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**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 21436/20**  
REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED: yes  
Date: **18 March 2021**

Hearing before Rabie J by way of Zoom conference.

In the matter between:

**D.T. MASHIGO**

**First Applicant**

**L.G. MASHIGO**

**Second Applicant**

**and**

**W. SOLOMON**

**First Respondent**

**M. MAGAOGA**

**Second Respondent**

**N. MAGAOGA**

**Third Respondent**

**REGISTRAR OF DEEDS: PRETORIA**

**Fourth Respondent**

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**JUDGMENT**

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1. In this application the applicants seek the following orders: declaring the transfer of an immovable property in The Reeds, Centurion, to the second and third respondents to be null and void ab initio; declaring the subsequent transfer of the aforesaid property from the first respondent to the second and third respondents to be invalid; directing the fourth respondent, the Registrar of Deeds, to cancel the registration of the property in favour of the second and third respondents and to restore the registration of the property in the name of the first respondent in order to give effect to the pre-emptive right which was obtained by the first applicant from the first respondent as per the order of this Court under case number 89177/2019; and an order for costs on the scale as between attorney and client against those parties opposing the application.
  2. The second and third respondents opposed this application and have launched a counter application for the eviction of the applicants from the property. The counter application was not opposed by the applicants.
  3. The background to the applications is briefly the following. During October 2018 the first applicant and the first respondent concluded a lease agreement in respect of the immovable property which were rented for business purposes by the first respondent to the first applicant. The lease was for a period of 12 months with an option to renew the lease two months prior to its termination, which was 15 October 2019. According to the applicant the parties agreed to the extension of the lease which included a right of first purchase should the first respondent, as owner, decide to sell the property. According to the first applicant the first respondent advertised the property for sale without offering it to the applicants. This dispute appears to have been resolved but during

November 2019 the second applicant was informed that the property was to be registered in the name of the second respondent since it had been purchased by the first and second respondents.

4. The first and second applicants thereupon applied to the court for an urgent interdict preventing the transfer of the property to and the registration thereof in the name of the second and third respondents.
5. It appears that the court hearing the urgent application made no factual finding on the merits of the applicants' right to purchase the property and that the presiding Judge urged that the parties to discuss the possibility of settling the application on certain terms suggested by him. The parties did so and a draft order was handed up and made an order of court 5 December 2019 by Baqwa J. The relevant part of the order reads as follows:
  - "1. The first respondent is ordered to provide the applicants with a written sale agreement for the purchase of the property, [...] Street, [...], Centurion (hereinafter referred to as "the property");
  2. The sale agreement shall be on the following terms and conditions:
    - 2.1 The purchase price shall be R 1 750 000, 00 (one million seven hundred and fifty thousand rand);
    - 2.2 The sale agreement will be subject to the suspensive condition that the applicants obtain financing in the form of a bank guarantee from a financial institution for the full purchase amount, within 30 (thirty) days from receiving the signed agreement from the first respondent as per paragraph 1.
  3. Should the applicants fail to deliver the counter signed agreement together with proof of obtained financing as contemplated in paragraph 2.2 above,

within 30 days of receiving the signed agreement, the first respondent is entitled to sell the property to a third party, and the applicants will not be entitled to challenge or dispute the sale and transfer of the property to a third party;

4. Each party to pay its own costs. Respondents are interdicted from transferring property for a period of 30 (thirty) days from the granting of this order."
6. Consequently, in terms of the order the applicants would be supplied with a signed sale agreement on the terms set out in the order and subject to the suspensive condition that the applicants would obtain financing for the purchase of the property within 30 days of receiving the signed agreement. The applicants had to countersign the aforesaid signed agreement supplied to them together with proof that they had obtained finance as contemplated in paragraph 2.2 of the court order. If the applicants complied with their obligations, they would be allowed to purchase the property. Furthermore, the respondents were interdicted from selling or transferring the property for a period of 30 days being the period allowed to the applicants to obtain financing. If the applicants were not able to obtain financing within the 30 day period, the interdict would lapse and the first respondent would be allowed to transfer the property to the second and third respondents.
7. On 9 December 2019 the signed agreement of sale together with a cover letter was sent to the applicants' legal representatives. The terms of the agreement mirror those contained in the order of 5 December 2019. On 11 December the applicants' representative wrote a letter to the attorney of the second and third respondents indicating that they had not received the signed agreement. In a return email reference was made to the previous email by which the agreement was sent and a copy of the agreement was

again attached to this email. There was no response by the applicants to this email.

8. The applicants failed to comply with the suspensive condition and did not manage to obtain financing for the purchase of the property. The attorney of the second and third respondents advised the applicants that the 30 day period had lapsed and that the property would be transferred to the second and third respondents. The applicants again failed to respond to this email. As a result the property was transferred to the second and third respondents.
9. The attorney of the second and third respondents was informed by the Deeds Office that the interdict granted on 5 December 2019 was still reflected on the property file despite the fact that the 30 day period had lapsed. Accordingly the attorney directed a letter to the applicants putting on record that the period had lapsed and requested them to uplift the interdict so that the property could be transferred.
10. On 23 January 2020 the first applicant requested the attorney of the second and third respondents to provide an agreement to her to which the attorney responded by saying that the agreement had on two previous occasions been provided to the applicants.
11. The applicants then changed their attitude by saying that they had received an annexure and not the full agreement. It eventually appeared that the applicants wanted a copy of the sale agreement between the first respondent and the second and third respondents. The court order of 5 December 2019, however, makes no reference to that agreement. The second and third respondent submitted that it was clear that the applicants did their utmost to frustrate the transfer of the property which they were occupying without paying rent. As a result of the applicants' failure to comply with the order dated 5 December 2019, and specifically the

suspensive condition, the Registrar of Deeds eventually proceeded with the transfer of the property and this occurred on 13 February 2020.

12. Although the applicants claim in the present application that they have complied with the suspensive condition, this is clearly not the case. They did not obtain a bank guarantee as alleged but instead presented merely a request and/or quote for financing which was, in any event, for an amount less than the purchase price of the property. Furthermore, the Acceptance of the Home Loan Offer was dated 26 February 2020 while the bank guarantee had to be provided, at the latest, by 9 January 2020.
13. In addition, the applicants failed to show in the present application that they could tender the full purchase price of the property. The loan which they might have been able to obtain fell far short of the purchase price of the property.
14. In the result the applicants failed to comply with the suspensive condition with the effect that the agreement never came into effect. The second and third respondents were consequently entitled, in terms of the order of 5 December 2019, to purchase the property. In the result, and according to the founding affidavit supporting the relief claimed in the Notice of Motion, the applicants have not shown any right for the relief sought by them.
15. On the day of the hearing before this court Mr Mosala, appearing on behalf of the applicants, applied for leave to file a supplementary founding affidavit. After some discussion he was allowed to do so and the matter stood down for two days.
16. In the supplementary affidavit which was filed the following was, inter alia, noted as the grounds for the application. It was submitted that the sale agreement or offer to purchase between the parties was regulated by the Consumer Protection Act, 68 of 2008. It was submitted that the first

respondent was in breach of the court order granted in December 2019 and in this regard reference was made to section 55 (2) (a-b) and section 55 (6) of the Act.

17. It was further submitted with reference to case law that a seller may not rely on a voetstoots clause if he knew about the defect at the time of the sale; if he deliberately concealed the defect; and if he made a fraudulent or innocent misrepresentation. It was further submitted that the seller would know that if the latent defect had not been concealed, the purchaser would have negotiated a more favourable purchase price.
18. In paragraph 9.4 of the supplementary affidavit the applicants concluded that in terms of section 55 (6) a consumer who knowingly enters into an agreement fully aware of the defect cannot have a recourse against the seller upon the conclusion of the sale agreement. The first applicant added that in the present matter he did not sign the sale agreement sent to him because he was already aware of the latent defects in the property being a defective foundation and faulty water pipes. Consequently, so he submitted, had he signed the contract he would have been prejudiced and left without a remedy or any form of relief. Further consequently, so he submitted, the first respondent did not sell the property or allow the applicant to exercise his preferential right because he was aware that the applicant had knowledge of the existing latent defects and this would have affected the selling price. It was noted that the sale agreement sent to the applicant did not mention the latent defects which the applicants and the first respondent, as seller and purchasers, were aware of and that if that had been done, the applicants would have insisted on a lesser purchase price. It was further submitted that since the defects had not been specifically mentioned in the deed of sale, a valid contract had not been presented to the applicants. Lastly, it was submitted that if the first

respondent submits a deed of sale to the applicants mentioning the latent defects, that will reduce the purchase price of the property.

19. The applicants also referred to an addendum which was drafted on 29 June 2019 which referred to, inter alia, defects in the property. According to the applicants this addendum forms part of the agreement of sale.
20. Firstly, the addendum was drafted at a time when the parties were still involved in a lease agreement. Secondly, the addendum made provision for the document to be signed by the parties but this never happened. Thirdly, the applicants' submissions in respect of the Consumer Protection Act are totally misplaced. The provisions referred to protect a purchaser who was unaware of latent defects of which the seller had been aware but had failed to inform the purchaser of. In the present case the applicants, as purchasers, had at all times been aware of the alleged defects. They would consequently, and whether the agreement of sale had mentioned to the defects or not, not have been entitled to a reduction in the purchase price or cancellation of the agreement if they had signed the agreement.
21. The biggest hurdle in the path of the applicants, and in this regard I agree with the submissions on behalf of the second and third respondents, is the fact that the previous court order quoted above, determined what the first respondent had to do and what the applicants had to do in order to purchase the property. According to the court order the price had been set and the applicants were given an opportunity to purchase the property for that price. The applicants were not entitled to impose further terms into the agreement nor to purchase the property for a lesser price. The applicants were therefore also not in a position to prescribe that certain defects were to be fixed before they purchased the property. The applicants were aware of all the alleged defects and they had to decide whether they could and would purchase the property for the price indicated in the court order.



They could not insist on a different price than had been accepted by the second and third respondents as mentioned in the court order.

22. The court order was clear and the first respondent complied with its terms. The issue of latent defects referred to in the supplementary affidavit was clearly an afterthought in order to confuse the issues and add to the disputes. I have already mentioned that the applicants failed to provide the required bank guarantee within the required period of time and thus failed to adhere to the suspensive condition.
23. In the results of the applicants' application should be dismissed.
24. Regarding the counter application for eviction I have mentioned before that the applicants failed to oppose that application. The property was leased for business purposes and as owners of the property the second and third respondents have acquired the rights and obligations of the first respondent in terms of the lease agreement.
25. The applicants have failed to honour their rental obligations in terms of the rental agreement and as at the date of the supporting affidavit the applicants were in arrears in the amount of R 192 636.65. The applicants were duly notified to remedy the breach but they had failed to do so. Consequently the applicants are entitled to the relief sought in the counter application.
26. In respect of the costs of both the main application and the counter application there is no reason why costs should not follow the event.
27. In the result that the following order is made:
  1. The applicants' application is dismissed with costs.
  2. In respect of the counter application in the Notice of Motion dated 22 September 2020 the following order is made:

- 2.1 The Respondents and/or all other illegal occupiers are hereby evicted from the property known as Erf [...], [...], [...]
- 2.2 The Respondents and/or all other illegal occupiers are ordered to vacate the property within 21 days of service of this order.
- 2.3 Should the Respondents and/or any other illegal occupier fail to vacate the property within 21 days of service of this order, the eviction order may be carried out and in which event the Sheriff of this Court is hereby authorised and ordered to evict the Respondents and/or all other illegal occupiers from the property.
- 2.4 The respondents are ordered to pay the costs of the counter application in the Notice of Motion dated 22 September 2020 jointly and severally.

**C.P. RABIE**

**JUDGE OF THE HIGH COURT**

**18 March 2021**

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