IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 31548/20

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
28 DECEMBER 2021

In the matter between:

REALTIME INVESTMENTS 214 CC	**APPLICANT**
(Reg. No. 2002/006657/23	
And	
TANAGRA VAN STRAATEN	**FIRST RESPONDENT**
I.D.[....]	
HELEEN BEHRENS	**SECOND RESPONDENT**
T/A BEHRENS ATTORNEYS	
UNLAWFUL OCCUPIERS OF	**THIRD RESPONDENT**
173 ESRASMUS AVENUE, RASLOUW AH,	
CENTURION, 0157	
REGISTRAR OF DEEDS, PRETORIA	**FOURTH RESPONDENT**
CITY OF TSHWANE MUNICIPALITY	**FIFTH RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The applicant initially brought urgent applications in two parts. In Part A to be heard on 28 July 2020 and the relief sought was to notify the first and third respondents in terms of Section 4(2) of the Prevention of the Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The application was brought *ex parte,* it being a precursor to an order for eviction of the said respondents in Part 8, the main application. The *ex parte* application was heard on 29 July 2020 and it was opposed by the first and third respondents. Although the *ex parte* order was granted, the issues pertaining to urgency and costs and other issues raised by the respondents were reserved for determination in the main application.

[2] In Part B of the application, which was also brought on urgency, to be heard on 18 August 2020 and which was opposed, the applicants sought the following relief:

> "2. Declaring that the agreement of sale, annexure "FA3"to the applicant's founding affidavit has been validly cancelled by the applicant
>
> 3. That the first and third respondents be evicted from the property being SS61/2 E[....] Ave Development (1044/2008). Portion 281, Farm 383, Section 1, City of Tshwane situate at 173 E[....] Ave, Raslouw AH, Centurion, 0157 ("the Property")
>
> 4. That the first and third respondent are ordered to vacate the property within one week of the date of service of any order of this Honourable Court
>
> 5. That in the event that the first and third respondent do not vacate the Property on the date determined by the Honourable Court, the

Sheriff of the Court or his/her lawfully appointed deputy be authorised to evict the first and third respondents from the property

6. That the first and second respondent be directed to pay the costs of this application including the costs of the application in terms of B hereof

7. That the applicant be granted such other alternative relief as the Court may deem fit in the circumstances

The relief in Part B was amended to include a new paragraph 6:

6. That the first respondent take all steps necessary and sign all necessary documents and failing the first respondent the Sheriff is authorised to take all steps necessary and sign all documents necessary to effect registration of transfer of the property into the name of the applicant.

It was agreed that the main application was not urgent. The matter was removed from the urgent roll of 18 August 2020 to the ordinary opposed motion roll with the applicant tendering wasted costs.

[3] The first and third respondent also launched a counter application in which they sought an interim interdict preventing the second respondent from paying the balance of the purchase price to the applicants, pending the outcome of an action instituted in the Regional Court. According to the first and second respondents the applicants consented to the relief sought in the counter applications save for the costs. The R200 000.00 would remain in the trust account of the second respondent till the finalization of the action.

[4] The applicant did not seek any relief from the second respondent unless the application was opposed by her. The second respondent did not oppose the application but caused an affidavit to be filed the purpose of which

was to assist the court in clarifying the facts..

BACKGROUND

The agreement

[5] It is common cause that the deponent to the founding affidavit Mrs Ilanda Du Toit was the sole member of the applicant. It is also common cause that the applicant (the seller) and first respondent (the purchaser), entered into a written agreement for the purchase of the property described above:

> -in the amount of R3 200 000.00 on 16 November 2019.
> -the first respondent would pay the deposit into the conveyancer's account and agreed that any amount paid to such conveyancer be invested for the applicant in an interest bearing account pending registration of transfer (clause 1.2).
> -the first respondent agreed to furnish guarantees in writing in a format acceptable to the conveyance and applicant for the payment of the balance of the purchase price due alternatively pay the balance due to the conveyancer in cash to the conveyancer (clause 1.6)
> -the applicant has the right to appoint an attorney and instructs the conveyancer as provided (clause 1.8); (the second respondent being the conveyancer appointed by the applicant)
> -It was agreed that the purchase price would be paid in cash to the applicant on date of registration of the property into the name of the first respondent (clause 2).
> -The first respondent was not allowed to effect any additions or alterations to the property unless written consent had been given to effect such changes by the applicant (clause 6.2).
>
> -The property was sold voetstoots as at date of signature and the applicant would not be liable for any defects in the property whether visible or not unless the applicant knew of the material defects that

were to visible and did not bring them to the attention of the first respondent (clause 11.1).

-No undertakings or warranties were issued by the applicant other than what is expressly contained in the agreement (clause 12.2).

-The first respondent declared that she was given fair and ample opportunity to inspect the property to her satisfaction. (clause 12.6). In the event of a breach by either of the parties, "the aggrieved party would be entitled to, without prejudice to its rights, claim damages that it may have suffered as a result of such breach, to cancel the agreement by written notice to the defaulting party, or to claim specific performance by the party of its obligations (clause 14.1)

-It was further agreed that upon cancellation of the agreement for any reason, the first respondent agreed to vacate the property and that occupation by the applicant be restored within 24 hours in the condition it was given as at date of occupation. (Clause 14.4)

[6] The first respondent is said to have inspected the property on three occasions on 19 October 2018, 10 September 2019 when the deponent and Du Toit were present and 7 December 2019 January and 2020 which took place in their absence, before taking occupation on 22 February 2020. On 4 June 2020 it came to the attention of the applicant that the first respondent had done alterations to the property before transfer and in breach of the agreement. The applicant contended that the alterations were extensive and had caused damage to the property and photographs were annexed..

[7] Applicant contended that the second respondent was instructed by the husband of the deponent, Mr Du Toit not to follow through with the transfer of the property in view of the breach and an email FA5, dated 4 June 2020, was annexed to the founding affidavit. Notwithstanding these instructions the second respondent went ahead with the transfer of the property to the first respondent, which occurred on 9 June 2020. Only a sum of R3 000 000.00 was paid over to the applicant and a sum of R200 000.00 was withheld by the second respondent. The applicant contended that the first respondent gave

instructions to the second respondent to withhold the amount and further that the second respondent had no lawful basis for withholding the said amount and, that the said amount was not paid over despite lawful demand. In a letter dated 10 June 2020 the second respondent addressed a letter to the first respondent in which the latter was advised to stop contacting the former respondent and the obligation was to invest the monies on behalf of the applicants till the dispute was resolved. Further, the second respondent in a letter annexed as F9 contended that the funds would not be released without the written consent of both parties alternatively an order of court

[8] On 12 June 2020 the first respondent demanded payment of an amount of R356 095.55 relating to defective of missing items on the property sold despite the fact that the property was sold voetstoots; that transfer had passed on 9 June 2020; That the first respondent had taken occupation since 22 February 2020; and the fact that first respondent had made alterations to the property in breach of the agreement

[9] The applicant denied liability for the defects pointed out by the first respondent being in the swimming pool, the fire retardant treatment etc. on 17 June 2020 and contended that it had complied fully with the agreement. Further, it addressed a letter to the first respondent demanding payment of the amount of R200 000.00 within seven days failing which the applicant would cancel the agreement and claim damages. The applicant refuted the contention by the first respondent that the full purchase price had been paid in full and on 23 June 2020 another letter followed stating that should the breach not be remedied by the 26 June 2020 the agreement would be cancelled. A letter cancelling the agreement was sent demanding that the property be reinstated to its original condition and that the property be handed back to no later than 15h00 on 30 June 2020.

[10] The applicant contended that the first respondent had not responded to the notice of cancelation nor had the respondent disputed the cancellation of the agreement. The first respondent was therefore in unlawful occupation and

had in terms of the agreement agreed to vacate the property within 24 hours. Therefore, the first respondent and everyone occupying the property through her were in unlawful occupation of the property. Consequently, the applicant tendered to repay the R3 000 000.00. The first respondent further failed to comply with an undertaking to desist from further damaging the property, to hand it back in the original condition it was found. It also contended that it was just and equitable for provisions of section 4(6) and 4(8) that the first and third respondent be ordered to vacate within one week, that they have been forewarned of the intended eviction and that they ought to have made alternative arrangements for accommodation.

[11] The first respondent in opposition contended that:

> -the applicant did not have the *locus standi* to launch the application for the eviction of the first and third respondent under PIE as she was the registered owner and person in charge of the property and neither she, her husband and two daughters who reside on the property were unlawful occupiers
> -the sale could not have been validly cancelled on 29 June 2020 after registration of the property on 9 June 2020; the purchase price was paid in full to the agent, conveyancer of the applicant and the second respondent; further, the second respondent had paid the transfer fee, transfer duty. Occupational rent and service charges for the period of occupation for the property were paid before the property was transferred to the first respondent with the full knowledge of the applicant and its representative;
> -at the time of transfer the applicant was aware of the amount held in retention due to defects complained about
>
> -the first respondent denied that all the terms of the agreement were material terms of the sale agreement, non-compliance of which would justify the cancellation of the agreement;

[12] It was denied that the alterations were major ones to such an extent that damage was caused to the property. Alterations were done to the flatlet to increase light into the living area, an to replace the support beams the structure of which had deteriorated, and the same existing zinc roof was put back onto the structure, photographs were attached

[13] The first respondent contended that the dispute regarding the retention of the R200 000.00 was rightfully first taken up by the applicant with the second respondent before changing track by purporting to cancel the agreement. Further, the counter application was sought for an interdict preventing the second respondent from paying out the monies to the first respondent and that stood, until such time as the action proceedings in the Regional Court were finalized, the applicant having no assets to secure the debt.

[14] In as far as the inspection of the property before purchase was conducted by the first respondent it was contended that the 2018 visit to the property was done when other properties in the area were viewed. On realisation a year later that the property was still on the market viewing was conducted in the presence only of the applicant's estate agent and the applicant's who had ample opportunity to point out the defects did not actively participate. The first respondent relied on the declaration as at paragraph 18 of the sale agreement and undertaking provided by the applicant's representatives, and the electrical compliance assurance regarding the condition of the equipment on the property.

[15] The first respondent contended that soon after occupation on 2 March 2020 a letter was addressed to the second respondent regarding the applicant's breach of non-disclosure, listing all the defects which were not disclosed by the applicant and requesting that a sum of R140 000.00 at least be retained pending quotations, as it seemed the applicant had no other assets. When further defects were discovered the first respondent demanded an increase in the amount to be retained. There was an exchange of emails

with the second respondent who confirmed that the issues were being addressed with the applicant and Du Tait. An undertaking was made by the second respondent to preserve the amount. Despite indication from the second respondent that the applicant would be referring the issue of the defects to its attorneys no response was received regarding the defects. In the meantime the second respondent went ahead with the process of finalizing registration and in an email dated 3 June 2020 indicated that registration would be achieved within five working days and demanded that the first respondent pay occupational rent up to estimated date of registration, payment of an electricity account, payment of he pro forma invoice relating to the notarial cession,

[16] The first respondent contended that she was not made aware of the content of an email dated 4 June 2020 addressed to the second respondent to stop registration until outstanding amounts are paid and the house is restored to the state that it was in at the time of occupation

[17] In the counter-claim the first respondent contended that in view of the defects she has established a *prima facie* right why the purchase price needs to be reduced with an amount which has been retained by the second respondent. Further, that the applicant was possessed of no other assets from which she may recover any damages or reduction in the purchase price. It is contended that the balance of convenience favours her in that there were prospects of success in the action, in that the applicant failed to disclose defects it knew about in items it specifically included in the sale agreement.

ANALYSIS OF EVIDENCE

[18] The traditional practice is that the seller appoints a conveyancer. In terms of the sale agreement the applicant appointed its own conveyancer. The second respondent was therefore appointed to receive the purchase price (received a cash payment paid into the trust account) and with the consent of the purchaser to invest same in an interest-bearing account on behalf of the

applicant, until such time as the property was transferred to the first respondent and at which occurrence the amount would be paid to the applicant. Strictly speaking and in terms of the contract the first respondent discharged her obligation in terms of the contract on payment of the full purchase price of R3 200 000.00 to the second respondent. In this case there is no confusion about who appointed the conveyancer, and who the agent for the applicant would be.

[19] Both counsel were in agreement that as appears in decided cases relied upon, that a case had to be determined according to its 'own facts and particulars of the contract; *Agu v Krige and Others* (20763/2017) [2019]ZAWCHC (28 March 2019)'Roya/ *Anthem Investments 129 (Pty)Ltd v Lau and Others 2014 (3) SA 626 (SCA).*

[20] In *Agu supra* relying on *Baker v Probert* 1985 (3) SA 429 (AD),the terms of the contract determined the status of the agent who in this instance was the conveyancer who received payment for the seller and at 439-G described agency as follows:

"It means no more than the person authorised by the defendant to accept payment of purchase price by the plaintiff. It connotes a *mandate by which the seller confers authority on the agent (his mandatory) to represent him in acceptance of the payment of the purchase price as* a *consequence, in law, that payment to the agent is equivalent to payment to the seller."*

Further in *Agu supra* at paragraph 21 is stated:

"…..*It must be remembered that the appointment of* a *conveyancer is no trifling matter. The conveyancer plays* a *pivotal role in any property transaction involving the conveyance of immovable property from one person to another…..The appointment of an conveyancer is as much* a *term of the agreement of sale, requiring negotiation and agreement between the parties,* as *are other material terms…..".*

[21] The issue in my view depends on how the parties to the contract including the second respondent conducted themselves outside of the sale agreement. The contentious issues pertain to the defects to the property which were raised by the first respondent soon after taking occupation of the property and the retention of R200 000.00 by the second respondent and, the alleged alterations to the property which resulted in the purported cancellation of the sale agreement. Counsel for the first respondent contended that the second respondent conducted herself not only as the conveyancer and agent in the sale agreement but also as the attorney for the applicant. It is not clear in the founding affidavit what the relationship, other than that of agent. was with the second respondent. except that it seems according to the applicant several telephone calls were made by Du Toit to the second respondent regarding the withholding of the R200 000.00. which could only have come into effect on the date of transfer when the second respondent failed to pay the whole amount.

[22] The answering and replying affidavits give content to the dispute regarding the the issues which were raised on 2 March 2020, soon after occupation of the immovable property by the first respondent on 22 February 2020 (the defects) and the alleged alteration which the applicant states came to its attention on 3 June 2020. The complaints raised with the second respondent pertained to items included in the agreement which were removed and the defects. For a perspective of the defects complained about the relevant voetstoots clause in the agreement reads as follows:

"the seller is therefore not liable to the purchaser for any defects in the property, whether visible or not , *unless the seller knew of material defects that are not (latent defects) and did not bring them to the attention of the purchaser, Annexure "A" refers""* (my under lining) Annexure A was not annexed to the founding affidavit

Withholding of the R200 000.00 the conduct of the first and second

respondent

[23] Having regard to the role of the second respondent, it seems she took on more than the role of an agent outside of the parameters of the sale agreement and, what is of paramount importance is that she has a contractual relationship emanating from the sale agreement only with the applicant. As I see it, she was the go between the first respondent and the applicant (represented by the Du Toit's). This is seen from what transpired from 2 March 2020 when the first complaint was lodged with a request to reserve monies for fixing the defects and indication that possible action might be instituted. It is also seen from how the amount increased from about an estimation of R140 000.00 to R200 000.00. This also comes out in the founding affidavit where the applicant referred to telephonic conversations, although no dates were given, and from emails addressed in the answering affidavit.

[24] The question is, why did the first respondent deem it necessary to address complaints to the second respondent and why did the latter respondent when the issue of the defects did not fall within the mandate of the agency. The first respondent refers to numerous emails addressed to the second respondent that preceded registration which among others raised the defects and pertaining to transfer e.g amounts owing in respect of electricity and occupational rent. It does not appear that the second respondent referred the complaints to any other person except the Du Toit's and it was only later in June month when the second respondent intimated that the applicant had attorneys to whom the dispute would be referred. In this instance it seems to me that the second respondent was acting on behalf of the applicant also as appointed agent.

[25] On 3 June 2020 the second respondent still communicates that she is on track with the process of registration except for occupational rent for March, April and June and the electricity bill and that failure to pay these outstanding amounts would render the sale agreement *null* and *void.* This she does with

full instructions form the applicant and by 7 June 2020 all outstanding payments due by the first respondent had been paid. The letter from the second respondent informs the first respondent for the first time that the applicant has referred the dispute on defects to a litigation specialist and that the matter was out of her hands. This can only mean that the second respondent communicated to the first respondent that she no longer represented applicant on the issue of defects, alternatively that as a conveyancer the issue on the defects was to be referred to a litigation specialist which she was not. Transfer of the property occurred on 9 June 2020.

[26] It is my view that the second respondent's responsibility was to fulfil her responsibility as the conveyancer appointed by the applicant. Having succeeded in transferring the property to the first respondent, hers was to pay over the monies received for the purchase of the immovable property, that is the R3 200 000.00, regardless of the issues of the defects or the fact that the property was the only asset the applicant had and from which the first respondent could claim for damages suffered as a result of the defects complained about. The Voetstoots clause made provision for a claim for damages for failure to disclose such defects the applicant knew about and failed to disclose as provided in clause 11 of the agreement. Instead of demanding that a certain amount be set aside by the conveyancer the correct step in my view was to have obtained a court order on urgency for the setting aside of the amount. However, failure to have gone that route is of no consequence and it does not make the second respondent attorney for the first respondent in as far as the defects were concerned.

[27] On 24 August 2020 the applicant's attorneys wrote a letter to the second respondent seeking explanations on whose instructions the R200 000.00 was withheld .She contended that it was at the request of the first respondent pending the resolution of the matter; that she was acting for both the applicant and first respondent when she received the money and that she was working in the best interest of both parties at all times when the money

was withheld and further that she was acting in the best interest of the transaction pending the resolution of the dispute and that she held the monies in Trust. Lastly, she gave the response without prejudice and she reserved her rights

[28] It is important to consider the explanation given by the conveyancer - second respondent in an affidavit dated 8 August 2020 which was made two weeks before the letter of explanation to the applicant's attorney. The second respondent resigned as a member of the applicant in 2009, so she could not have received an offer to purchase as purported in paragraph 4 of the said affidavit. The offer to purpose could only have been received by Mrs Du Toit who was the sole remaining member of the applicant. In the agreement she is described as the attorney and conveyancer for the seller and certain duties. Nowhere in the said agreement does it appear that she also acts for the first respondent, the purchaser or, that she was mandated to act for the purchaser as well. The affidavit also does not indicate that she acted for the purchaser or that she withheld the R200 000.00 on the purchaser's instructions. Already on 5 June 2020 the second respondent was aware that the first respondent had attorneys of her own, so the explanation in the letter of 25 August 2020 is far from the truth.

[29] In my view the retention of the R200 000.00 cannot be viewed as instruction from a client being the first respondent but it was a request to preserve the money because the applicant had no other asset which could be attached to satisfy the claim should the first respondent be successful in the action. I also do not find that correspondence addressed to the second respondent by the first respondent's husband gives credence to the view that the first respondent viewed the second respondent as her attorney during the process of the transfer. In the founding affidavit the applicant refers only to the letter of the second respondent and not to the one from Mr Van Stratten. The tone of both letters does not suggest in my view an attorney client relationship. Reference to this communication is in my view irrelevant and detracts from the issues. I have already said this necessitated urgent relief

which the first respondent could have been entitled to through an order of court. I cannot say that the second respondent acted with malice but at best she was on a frolic of her own when she acted contrary to her mandate, and the applicant should have looked to her for payment of the money withheld as the first respondent had paid in full the purchase price of the property.

The cancellation of the agreement of sale of the property

[30] Clause 14.1 of the agreement provided:

> *"Should either party commit a breach of any of the tersm of this agreement and fail to remedy same within seven (7) days of being call upon in writing to do so, the aggrieved party shall be entitled to, without prejudice to his rights, claim damages that he may have suffered as a result of such breach, to cancel the agreement by written notice to the defaulting party, or to claim specific performance by the party of his/.her obligations in terms of this agreement"*

[31] It is common cause that between the 3 and 9 June 2020 the applicant sought compliance by the first respondent to enable transfer of the property eg payment of outstanding occupational rent, the electricity bill etc that the applicant gave the second respondent the green light to proceed with the transfer. While there was knowledge on the part of the applicant that the first respondent had sought a retention of a certain amount to cater for the defects such event had not as yet materialised before confirmation of the transfer. My understanding is that the transfer and payment of the purchase price in terms of clause 2 was intended to occur almost simultaneously. I have already determined that the that the first respondent had complied with the obligation to pay the entire purchase price to the second respondent who was obligated to pay to the applicant. I have also found that instead of the first respondent calling upon or demanding the withholding on a sum of money from the purchase price on grounds the applicant had no assets to pay his claim, such

preservation could have been achieved by urgently seeking relief from the court.

[32] The applicant became aware that the first respondent had made alterations to the property in breach of clause 6.2 on 3 June 2020 and instructions to the second respondent on 4 June 2020 read:

"Our instruction is to stop the registration process until the outstanding fess are paid and the house is restored to the state it was at occupation on 22 February 2020. Should the buyer not adher to these conditions within 7 days, the sale is null and void and as stated below we will exercise *our right in terms of the contract."*

[33] Although the second respondent in the explanatory affidavit seems to suggest that the issue of the alterations was discussed with the first respondent and /or her legal representative, the question is, do the instructions from the applicant and the subsequent discussions with the respondent before transfer constitute a valid cancellation. The first respondent's lawful possession and occupation of the property could not result in the cancellation of the agreement and eviction from the property in that in my view there was no prior written notification to comply with the clause. It seems to me that the applicant did not consider the issue of the alterations as constituting such a serious breach that it would have entailed cancellation, given the fact that the purchase price had been paid and was invested in an interest -bearing account, and also that the first respondent had complied with all suspensive conditions. It does not seem to me that the alterations can be said to constitute a material breach of the sale agreement at the time of such observation on 3 June 2020.

[34] I am of the view that the applicant had to prove to satisfaction of the court from the beginning that such breach was material, that it went to the root of the contract and that there was justification even after transfer for the court to give consideration to the issue of cancellation, restitution and eventual

eviction of the first and third respondents from the property. I am not satisfied that the applicant has made out a case on the facts. Further, the applicant should have explained and addressed the purpose of the inclusion to the clause in the agreement on the prohibition on alterations before transfer. As I see it there is more prejudice to be suffered by the first respondent where the dispute is not as a result of a breach of a material term of the agreement.

[35] What seems to be the case is that after the transfer there is an attempt by the applicant to build up a case for cancellation of the agreement based on the fact that monies were withheld by the second respondent and belatedly on the alterations. The question is why would the alterations still constitute a material breach, when they applicant in the interim has conceded to the amount of R200 000.00 being withheld by the second respondent while also tendering repayment of the R3 000 000.00. In as far as the withholding of the monies in trust, I do not find that it is necessary to give any order in the counter application. Paramount to the whole dispute in my view is that the first respondent complied with her part of the obligation and that on date of transfer which was authorised by the applicant she had paid the entire purchase price to the agent of the applicant which constituted payment to the applicant. Having regard to the above it is my view that the application in part B as amended be dismissed.

Costs of the ex parte application

[36] The entire application was served on the respondents in an envisaged urgent application. Although the order in terms of section 4(2) was given to comply with the legislation, at the time the first respondent was within her rights to oppose the application and to present herself as she was in my view in lawful occupation of the property. I am of the view that the applicant could have obtained the order without resorting to urgency given the facts of the case. The applicant is ordered to pay the first respondent's wasted costs of the day.

Order

1. The applicant is ordered to pay the first respondent's wasted costs in the *ex parte* application (Part A).

2. The main application (Part B) is dismissed with costs.

3. No order is made in respect of the counter-application.

TLHAPIW
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**14 APRIL 2021**
JUDGMENT RESERVED ON	**:**	**14 APRIL 2021**
ATTORNEYS FOR THE APPLICANTS	**:**	**ROSSEAU INC.**
ATTORNEYS FOR 1sT RESPONDENTS	**:**	**PRINSLOO BEKKER ATT.**
ATTORNEYS FOR 2ND RESPONDENTS	**:**	**HELEEN BEHRENS ATT.**