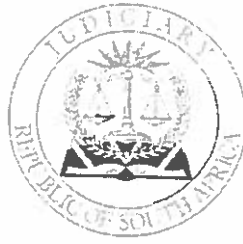


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
14 November 2019	
DATE	SIGNATURE

CASE NO: 6620/19

In the matter between:

JOSEPH MPHO KGOTSI

FIRST APPLICANT

THEMBISILE LORRAINE KGOTSI

SECOND APPLICANT

And

ANNA LINA MODISE

RESPONDENT

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*EX TEMPORE JUDGEMENT*

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COLLIS J:

INTRODUCTION

1. This is an opposed application wherein the first and second applicants as per their Notice of Motion seek the following relief:

- 1.1.1 That it be declared that the sale and purchase contract dated the 18<sup>th</sup> of November 2018 between the parties be declared to be valid and the purported cancellation by the Respondent is null and void.
- 1.1.2 That Respondent appoint a conveyancer to attend to the transfer of the property within seven days of the order.
- 1.1.3 That should Respondent fail to comply with the order 1.2 above, that the Chairperson of the Legal Practice Council be authorized to appoint the conveyancer.
- 1.1.4 That the Respondent sign all transfer documents necessary to effect transfer of the property within 14 days after being requested by the appointed conveyancer.
- 1.1.5 That failure to comply with 1.4 above by the Respondent, the Sheriff of Cullinan be authorized to sign all the transfer documents to effect transfer of the property to the Applicants.
- 1.1.6 That costs of the Sheriff and the Chairman of the Legal Practice Council be paid by the appointed conveyancer from the proceeds of the sale of the property.
- 1.1.7 That the Respondent pay costs of the suit on Attorney and Clients scale.

## 2 BY WAY OF BACKGROUND

2.1 On the 18<sup>th</sup> of November 2018 the applicant and respondent entered into a written sale and purchase contract. The material terms of the contract were as follows:

- a) Applicant purchase the Respondent's immovable property being ERF 12693 MAMELODI (hereinafter referred to as the property).
- b) The purchase price of the property was R700 000-00 (**Seven Hundred Thousand Rands**) (Clause 1.1. of the contract).
- c) Purchase price was payable by funds to be obtained by the applicants from a loan to be approved by a bank for R700 000-00 (**Seven Hundred**

**Thousand Rands)** within 30 days from the 18<sup>th</sup> of November 2018. This was a suspensive clause (Clause 15 of the contract).

- d) The applicants shall within 30 days from the 18<sup>th</sup> of November 2018 deliver guarantees of the purchase price to the respondent. (Clause 1.1.4 of the contract).
  - e) In the event of breach of the contract by the applicants, the respondent shall by notice inform applicants to remedy the breach, before cancellation of the contract.
  - f) The sale and purchase agreement incorporated the lease agreement
  - g) In terms of the lease agreement the rental was R5 000-00.
  - h) In terms of the lease agreement the lease period will terminate on the date of transfer of the property, by operation of the law (*ex lege*), as the leasee would be the owner of the property.
- 3 It is the applicants contention that on 28 November 2018 Absa Bank approved a loan in the amount of R 700 000 and instructed Fuchs Roux Incorporated to attend to the bond registration.
- 4 In execution of such instruction Fuchs Roux Incorporated directed a letter to the transferring attorneys M.M Malete requesting the bond guarantee requirements. This letter is dated 5 December 2018 and in reply; M.M Malete Incorporated requested the necessary bank guarantee(s) for the purchase price.
- 5 What followed was then a purported cancellation by the respondent through her attorneys Sello Letswalo Attorneys dated 14 January 2019 wherein the reason for cancellation was stipulated that the purchasers (applicants) had failed to furnish the seller (respondent) with a financial institution guarantee pertaining to the purchase price within 30 days of signature of the contract and the seller (respondent) was unwilling to wait further for such guarantee. The said letter of cancellation is annexed to the founding affidavit as annexure "JMK 6".
- 6 In response to the purported letter of cancellation the applicants attorney (Fuchs Roux Inc) replied wherein issue was taken that the respondent (seller) had failed to comply with Clause 7 of the contract (dealing with any default by the purchaser)

and on 18 January 2019 the said attorneys proceeded to furnish M Malete Attorneys with the said guarantee.

#### IN OPPOSITION

- 7 The respondent denies that at the time that the agreement was concluded that the time frames in relation to the conditions contained in Clause 15 was already inserted in the offer to purchase. Having denied same, the respondent nevertheless contends that the applicants have been remiss in complying with this condition. In addition to this, the respondent alleges that when indeed the guarantees were ultimately furnished to M.M Malete Inc the mandate had already been terminated and that the applicants' attorneys had been appraised of same.
- 8 In support of this assertion the respondent had annexed to her answering affidavit, a confirmatory affidavit deposed to by Mr Malete wherein he had confirmed that the applicants had failed to furnish the guarantees by 2 January 2019 and that they had failed to pay him the transfer costs demanded from them on 28 November 2018. As a result he had informed the respondent attorneys as at 13<sup>th</sup> January 2019, his firm had not received the guarantees. It was the respondent's attorneys who in turn had informed him that the purchase was considered automatically cancelled as is provided for its Clause 15.1 of the offer to purchase.
- 9 'The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract.' The decision *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Invest (Pty) Ltd*. 2018 (2) SA 314 (SCA) cited with approval that the principle of *pacta sunt servanda* is still part of our law. This entails that obligations arising from a written contract, whether that clause is fair or unreasonable, must be complied with.
- 10 In addition to this the decision *Kate's Hope Game Farm (Pty) Limited v Terblanchehoek Game Farm (Pty) Ltd* [1997] 4 ALLSA 185 (A); 1998 (1) SA 235 (SCA) reaffirmed that position that a claim based on a contract is to be put within

the four corners of the agreement. A proper setting out of the cause of action requires an averment of the fulfilment of such condition as the agreement might attach to the obligation sought to be relied upon. These conditions must be of the nature of pre-requisites for the coming into existence of an obligation or terms, reciprocal obligations of which prior or simultaneous fulfilment is required and the like. In other words a litigant relying on a contract which is subject to a condition has to plead and prove that condition and its fulfilment.

- 11 In the present matter and having regard to the affidavits it is undisputed that the applicants had obtained the necessary bond approval within the time period stipulated in Clause 15 of the underlying agreement.
- 12 The agreement provided for the applicants to obtain the necessary loan from a financial institute within 30 days or the extended 15 day period. The loan was obtained on 28 November 2018 and on 05 December 2018, this information was relayed to M.M Maletle Inc.
- 13 The Court therefore finds that the applicant have complied with the provisions set out in Clause 15 of the offer to purchase.
- 14 The matter however does not end there. In addition to securing the finance the applicants were to furnish the respondent with a bond guarantee within 30 days of signature of the offer to purchase. During argument Mr Masango conceded that such guarantee was to have been provided to the seller within 30 days of acceptance of the offer and as such by no later than 18 December 2018 to comply with Clause 1.1.4 of the offer to purchase. It is common cause that the bank guarantee was not provided by the applicants by the deadline 18 December 2018.
- 15 The offer to purchase specifically provided how the parties should call upon each other to remedy a breach. In this regard Clause 7 provides for same, the so-called "*Lex Commissoria*".

- 16 Clause 7 specifically states that in the event that the purchasers fail to furnish guarantees on time the seller (respondent) must dispatch a notice to the purchaser demanding delivery of the guarantees within 10 (ten) days as failure will result in the contract being cancelled.
- 17 The applicants alleges that after their breach (to deliver the guarantees) the respondent (seller) had failed to dispatch a notice to demand the delivery of the guarantees and given their failure the respondent has failed to acquire the right to cancel the contract as such.
- 18 The respondent conceded that no notice to remedy the breach had been dispatched and the basis for this concession is the fact that the contract had already been terminated on 14<sup>th</sup> January 2019.
- 19 This reasoning by the respondent, I cannot find favour with. This I say so, as it is in total contradiction to the provisions Clause 7 of the offer to purchase and it as such is also in total contradiction with the notion of the privity and sanctity of contracts which goes hand in hand with the freedom to contract.
- 20 Parties simply do not enter into contracts and then walk away from same when a defaulting party breaches a term contained in such contract. They first permit or allow the defaulting party to remedy their breach with the intention to keep the contract in place.
- 21 In the present instance the respondent (seller) had failed to do so and as such the respondent had failed to comply with the *Lex Commissoria* contained in the offer to purchase.
- 22 It therefore follows, the applicants would be entitled to the relief they seeks, and having been the successful party they also would be entitled to the costs of the application.

## ORDER

23 In the results the following order is made:

- 23.1 It is declared that the sale and purchase contract dated the 18<sup>th</sup> of November 2018 between the parties is valid and the purported cancellation by the Respondent is null and void.
- 23.2 The Respondent is to appoint a conveyancer to attend to the transfer of the property within 10 court days of date of this order.
- 23.3 Failure which the Chairperson of the Legal Practice Council be authorized to appoint a conveyancer.
- 23.4 The Respondent is ordered to sign all transfer documents necessary to effect transfer of the property within 14 days after being requested to do so by the appointed conveyancer.
- 23.5 Failure by the Respondent to comply with 23.4 above, the Sheriff of Cullinan be authorized to sign all the transfer documents to effect transfer of the property to the Applicants.
- 23.6 Costs of the Sheriff and the Chairman of the Legal Practice Council be paid by the appointed conveyancer from the proceeds of the sale of the property.
- 23.7 The Respondent is ordered to pay costs of the suit on Attorney and Client scale.



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**COLLIS J  
JUDGE OF THE HIGH COURT OF  
SOUTH AFRICA**

**Appearances as follows:**

Counsel for the Plaintiffs	: Mr. Jackson Masango
Attorney for the Plaintiffs	: Fuchs Roux Incorporated
Counsel for the Defendant	: Mr. Victor Mabe
Attorney for the Defendant	: Victor Mabe Incorporated
Date of Hearing	: 13 November 2019
Date of Judgement	: 14 November 2019