IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

01 APRIL 2022
Date

L RETIEF

CASE NO: **55307/2021**

In the matter between:

STAND 7199 PIETERSBURG EXTENSION 28 (PTY) LTD	First Applicant
STAND 7216 PIETERSBURG EXTENSION 28 (PTY) LTD	Second Applicant
STAND 7232 PIETERSBURG EXTENSION 28 (PTY) LTD	Third Applicant
STAND 7332 PIETERSBURG EXTENSION 28 (PTY) LTD	Fourth Applicant
STAND 7333 PIETERSBURG EXTENSION 28 (PTY) LTD	Fifth Applicant
STAND 7334 PIETERSBURG EXTENSION 28 (PTY) LTD	Sixth Applicant

and

GEYSER ATTORNEYS INCORPORATED	First Respondent

MAGAE MAKHAYA HOUSING (RF) (PTY) LTD	Second Respondent
THE PUBLIC INVESTMENT CORPORATION SOC LIMITED	Third Respondent
GOVERNMENT EMPLOYEES PENSION FUND	Fourth Respondent
SEKEPE INVESTMENTS (PTY) LTD	Fifth Respondent
THE ALCHAMY (PTY) LTD	Sixth Respondent
MAROBALO INVESTMENTS (PTY) LTD	Seventh Respondent
KHOLOFELO SEKEPE MAPONYA	Eighth Respondent
BONGANI PATRICK MADUNGANDABA	Ninth Respondent
RELEBOHILE NATHAN QOBOSHIANE	Tenth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Eleventh Respondent

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JUDGMENT

This matter has been heard in open court and disposed of in terms of the directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

RETIEF AJ:

INTRODUCTION

[1] This is an opposed application initially brought in the Urgent Court an now concerns declaratory and final mandatory relief. The thrust of the relief sought, concerns an enquiry into whether the First Respondent ("*Geyser attorneys*"), as the appointed transferring attorneys, is prohibited from performing the necessary administrative and related services associated with the transfer and registration of the Applicants' immovable properties as a result of the interim prohibitory order obtained in case number 46022/2021 ("*interim application*").

[2] The interim application was brought by the Third and Fourth Applicants ("*PIC*") and ("*GEPF*"), in which all the Respondents in this present application were cited save for the Applicants and the First Respondent.

[3] The relief in the interim application was sought in two parts, Part A being the interdictory relief, operating as interim relief pending the final relief in Part B.

[4] According to GEPF the purpose of the interim order, was to curtail the Eighth Respondent ("*Mr Maponya*") and the companies which he controls, being Fifth to Seven Respondents ("*Sekepe Investments, Alchamy and Marobalo Investments*") from potentially influencing the affairs of the Second Respondent, Magae Makhaya Housing (RF) Pty Ltd ("*MMH*"). Mr Maponya is also a shareholder of and a director in all the Applicant companies.

[5] The declaratory relief sought by the Applicants primarily relates to the clarification of prayer 2.5 of the interim order which, without PIC and GEPF written consent, interdicts and prohibits Mr Maponya, Sekepe Investments, Alchamy, Marobalo Investments and MMH from dealing with MMH's property and/or funds held for and/or on behalf of MMH in any bank account, including any portion of

monies paid by GEPF in favour of MMH as directed by the Supreme Court of Appeal ("*SCA*") in case number 110/2019 ("*loan appeal*").

[6] The Applicants contend that the interim oder does not prohibit the execution of the sale and purchase agreements ("*agreements*") between themselves and MMH and as a consequence, Geyser attorneys can proceed with the transfer and registration of the Applicants' properties.

[7] Relying on that contention the Applicants seek the following declaratory relief in their notice of motion:

> "*3. That the Honourable Court declare that the interim court order granted under proceeding case number 46022/2021 does not prohibit the First Respondent from proceeding with the transfer and registration of the properties:*
>
> *3.1 Erf 7199 Pietersburg Extension 28;*
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> *3.2 Erf 7216 Pietersburg Extension 28;*
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> *3.3 Erf 7232 Pietersburg Extension 28;*
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> *3.4 Erf 7332 Pietersburg Extension 28;*
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> *3.5 Erf 7333 Pietersburg Extension 28;*
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> *3.6 Erf 7334 Pietersburg Extension 28.*
>
> *("properties")*"

[8] The Applicants rely on three propositions for their contention, *supra*, summarised as follows:

8.1 The Applicants were not cited as a party in the interim application consequently, the interim order does not apply to them. This proposition was expanded in argument and in the Applicants' heads of argument to include that such failure rendered the interim order , null and void. However, no such amended relief catering for this proposition is sought.

8.2 The papers filed in the interim application do not appear to raise lack of authority by the directors to the agreements at the material time;

8.3 The interim interdict cannot prevent conduct which has already occurred, namely that the purchase price for the properties had already been paid into trust with Geyser attorneys prior to securing the order.

[9] Geyser attorneys filed a notice to abide and Magdalena Julya Geyser, the sole director of the firm, deposed to an explanatory affidavit in which she confirms having sought the written consent from PIC and GEPF as referred to in the interim order.

[10] Accompanying the declaratory relief is final mandatory relief in amended prayers 3(B) and 3(C) respectively. The prayers essentially directing Geyser attorneys to continue with the transfer and registration of the properties and directing MMH, *inter alia*, sign all the necessary documents to effect the transfer failing which, authorising the Sheriff of the Magisterial District of Polokwane to attend to the signature of the documents necessary to enable the transfer on behalf of MMH.

[11] The Applicants only move for the declarator and amended final relief.

[12] Mr Maponya opposed the reference to a punitive cost order against him personally, requested by PIC and GEPF in their answering affidavit and filed an affidavit opposing costs and an explanatory affidavit. Mr Maponya's explanatory affidavit deals, *inter alia,* with evidence before Rabie J in case number 2643/18 ("*loan application*").

[13] The loan application was finally settled by the SCA in the loan appeal, as referenced in the interim order.

[14] PIC and GEPF opposed the application and filed a detailed and comprehensive answer. The thrust of their opposition is the Applicants' failure to deal with the necessary allegations to sustain the relief sought and further that the declaratory relief is premised on a number of misconceptions. The central misconception advanced, is the Applicants' mistaken belief the that the agreements relied upon, in law are valid and enforceable.

[15] PIC and GEPF contend further that the misconception is fatal, rendering the Court's necessity to consider an enquiry into declaratory relief unnecessary.

[16] The Court is mindful of the fact that, if the acrimonious debate between all the parties remains unresolved, it will have far reaching consequences for the most vulnerable namely, State employees whose pension contributions make up the considerable funding used in the investment and acquisition of these properties.

[17] In addition, the Court in **Rail Commuters**[1] stated that in considering whether it is desirable to order mandatory or prohibitory relief in addition to a declarator, a Court will consider all the relevant circumstances.

CONSIDERATION OF ALL THE RELEVANT FACTS AND CIRCUMSTANCES

[18] MMH was incorporated to develop low-cost housing projects. At the time of its incorporation and in December 2015, the shareholders of MMH concluded a shareholders' agreement. As at 2015 and according to the shareholders' agreement, the shareholding was recorded as follows:

18.1	Fifth Respondent, Sekepe Investments (Pty) Ltd ("*Sekepe Investments*")	55%
18.2	Fourth Respondent, Government Employees Pension Fund ("*GEPF*")	25%
18.3	Sixth Respondent, The Alchamy (Pty) Ltd ("*Alchamy*")	10%
18.4	MMI Transactional Advisory Division (Pty) Ltd [2]	10%

[19] Clause 10 of the shareholders' agreement provides for financing to be provided to MMH[3]. It states that the funding of the company will be from the profits of the company by way of loans on commercial terms and only in so far as it is agreed by the shareholders by way of loans to the company.

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1 **Rail Commuters Action Group v Transnet Limited t/a Metrorail** [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (Rail Commuters).

2 "KM2" Eighth Respondent's explanatory affidavit, caseline (016-224)

3 Supra footneore 2 at para 10.1.1 caseline (016-226)

[20] The shareholders' loans to MMH were to be in accordance with the proportion of the shareholders' shareholding.

[21] Sekepe Investments, Alchamy and remaining shareholdres were to obtain money from the GEPF in terms of separate loan facility agreements. ("*loan agreements*")[4]. The reasoning was to enable these companies to meet any call for funds by MMH in proportion to their shareholding in terms of the shareholders' agreement.

[22] In other words, GEPF would use Sekepe Investments, Alchamy and the other shareholders as a conduit through which to fund MMH indirectly and itself directly, the reason for which is not apparent.

[23] MMH relying on the prospect of funding proceeded to consider land acquisition proposals, in so doing, MMH entered into a development management services agreement with Matsomane Maponya Investments ("*MMI*"). Mr Maponya is, a director of and shareholder in MMI.

[24] On the 5 September 2017 MMH's Board of directors, by virtue of a Round Robin resolution approved the land acquisition proposal presented by MMI. The land proposal related to properties. [5]

[25] The resolution was passed on the condition that Mr Maponya declared his conflict of interest, if any with regard to the properties.

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4 "KM1" SCA Judgment 110/2019 Eighth Respondent's explanatory affidavit, caselines (016-202).
5 "KM6" Eighth Respondent's explanatory affidavit, caselines (016-375).

[26] Mr Maponya on the 13 July 2017 signed a declaration declaring his personal and financial interest as a shareholder and director in all the Applicant companies, MMI, Sekepe Investments, Alchamy Investments and Marobalo Investments.[6]

[27] On the 14 September 2017 MMH's Board of directors by virtue of a Round Robin resolution passed a resolution approving an additional amount. The total approved amount was R72,127,849.34, the resolution was subject to valuation.[7]

[28] Prior to the Board approvals and on the 13 July 2017, MMH and the Applicants entered into the agreements.

[29] At the time of the conclusion of the agreements, Mr Maponya acted on behalf of all of the Applicant companies. This would explain why he signed his declaration of personal and financial interest on the same date the 13 July 2017.

[30] The terms in all the agreements were identical save for the respective purchase prices. All the agreements referred to Geyser attorneys as the transferring attorney and their name and contact details was formatted and printed at the bottom of each and every page.

[31] MMH as the purchaser, called for the funding in terms of clause 10 in terms of the shareholders agreement which in turn triggered payment of the advances under the loan agreement to the shareholders. GEPF was obliged to advance the funds.

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6 "AMS18" answering affidavit (006-201) and Para 12.1 "KM3" Eighth Respondent's explanatory affidavit, caselines (016-273).

7 "KM7" Eighth Respondent's explanatory affidavit, caselines (016-377). "AMS 19", para E at caselines (006-203).

[32] GEPF failed to make the advances causing Sekepe Investments, Alchamy and Marobalo Investments to launch the loan application claiming specific performance under the loan agreement. Mr Maponya deposed to the founding papers on behalf of the Applicants.

[33] The enquiry by the SCA in the loan appeal was to determine whether MMH shareholders possessed the requisite right to the advances from GEPF in terms of the loan agreement. The SCA in their judgment did not deal with the validity of the agreements themselves nor vindicate them.

[34] The reason for the failure of the Applicants to claim payment of the initial purchase amounts in terms of the agreement and the time lapse in which to do so as a consequence of the loan application and subsequent loan appeal (i.e. July 2017 to December 2020) has been "raised" in this application by the Applicants themselves for the first time.

[35] The Applicants foreseeing the difficulty, now in this application rely on an oral waiver. Which waiver translates into the Applicants waiving their rights to claim payment of the initial purchase amounts as set out in paragraph 1.1. of the agreements. Thereby releasing MMH of its reciprocal obligation to do so. The Applicants contend that the waiver was agreed pending the outcome of the loan dispute.

[36] Only on the 26 August 2021 some 8 (eight) months after the resolution of the pending loan dispute did GEPF through its attorneys undertook to pay the R106,000,722.09 to pay funds in compliance of the SCA Court order to honour a loan agreement with MMH shareholders. It was not paid at the behest of the Applicants exercising any right to claim payment of the purchase price in terms of

the agreement. The R106,000,722.09 is the amount referred to prayer in 2.5 of the interim order.[8]

[37] The undertaking to pay was addressed to Mr M.R. Phala Attorneys ("*Phala attorneys*"), the attorney acting for Sekepe Investments, Alchamy and Marobalo Investments. Of importance is that the undertaking to pay was conditional upon a written undertaking by Phala attorneys that the funds meant for MMH would be paid directly into MMH's bank account. The condition so it goes, was to ensure compliance with the SCA's Court order. There is little doubt that the R106,000,722.09 was meant for MMH.

[38] Whether Phala attorneys indeed provided the written undertaking to GEPF is unclear, but what is common cause is that:

38.1 GEPF paid honoured the R106,000,722.09;

38.2 on 31 August 2021, a mere few days after the payment was made by GEPF, a portion of the funds, being the amount of R72,127,849.34 duly approved by MMH's Board in September 2017 for the land proposal was paid into Geyser attorney's trust account;

38.3 the deposit of the R72,127,849.34 into Geyser attorney's trust account was made by T Motala Attorneys, ostensibly the correspondents of Phala attorneys;

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8 para 2.5, Third and Fourth Respondents' answering affidavit, caselines (006-26).

38.4 The amount of R72,127,849.34 was not paid by the purchaser MMH;

38.5 The amount of R72,127,849.34 was not received by MMH as intended and directed.

[39] MMH as the purchaser in terms of the agreement and as the company who was entitled to be funded in terms of the shareholders agreement did not physically receive the funds. MMH was the only company in which Mr Maponya, at the time, did not have a vested interest, and who was removed from the "transaction".

[40] This caused GEPF to launch the interdictory application on an urgent basis.

[41] GEPF contended , *inter alia*, that as a result of the "transaction" the directors of MMH could not legally deal with nor give account of the substantial funds intended for the company to the satisfaction of its shareholders. Mr Maponya was highlighted as the protagonist in the scheme of non-payment to MMH. This appears to be well founded.

[42] It is important to note that Mr Maponya is a shareholder and director of **all** the Applicant companies, Sekepe Investments, Alchamy, Marobalo Investments and MMI **except** MMH. Since May 2019, GEPF is the sole shareholder of MMH and Mr Maponya removed as a director.

[43] GEPF provided Geyser attorneys with a copy of the interim order. *De facto*, Geyser attorneys held R72,127,849.34 of the R106,000,722.09 of MMH funds alternatively funds meant for MMH in terms of the agreement, in their trust account

without MMH, the purchaser's, consent nor that of GEPF as referred to in the interim order, placing Geyser attorneys in a difficult and ethical dilemma.

[44] Geyser attorneys on the 3 September 2021 informed PIC and GEPF that they were in receipt of R72,127,849.34, identified that the funds were paid in respect of the agreements and undertook not to proceed with the transactions without receiving a written resolution from the directors of MMH.

[45] Furthermore, and on the 29 October 2022, Geyser attorneys informed the Applicants' attorney, Victor Mabe Inc that they had received a copy of the interim order and pursuant thereto, had requested written consent to proceed from PIC and GEPF.[9]

[46] PIC and GEPF have not provided consent to the Geyser attorneys and I doubt they will if one has regard to their opposition and moreover having regard to Part B of the interim application in which they seek the cancellation of the loan agreement.

[47] A difference of opinion between the Applicants and Geyser Attorneys regarding the necessity of consent has arisen suggestive of the existence of a live dispute.[10] In consequence, the Applicants necessity for the declaratory and mandatory relief becomes apparent.

[48] I now deal with the agreements.

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9 para 5 and 8 Geyser explanatory affidavit (caselines 009-4-6).

10 **Competition Commission of SA vs Hosken Consolidated Investment Ltd and Others CCT** 296/17 at 85.

THE AGREEMENTS

[49] In paragraph 26 of the Applicants' founding papers the Applicants confine the enquiry into their rights by stating that:

> "*26. The present proceedings are essentially brought against the First and Second Respondent, on account of the rights flowing from* ***written*** *agreements* (own emphasis) *between the Applicant and the Second Respondent.*"

[50] The Applicants so confident of their legal standing in terms of the agreements that they have failed to properly establish or deal with their rights in their founding papers.

[51] Mr Maponya in his explanatory affidavit is of the view that because the SCA granted specific performance of the loan agreements it automatically gives legal credence to the agreements, alternatively that any enquiry into the validity of the agreements is *res judicate.*

[52] The thrust of the SCA's enquiry at the time of the loan appeal was the standing of the shareholder applicants in terms of the loan agreement and not an enquiry into or pronouncement of the validity of the agreements as the origin of the funding. This was the cause of action before the High Court of first instance and then the SCA on appeal. For that reason, Mr Maponya himself confined his own founding papers in the loan application to a narrow ambit of the agreements and only dealt with those terms which "*are important for purposes hereof:-*".[11]

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[11] Reference to "*hereof*" means the loan application.

[53] Mr Maponya only dealt with clause 2 and 1.2 of the agreements, namely the fulfilment of the suspensive condition and interest payable in the event of a delay of transfer. No mention is made of the delay or failure to make payment of the initial purchase amount in terms of paragraph 1.1 of the agreements, which is clearly at variance with payment terms in terms of the agreements.

[54] In so far as the contention of *res judicata* may be relevant, the Constitutional Court too, in the Molaudzi v The State[12] matter expanded the common law doctrine of *res judicata* by revisiting the facts of a matter which it had finally dealt with thereby relaxing the application of the doctrine in certain circumstances. To prevent a manifest injustice, this Court will take cognisance of all the facts.

[55] The Applicants in reply also rely on a similar contention by mere reference without explanation to the outcome of the loan appeal and the shareholders'agreement. Of interest is that on their own version, the Applicants had an interest in the outcome of the loan application and were not cited. This however did not seem to bother them at the time.

[56] Lastly, the Applicants own reliance on the oral waiver of their right to claim payment of the initial purchase amount in paragraph 1.1 in terms of the agreement was not raised nor ventilated in the loan application nor the loan appeal.

[57] PIC and GEPF contend that the agreements are invalid and unenforceable for failure by MMH to obtain special Board approval for the agreements and alternatively that performance in terms of the agreements have prescribed.

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12 [2014] ZACC 15

[58] I now turn to consider whether the Applicants' application is predicated upon the rights flowing from the agreements.

[59] To do so I accept the inescapable premise that the formalities of the agreements are governed by the provisions of the Alienation of Land Act, 68 of 1981 ("*Alienation Act*") and have regard to the impact of the waiver.[13]

[60] Against this backdrop:

60.1 According to paragraph 1.1 of the agreements, the purchase price was payable firstly, by an initial amount paid in cash, free of bank costs to the Applicants against the registration of the property in the name of MMH.

60.2 Secondly, by a balance to be paid within 6 (six) months of registration.

60.3 Clause 1.2 deals with interest payable for delay in transfer but paragraph 1 is silent on delay and/or failure to be in terms of paragraph 1.1 of the agreements.

60.4 Therefore MMH was obliged to furnish Geyser attorneys with payment of the initial amount in paragraph 1.1 or a bank guarantee within 14 (fourteen) days from date of acceptance.

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13 "A1, 2, 3, 4, 5, 6" to response to rule 35(12) notice; Offer to Purchase, caselines (004-8 to 004-37) read with "FA3" Offer to Purchase, caselines (001-40-001-44).

60.5 Its common cause that the date of acceptance in all the agreements was the 13 July 2017.

60.6 In terms of paragraph 9.2 of the agreements:

> "9.2 *No agreement at variance with or in addition to the terms and conditions of this deed of sale, or novation or cancellation of this deed of sale, shall be binding on the parties hereto unless reduced to writing and signed by both parties.*"

60.7 It is common cause that MMH failed to pay the initial amount within 14 days of acceptance in terms of paragraph 1.1 of the agreements.

60.8 The Applicants in their founding papers raise the existence of an oral waiver agreed upon between them and MMH relating to the payment of the purchase price in terms of the agreement.

60.9 Considering the waiver. A waiver is nothing else other than a relinghishing (giving up) of a right and in this case although poorly expressed amounts to a temporary waiver of the Applicants' right to claim payment of the purchase price pending the outcome of an event. In consequence, relinguishing MMH from its reciprocal obligation on the same terms.

60.10 The expectation being that the revival of the relinghished right and therefore the obligation to pay would be triggered by the resolution

of the loan dispute. It is common cause that the loan dispute was settled by the SCA in December 2020.

60.11 MMH is silent on the existence of the oral agreement of waiver and did not depose to a confirmatory affidavit in support of the Applicants' contentions. However the facts demonstrate that the Applicants indeed acted as if they had waived their right to claim the agreed initial purchase amounts owing in terms of paragraph 1.1 of the agreements. This too, appears to be done with the knowledge of MMH as MMH has not disputed this fact nor are other facts placed before Court by any party to suggest that MMH was in wilful default.

60.12 The Applicants did not demanded payment of the initial purchase amount within 14 (fourteen) days of acceptance from MMH in terms of paragraph 1.1 of the agreements. In fact the Applicants have not exercised any right to claim payment from MMH at all in terms of the agreement.

60.13 The Court therefore accepts the existence of the waiver, *inter alia,* the actions of the contracting parties and as consequence the Applicants right flowing from the wriiten agreements to claim the initial purchase amount in terms of the agreement, on their own version, is discharged until revived.

60.14 The only way to revive the right to claim the agreed initial purchase amount again is to amended the agreements to reflect the consensus reached regarding when and/or how the initial purchase

amount will become payable. This falls within the scope of paragaroh 9.2 of the agreement and must be reduced to writing and signed by all the parties. This was not done.

60.15 Expanding on a further difficulty is that the right to claim and obligation to pay on the version provided, is dependant on the outcome of the loan dispute, the outcome unknown. Until known and for that matter until ruled in MMH's favour, no consensus to buy and sale could have existed and the agreement at the time of the waiver became unenforceable.

60.16 In the premises the the Applicant on its own version has not demonstarted that it poseses any rights flowing from the agreements and any relief which requires the establishment or enquiry into such rights must fail.

[61] In so far as is necessary, I deal with GEPF's reliance of the Applicants failure to fulfil the suspensive condition:

61.1 The Applicants fail to deal with the fulfilment of the suspensive condition, namely that:

"*This offer is subject to the suspensive condition that the Purchaser's board approves the sale.*"[14]

61.2 Mr Maponya contends that the Round Robin resolution signed by the directors on 5 September 2017 is sufficient to fulfil the

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14 para 2 of "A1", *supra* footnote 13.

suspensive condition and elected not to explain the provisions of MMH's MOI relied upon by PIC and GEPF.

61.3 In argument Counsel for Mr Maponya highlighted that PIC and GEPF admitted the Round Robin resolution in their answering affidavit in the loan application, but Counsel failed to bring to the Court's attention that the admission was qualified in paragraph 8.7 of the answer. Moreover, Counsel failed to deal with the provisions of the MOI relied upon by PIC and GEPF.[15]

61.4 PIC and GEPF have consistently suggested and/or alleged, both in the loan application[16] and in this application that:

58.3.1 Board approval was obtained on 5 September 2017;

58.3.1 Mr Maponya had a financial and personal interest in the transactions and in consequence, the director's powers were limited in terms of clause 12.1 of MMH's MOI;

58.3.1 The limitation of powers triggered the necessity of a special resolution. No special resolution was passed;

58.3.1 Although GEPF denied sufficient approval due to lack of shareholding authorisation in the loan application, GEPF failed expand the argument in the loan application, as it now does.

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15 para 8.7 "KM5" Eighth Respondent's explanatory affidavit caselines (016-273-356).

16 *supra*, footnote 15.

61.5 The Applicants in reply do not spesifically deal with PIC and GEPF's contention relating to the necessity of a special resolution nor do they dispute the requirement of a special resolution nor that PIC and GEPF have dealt with and applied the provisions and sub-provisions of clause 12.1 of the MOI incorrectly.

61.6 The Applicants in reply, simply refer to the provisions raised by PIC and GEPF in the MOI as "*apparent provision in the shareholders' agreement*". No weight can be attached to that as the contention of special resolution is clearly demonstrated in terms of the MOI and not shareholdrs agreement.

61.7 The Applicants further refer to the provisons relied upon as the "*apparent provisions*" by stating that the reference to same "*locates the Respondents into the fold of contempt of court, of a different kind*".[17] The absurdity of the remark is clear.

61.8 Remaining unchallenged this Court accepts the correctness of clause 12.1 and the sub-clauses as set out in the MOI as referred to and deals with it on that basis.

61.9 Applying it to the facts, it would appear that due to Mr Mapornya's personal and financial interest in all the transactions MMH was encumbered to comply with the provisions of theit MOI due to the limited powers of the directors.and pass a special resolution.

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17 See paragraph 26 and 27 of the replying affidavit.

61.10 MMH although cited elected not to enter the arena in this application nor filed a confirmatory affidavit to advance PIC and GEPF's contention of lack of sufficient approval of their shareholders at the material time, by confirming it as a fact.

61.11 However as at May 2019 GEPF became the sole shareholder of MMH and is in a position to give credence to the proposition.

61.12 Having regard to all the fatcs ventilated in this application the suspensive condition has not been fulfilled due to a lack of authority by for the transactions by way of special resolution. In the premises, the agreements would have lapsed[18] and an enquiry into their enforceability as contended by PIC nad GEPF is unnecessary.

61.13 The necessity to deal with the prescription as a result of the non performance of the agreements as relied upon by GEPF too appears unnecessary as it would require the Court to accept the premise that the Applicants, on their version, have established rights flowing from the agreements to warrant performance, which it cannot.

APPLICANTS' ARGUMENT IN SUPPORT OF RELIEF

[62] The Applicants in their founding papers, in support of the declaratory and mandatory relief, rely on the contention that the interim interdict in no way restricts

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18 Fairbancks Investment v S Olivier (268/07) [2008] ZASCA 41

the transfer albeit continuation of the transfer and registration of the properties and rely on the several propositions[19] in support thereof.

[63] None of the propositions advanced by the Applicants assist them with the fundamental enquiry for both declaratory and/or final interdictory relief namely, in *causa*, the establishment of a clear right,[20] albeit an interest in a right[21] flowing from the agreements to enable Geyser attorneys to proceed with the transfer and registration of the properties.

[64] To illustrate the point, Applicants' Counsel in argument and in his heads contends that the Applicants should have been cited as a party in the interim application. I cannot fault this proposition especially in the circumstances when Mr Maponya has an interest in the Applicants and the thrust of the interim application, according to PIC and GEPF, was to curtail the actions of Mr Maponya in companies he controlled. However, even if the case law relied upon by the Applicants favoured their argument that such failure to cite rendered the interim order null and void,[22] the fact remains, absent the interim order the Applicants own failure to establish its rights flowing *vis-à-vis* the written agreements is fatal.

[65] Put another way Geyser attorneys as a matter of fact and law would be unable to commence with the transfer of the properties as a result of the Applicants' own failure to establish their rights in terms of the written agreements.

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19 para [6].

20 In respect of final relief.

21 In respect of a declarator.

22 **Dada v Dada** 1977 (2) SA 287 (T) at 288C-F, **Henry Viljoen (Pty) Ltd v Awerbuch Bros** 1953 (2) SA 151 (O) at 165-171 and **DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket** 2002 (6) SA 297 (SCA) at 201-302.

[66] The Applicants' remaining propositions too, do not assist the Court with the necessity to nor its approach in determining declaratory relief as set out in Section 2(1)(c) of the Superior Court Act.[23]

[67] To yet again illustrate the point, the two-stage enquiry dealt with in **Cordiant Trading CC v Daimler Chrysler Finance Services (Pty) Ltd**,[24] adopted by Watermeyer JA in **Durban City Council v Association of Building Societies**[25] is namely:

67.1 the court must be satisfied that the applicant is a person interested in an existing, future, or contingent right or obligation, and then if so satisfied;

67.2 the court must decide whether the case is a proper one for the exercise of discretion conferred on it.

[68] Applying the legal enquiry at stage one, the Applicants must fail therefore stage two is not triggered, necessitating the Court's exercise of its discretion one way or another. The declarator must fail.

[69] Relying upon the same legal enquiry, the final interdictory relief at prayers 3(B) and 3(C) necessitating, *inter alia*, the establishment of a clear right and the Applicants failure to set our facts sustaining final relief, the final relief must fail.

COSTS

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23 Para [8].

24 2005 (6) SA 205 (SCA).

25 1942 AD 27 para 18.

Respondent is in the Court's discretion. The Court has considered all the circumstances, all the allegations levied against Mr Maponya and Mr Maponya's opposing affidavit and the circumstances in which the relief was sought on an urgent basis.

[72] The Court too has been requested to deal with the costs occasioned by the applications being struck from the urgent roll due to or lack of urgency and the Applicants request is to confine it to the wasted costs in so far as the papers have remained the same.

Having regard to all the circumstances the following order:

1. The application is dismissed;

2. The Applicants are jointly and severally ordered to pay the Third and the Fourth Respondent's costs on an attorney own client scale, such costs occasioned by this application including the wasted costs occasioned by the urgent application, the costs to include the employment costs of two Counsel.

L.A. RETIEF

Acting Judge of the High Court, Pretoria

Appearances:

Applicants' Counsel:	Advocate M.E. Manala Menlyn Maine Chambers Email: manalae@law.co.za Mobile: 087 312 1730
Applicants' Attorney:	Manele & Co. Incorporated
Applicants' Ref:	M&Co-T Manele/M0028
Third & Fourth Respondents' Counsel:	Phillip Mokoena SC with Nosisa Kekana and Thato Seroto Chambers, Johannesburg
Third & Fourth Respondents' Attorney:	Cliffe Dekker Hofmeyr Incorporated
Third & Fourth Respondents' Ref:	M Mphafudi/T Fuhrmann/22008582
Eighth Respondent's Counsel:	Adv. D. Van Den Bogert Menlyn Maine Chambers Email: dingnus@counseltsa.co.za
Eighth Respondent's Attorney:	Motala Attorneys Inc
Eighth Respondent's Ref:	TM/CVL/M00426
Date of Hearing:	25 February 2022
Judgment handed down:	1 April 2022