorneys Kevin Schaafsma in Randburg the first Applicant and the first Respondent concluded a written Deed of Alienation (the agreement) in terms of which the Applicant purchased the property for an amount of R250 000.00.

[13] The terms of the agreement were the following:

- (i) The full purchase price of R250 000.00 (Two Hundred Thousand Rand) would be payable in monthly instalments of R3 000.00 with effect the 1st November 2013.
- (ii) The Applicant would take occupation of the property by the 18th November 2013.
- (iii) Transfer of the property into the name of the Applicant would take place as soon as Applicant shall have made payment of 50% of the purchase price.

[14] The Applicant says he made payments directly to the first Respondent and some payment into the bond account of the first Respondent at Standard bank. On the 8th December 2015 the Applicant took occupation of the property.

[15] During or about September 2018 he the Applicant requested the first Respondent to transfer the property into his name since according to him he had by that time made payment of 50% of the purchase price. This request did not materialise.

[16] The Applicant says that he continued to make payments to the first Respondent including an amount of R200 000.00 which was paid into the Trust Account for Nel Attorneys.

[17] During November 2018 and at Diepkloof Shopping Centre the Applicant and the Respondent met with an Estate Agent who told him that the first Respondent intends selling the property to the second Respondent. He was offered R150 000.00 (One Hundred and Fifty Thousand Rand) which he declined to accept.

[18] During March 2019 he received an sms from the first Respondent that he should vacate the property as it had been sold to the second Respondent. He consulted attorneys to intervene on his behalf but that did not help.

[19] On the 26th March 2019 the attorneys who had been instructed to attend to the transfer of the property to the second Respondent addressed a letter to him in which they informed the first Applicant that his agreement with the first Respondent had not been registered in terms of the provisions of Alienation of Land Act 68 of 1981.

[20] The property was ultimately transferred to the second Respondent on the basis of no offer to purchase signed between the first and second Respondent on the 1st November 2019. A bond was registered over the property in favour of Absa Bank the third Respondent.

THE FIRST RESPONDENT'S CASE

[21] The first Respondent denies that she concluded the agreement with the Applicant alternatively he says that such agreement falls foul of the provisions of the Alienation of Land Act and is accordingly null and void.

[22] According to the first Respondent their agreement was that the first Applicant would assist her with evicting the illegal tenants whereafter they would then conclude an agreement of sale.

[23] She says that the Applicant did make payment of monies to her as well as into her Standard Bank bond account. At a later stage the Applicant told her that he is unable to raise a bond and is unable to purchase the property that is why she then went ahead and instructed an Estate Agent to sell the property.

THE AGREEMENT

[24] I am satisfied that despite the first Respondent's denial that the parties concluded the sale agreement.

[25] The issue is what effect should be given to that agreement. In order to answer that question this Court has to look into whether the parties thereto complied with the provisions of the agreement read with the Alienation Land Act.

[26] Clause 2,2 of the Agreement reads that: "The seller shall within 30 (thirty) days after conclusion of this contract hand to the purchaser a certificate drawn by the Mortgage indicating the monies the mortgage requires to be paid. There is no evidence that this requirement was complied with.

[27] Clause 4.2 reads that payment of the R3 000.00 per month should be paid into the mortgage bond account of the seller at Standard Bank. This clause was also not fully complied with in that some payments were made directly to the first Respondent.

[28] It is common cause that the first Applicant and the first Respondent acknowledged that the first Agreement is subject to the provisions of the Alienation of Land Act 69 of 1981 (See: clause 3.1 and 3.2)

[29] Clause 4.4 of that agreement provided that Applicant would be entitled to take transfer of the property once 50% of the purchase price, shall have been paid and in terms of clause 18.3 an obligation was placed on the first Respondent to record the agreement with the Deeds Registry in terms of Section 20(1) (a) of the Alienation of Land Act and in the event the first Respondent failed to do so then the first Applicant had the right to do so (See clause 19.4).

[30] The first Applicant failed to comply strictly with the terms of payment of the purchase price in that he did not make payments into the bond account held by the first Respondent at Standard Bank, this failure led to Standard bank foreclosing on the bond and obtained judgment against the first Respondent for payment of the sum of R280 105.28 together with interest on the 16th April 2015. Standard bank also obtained an order declaring the property executable.

[31] It is correct that during or about October 2018 the Applicant instructed his own attorneys Messrs Nel Attorneys to request a cancellation of bond and to do transfer of the property into his name now that as he alleged he had made payment of 50% of the purchase price. Standard bank obliged on the 23 January 2019 and furnished figures to Nel Attorneys showing that an amount of R305 478.22 was payable and required to enable Standard bank to cancel the bond.

[32] The cancellation figures clearly indicate that the first Applicant had not as yet paid sufficient money to enable him to take transfer. What is further strange is that the Applicant then attaches deposit slips totalling R200 000.00 (Two Hundred Thousand Rand) which amounts were paid to Nel attorneys not with references to the property in question but relates to the property in Orlando East.

[33] The Applicant did not comply with the terms of the first agreement and was not entitled to take transfer of the property. When it became clear that the Applicant was unable to proceed with the transaction the first Respondent as he was entitled to accepted an offer from the second Respondent.

[34] There is a dispute as to whether the Applicant consented to the second sale to the second Respondent. This Court must accept the version of the first Respondent which is supported by the Estate Agent that indeed the Applicant agreed to the sale on condition he is refunded R150 000.00 (One Hundred and Fifty Thousand Rand).

[35] It was when the Applicant through his attorneys belatedly raised an objection to the sale that he was informed that in fact the first agreement was not recorded in the deeds registry as required in terms of Section 20 of the Act.

[36] The Applicant and the first Respondent were aware all along that the first agreement was subject to the provisions of the Alienation of Land Act. They acknowledged their obligation in terms of Section 20 thereof to record the first agreement with the Deeds registry they failed to do so hence there is nothing that could have prevented the second Respondent to take transfer of the property.

[37] The Applicant failed to meet his obligation in terms of the first agreement and accordingly acquired no real rights therein. In his Founding Affidavit in particular with reference to provision of Section 7 of the Act the Applicant does not say that he obtained a certificate from Standard bank stating the amount payable to enable the bank to release the property from the bond. In any case when his attorneys did obtain that in the year 2019 Standard bank had already cancelled the bond and foreclosed. The property was at that time strictly speaking in the hands of Standard bank. The Applicant even at that time failed to make payment of the amount indicated by Standard bank.

[38] Failure by the Applicant and the first Respondent to register the agreement in terms of Section 20 of the Act had the following consequences. Firstly, Standard bank is not deemed to have consented in favour of the Applicant to discharge the mortgage bond as contemplated in Section 9(8) of the Act. Secondly in terms of Section 26 of the Act the first Respondent was not entitled to receive and the Applicants were not obliged to pay any part of the purchase price. Lastly the Applicant and the first Respondent did not give notice to prospective purchase about the first Agreement which could and should have been done by registering the first agreement in order to create a caveat against transfer of the property.

[39] The Applicants were informed by way of a letter from the attorneys dated the 26 March 2019 that failure to have the first agreement recorded in terms of Section 20 is fatal still the Applicant did not do anything to has that first agreement recorded. The Applicant acquired no rights in that agreement and have no *locus standi* to

oppose registration of the transfer of the property to the second Respondent. At the most out of this transaction the first Applicant has an enrichment claim against the first Respondent. In any case he had already previously indicated that he will accept an amount of R150 000.00 (One Hundred and Fifty Thousand Rand) to enable him to walk away from the deal.

[40] The second Respondent makes common cause with the third Respondent on the issue that the first agreement having not been recorded as required by Section 20 of the Act transferred no real right to the Applicant at best the Applicant acquired a personal right that can only be enforceable against the first Respondent and not against bona fide third party possessors like the second Respondent.

[41] The Applicants have in their heads of argument avoided dealing with the provisions of Section 20 of the Act which in my view is dispositive of their application. Applicants have instead not only raised technical issues about the deponent to the third Respondent's Affidavit as well as failure to apply for condonation by the Respondent for the late filing of their Answering Affidavit.

DID THE APPLICANT ACQUIRE A REAL RIGHT IN THE PROPERTY?

[42] The answer to this question is a no. What the Applicant acquired is a personal right only enforceable against the first Respondent. The Applicant would have acquired a real right to claim transfer of the property after paying 50% of the purchase price had there been registration of the agreement in terms of Section 20 of the Act.

[43] It is so that in the view of this Court and others the first agreement only regulates the contractual relationship between the first Applicant and the first Respondent.

[44] The Applicants did not do anything or take steps to place the first Respondent in mora. They did not do so because there was non-compliance also from their side. There is no evidence by the Applicant that they made payment of transfer costs,

transfer duty, rates and taxes as well as service charges in terms of clause 6 of the first agreement.

[45] Secondly there is in my view sufficient evidence that the Applicants consented to the sale of the property to the second Respondent. Even if they had not so consented they had not acquired any right over the property save a personal right against the first Respondent. The Applicant can therefore not qualify to claim specific performances as in their prayers.

THE SECOND AGREEMENT

[46] The first and second Respondents concluded an agreement of sale during November 2018 with the knowledge of the Applicant. They proceeded to lodge and record such agreement with the office of the Registrar of Deeds. That agreement can never be assailed by the so called existence of the first agreement.

[47] Firstly the facts relating to the conclusion of the agreement of sale of the property between the first and second Respondents and compliance with Section 2 (1) of the Act is not disputed. It was reduced into writing and signed by both parties thereafter it was recorded in the Deed office in terms of Section 20.

[48] The only basis on which the Applicant challenge the validity of the second agreement is that the first Respondent was still having a valid agreement with the Applicant. That defence is not correct the agreement between the Applicant and the first Respondent at that time produced consequences of a personal right and not a real right to the property.

CAN THE APPLICANT RELY ON THE THEORY OF FICTIONAL FULLFILLMENT AS OPPOSED TO THE THEORY OF ABSTRACT TRANSFER

[49] To answer this question the law as set out by the SCA in the matter of **Legator McKenna Inc and Another v Shea and Other 2010(1) SA 35 SCA** is instructive. In that matter it was held as follows:

“In accordance with the abstract theory the requirements for the passing of ownership are two fold, namely delivery which in the case of immovable property is effected by registration of transfer in the Deeds office. Coupled with a so-called real agreement or “Saaklike ooreenkoms” the essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.”

[50] The sale agreement between the first and second Respondents complied with all the requirements of a valid agreement coupled with the necessary intention and meeting of the minds between the transferor and the transferee. In keeping with the Legator Mckenna decision the registration of transfer effectively rendered the second Respondent the *de facto* and de jure owner of the property. Hence the Applicants did nothing to interdict such transfer.

[51] The finding that the second agreement was valid in all respects goes without saying that there can be no valid attack on the existence and validity of the bond registered over the property in favour of the third Respondent. The mortgage bond was lawfully and validly registered; the Applicants have no basis to pray for an order directing the fourth Respondent to cancel the title deed against which the third Respondent rights have been registered and secured.

[52] The Applicant reliance on the theory of fictional fulfilment must also fail. It is a theory that operate where a party to a contract deliberately commits some act by which fulfilment of a condition is hindered. The Applicant has not presented evidence in which respect did the first Respondent interfere with fulfilment of a condition of the first agreement. The Applicants reliance on this doctrine is misplaced.

[53] In conclusion this Court is satisfied that the agreement between the first and second Respondents remain valid and that the agreement between the Applicant and the first Respondent no longer existed at the time that transfer of the property took place.

[54] In the result the application in case number 30518/2020 is dismissed with costs.

THE EVICTION APPLICATION CASE NO 34521/2020

[55] The Applicant in this matter is the second Respondent in the declaratory application referred to above. I have already in that matter found that the second Respondent acquired the rights of ownership of the property lawfully.

[56] The issues to be determined in this eviction application are the following:

- a) Whether the Applicant in the declaratory application acquired any legal right to continue occupation of the property.
- b) Whether it is just and equitable to evict the Applicants.
- c) In the event the eviction is granted what will be a suitable time period within which the eviction shall be executed.

[57] I shall henceforth refer to the parties as they are listed in the eviction application to avoid confusion.

[58] It is common cause that the property Erf 1[...] was registered in the name of the Applicant namely Dichabe Itumeleng Gift on the 9th April 2019. It is also common cause that the property is occupied by the third Respondent being the daughter of the first and second Respondents.

[59] After the sale and registration of the property into the name of the Applicant a letter was sent to the Respondents to vacate the property by the end of August 2019. The Respondent did not heed that letter of demand as a result a second letter was sent to the Respondent by the Applicants' attorneys calling on the Respondents to vacate the property by the 14th September 2020. Still the Respondents did not vacate the property it is this refusal that prompted the Applicant to proceed with this application in terms of the PIE Act.

[60] The first and second Respondents are not in occupation of the property however, it is so that the only occupier being the third Respondent does so on the authority of the first and second Respondents.

[61] The Respondent oppose this eviction application on the following grounds:

- i) That their occupation of the property is lawful because they have an existing lawful sale agreement with the owner Ms Khakhu Mulaudzi.
- ii) Secondly that the sale agreement between the Applicant and Ms Mulaudzi is invalid thus affecting the transfer of the property to the Applicants.

[62] I refer to the judgment in case number 30518/2020 and repeat contents thereof in this judgment. I have made a finding that the sale agreement and subsequent transfer of the property to the Applicant on the 9th April 2019 is valid and cannot be faulted.

DOES THE FIRST TO THIRD RESPONDENTS HAVE A LEGAL RIGHT TO
CONTINUE OCCUPATION OF THE PROPERTY?

[63] This question has been answered in my finding in respect of case number 30518/2020. The first Respondent in his own words admitted having stopped making payments to Ms Mulaudzi the seller. I have also in my judgement above found that the first agreement became void by virtue of it not having been registered in terms of Section 20 of the Alienation of Land Act.

[64] There is evidence that the first Respondent knew as far back as November 2018 that Ms Mulaudzi was selling the property to someone else. The first Respondent took no steps to assert his rights in terms of the first agreement. The seller Ms Mulaudzi acted openly and did not hide that fact. If the Respondents felt aggrieved they could have at that stage interdicted the sale. In the result I find that the first to third Respondents lost whatever right they may have in respect of the

property during November 2018 and accordingly have no right to continue occupation.

IS IT JUST AND EQUITABLE TO EVICT THE FIRST TO THIRD RESPONDENTS?

[65] The first and third Respondents do not claim that the property is their prime residence. It is only the third Respondent who can claim that the property is her primary residence.

[66] Section 4 (6) of the PIE Act provides that a Court must grant an eviction order if it is of the view that it is just and equitable to do so after considering all the relevant facts. Such relevant facts besides ownership includes inter alia whether the property is occupied by the elderly, children, disabled persons and households headed by woman.

[67] The third Respondent who is the daughter of the first and second Respondents has not filed an affidavit setting out her personal circumstances neither has the first Respondent informed this Court whether the third Respondent deserves protection under one or more of the relevant facts set out in Section 4(6) of PIE. In the absence of any information to the contrary I conclude that the third Respondent will not be left homeless after eviction. She still has a home in Orlando East where the first and second Respondents are. She is free to join them or seek rented accommodation elsewhere.

WHAT WILL BE A SUITABLE DATE FOR THE RESPONDENTS TO VACATE?

[68] The Applicant is the registered owner of the property and is presently paying off a bond registered over the property that he is not enjoying. This has been the case since the year 2019. It is now almost three years that he has been deprived of enjoyment of his property.

[69] On the other hand it is so that the Respondents have been in occupation since 2015 and need a fair amount of time to move their furniture to an alternate place.

[70] In the result I have come to the conclusion that a reasonable period to vacate be not later than the 30th of April 2023. Accordingly, I make the following order:

ORDER

1. The application in Case Number 30518/2020 is hereby dismissed.
2. The first Applicant is ordered to pay the Respondents taxed party and party costs.
3. The application in Case Number 34521/2020 is granted.
4. The first, second and third Respondents and all persons occupying the property through and under them are ordered to vacate the property by not later than Monday the 30th April 2023 at 14h00.
5. In the event that the first, second and third Respondents do not vacate the property voluntarily by the given date the Sheriff or his Deputy duly assisted by the South African Police Services or a Private Security Company are hereby authorised to carry out the eviction.
6. The first, second and third Respondents and all persons occupying through or under them are hereby interdicted and restrained from entering the property at any time after they have vacated same or been evicted therefrom by the Sheriff.
7. The first Respondent is ordered to pay the taxed party and party costs of this application.

Dated at Johannesburg on this 17th day of March 2023

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 16th JANUARY 2023

DATE OF JUDGMENT : 17th MARCH 2023

FOR APPLICANT : ADV S SWIEGEN

FOR RESPONDENT : ADV PHUKUBJE
ADV LIAN KEISER
ADV NICO HORN