

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

**CASE NO: 11611/22**

In the matter between:

**PLATINUM PROPERTY ENTERPRISE (PTY) LTD**

**Applicant**

And

**CATHERINE ALMA MCSHANE**

**First Respondent**

**THE REGISTRAR OF DEEDS, CAPE TOWN**

**Second Respondent**

Heard: 18 November 2022

Delivered: 19 December 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 19 December 2022 at 10h00.

---

**JUDGMENT**

---

**LEKHULENI J**

**INTRODUCTION**

[1] This is an application for an interdict and for specific performance. The applicant brought this application on an urgent basis and sought an interim order restraining the first respondent from transferring an immovable property, namely, Erf

5[.], 9 G[.] v[...] P[...] Street, Yzerfontein, to any purchaser other than the applicant. The applicant also sought an order directing the Registrar of Deeds not to register the transfer of the immovable property into the name of any person save that of the applicant. In addition, the applicant sought an order directing the first respondent to sign the applicant's transfer documents, failing which the Sheriff of this court be authorised to sign on behalf of the first respondent.

[2] On 14 July 2022, an interim order in favour of the applicant was granted restraining the respondent from transferring the property into the name of any person other than the applicant. The interim order was returnable on 16 of November 2022. The first respondent opposed the confirmation of the interim order and further filed a counter-application. The first respondent launched the counter-application on the basis that the applicant repudiated the sale agreement. The first respondent also averred that she accepted the applicant's repudiation and elected to cancel the sale agreement. The applicant opposed the counter-application on the grounds that it did not repudiate the sale agreement and that the sale agreement is, therefore, not cancelled.

## **BACKGROUND FACTS**

[3] The facts giving rise to this case can be summarised briefly as follows: On 11 April 2022, the applicant duly represented by its directors and the first respondent, who is 93 years old, concluded a written sale agreement. The applicant bought vacant land from the first respondent for R860 000. The first respondent, the seller, appointed May and Associates Inc as the conveyancer to effect the property transfer.

Upon being requested to do so, the applicant and the first respondent undertook to sign all documents required to be signed in connection with the transfer. The applicant performed in terms of the sale agreement, and on 26 May 2022, paid the full purchase price of R860 000, together with costs into the conveyancer's trust account as specified in the sale agreement. Subsequently, on 26 May 2022, the conveyancer informed the estate agent who brokered the transaction that the applicant had paid the purchase price in full in compliance with the sale agreement. The conveyancer requested the estate agent to provide proof of payment of the full purchase price to the first respondent and to arrange with the latter to attend at the conveyancer's offices to sign the transfer documents.

[4] Indeed, the estate agent liaised with two daughters of the first respondent, who assisted her in sending and receiving emails and corresponding with the estate agent. The estate agent informed the first respondent's daughters via email that the applicant paid the purchase in full and inquired about the first respondent's ability to sign the transfer documents on 01 June 2022. The daughters informed the agent that their mother - the first respondent - was ready to sign the transfer papers and would attend the conveyancer's offices on 01 June 2022. On 01 June 2022, the first respondent attended the conveyancer's offices and refused to sign the transfer documents.

[6] Pursuant to that, the first respondent sent an email on 02 June 2022, to the agent wherein she stated that she was cancelling the offer to purchase her property with immediate effect. On the same day, the agent informed the first respondent that the applicant did not accept the purported cancellation and cautioned the first

respondent not to sign any other offer to purchase. On 02 June 2022, the conveyancer addressed a letter to the first respondent via email informing her that the purported cancellation was unlawful and putting the first respondent to terms to sign the transfer documents. In the said correspondence, the conveyancer drew the first respondent's attention to clause 9.1 of the sale agreement that she was required to remedy her breach within 7 (seven) days after dispatch of the written notice by signing the transfer documents at their offices. The Sheriff served the said correspondence upon the first respondent, and the latter did not respond to this correspondence. On 10 June 2022, the conveyancer addressed a final notice to the first respondent in which he informed her that he held instructions from the purchaser to proceed with legal proceedings against the first respondent and claim specific performance of the sale agreement together with legal costs.

[7] On 27 June 2022, the conveyancer ingeniously arranged with the Sheriff and the landlord of the first respondent to serve the transfer documents upon the first respondent at the latter's residential address for signature. The Sheriff attended at the respondent's premises with the first respondent's landlord; however, the first respondent refused to sign the transfer documents.

[8] Later, the applicant discovered on 06 July 2022, that the first respondent had sold the immovable property to another purchaser. It was as a result of the purported second sale agreement that the applicant brought this matter on an urgent basis to interdict the transfer of the property to any third party. In this application, the applicant seeks an order confirming the interim order.

## **THE COUNTER APPLICATION**

[9] The first respondent filed an affidavit to show cause why the rule nisi should not be made final and why it should be discharged. In addition, the said affidavit was also a founding affidavit in the counter-application in which the first respondent sought an order confirming the cancellation of the sale agreement between the applicant and the first respondent due to an alleged repudiation of the sale agreement and her acceptance of such repudiation.

[11] After the interim order was granted on 14 July 2022, it came to the applicant's attention that attorneys Roopa and Potgieter were appointed as the transferring attorneys of the second sale of the same property. On 15 July 2022, May and Associates Inc sent a copy of the court order to attorneys Roopa and Potgieter, informing them that they should immediately stop any transfer (of the second sale) at the Deeds office to avoid the second purchaser from incurring a financial loss. In addition, May and Associates Inc sent the applicant a copy of the interim order and asked her to attend their offices to sign the transfer documents. Meanwhile, Roopa and Potgieter attorneys made an undertaking that they would not proceed with the transfer process in respect of the second sale pending the outcome of the application.

[12] On 20 July 2022, Roopa and Potgieter addressed a correspondence to May and Associates Inc informing them that the first respondent would do all things necessary to effect the transfer but that the first respondent did not believe that May and Associates were acting in her best interest as her appointed conveyancers. It was stated that the first respondent wished someone else to attend to the transfer. In

response, May and Associate Inc demanded that before the purchaser would take transfer, the first respondent would have to sign a settlement agreement in which she agreed to pay the costs of the main application on a punitive scale. This demand was described as 'not negotiable'.

[13] In a further follow-up correspondence of 04 August 2022, May and Associates Inc stated that the purchaser insisted that all legal costs incurred thus far in obtaining the interim order be deducted from the purchase price and that the seller sign a settlement agreement to this effect. This was also labelled as non-negotiable. In response to this correspondence, Roopa and Potgieter wrote to May and Associates asking for a copy of the proposed settlement agreement. The said correspondence also recorded that their client required clarification as to whether it was the purchaser's position that it would not take transfer unless the non-negotiable settlement agreement was signed.

[14] On 11 August 2022, May and Associate forwarded all necessary transfer documents to the first respondent's attorneys, and the proposed settlement agreement for the first respondent's signature. On 16 August 2022, the first respondent signed the transfer documents after her attorney explained the contents thereof to her. However, she did not sign the 'non-negotiable' settlement agreement. The same day, the first respondent's attorney delivered the transfer documents, the title deed of the property, and the rates clearance certificate to May and Associates to proceed with the transfer.

[15] On 19 August 2022, May and Associate Inc wrote to the first respondent's attorneys in which they stated that it was the purchaser's instructions that since the seller (the first respondent) had failed to sign the settlement agreement, that the transfer process would be placed on hold until the High Court has made a final order regarding the rule nisi and interim interdict. They also stressed that the transfer process is now put on hold at the instructions of the buyer. In response, the first respondent's attorney advised May and Associates that the applicant's refusal to take transfer, notwithstanding that the transfer documents were signed, amounted to a repudiation of the sale agreement.

[16] In terms of clause 9 of the sale agreement, the applicant was given seven days to remedy the breach. The said correspondence warned the applicant that there was no lawful basis to refuse to effect transfer until the settlement agreement proposed by the applicant was signed. At that stage, the first applicant indicated that he had yet to accept the repudiation. However, she informed the applicant that if the applicant persisted in that attitude, she would accept the repudiation and cancel the sale agreement.

[17] In response, May and Associates Inc indicated that the purchaser's instructions remained unchanged. On 22 September 2022, the first respondent's attorney addressed correspondence to the applicant's attorneys advising them that the applicant has failed to perform or to take transfer despite being afforded an opportunity to do so in accordance with the provisions of the breach clause of the sale agreement. Furthermore, the first respondent's attorneys informed the applicant's attorney that the purchaser's refusal to effect transfer until a demand

unrelated to the terms of the sale agreement was met constituted an ongoing repudiation of the agreement, entitling the first respondent to accept the repudiation and to cancel the contract. The first respondent's attorney indicated that the first respondent accepted the repudiation and, accordingly, cancelled the contract.

## **ISSUES**

[18] The questions that this court is enjoined to consider are the following:

1. Whether the applicant repudiated the agreement when it insisted that the transfer process be kept on hold pending the finalisation of this application.  
Put differently, whether the first respondent validly cancelled the sale agreement based on the alleged repudiation thereof by the applicant.
2. Whether a proper case has been made to confirm the interim order.
3. Whether a punitive costs order would be appropriate under the circumstances.

## **PRINCIPAL SUBMISSIONS BY THE PARTIES**

[19] At the hearing of the matter, Ms Venter, who appeared on behalf of the applicant, submitted that the applicant's insistence that the transfer process be kept on hold pending the finalisation of the application does not constitute a breach of any terms of the sale agreement, and accordingly constitute neither negative nor positive malperformance. Counsel contended that time was not of the essence in this matter and that there was no date specified for taking transfer of the immovable property. Ms Venter further submitted that neither the words informing the first respondent that



the transfer process would be held in abeyance nor the applicant's conduct could reasonably have led the first respondent to conclude that proper performance of the sale agreement (by taking transfer of the immovable property) would not be forthcoming. In the main, Ms Venter implored the court to dismiss the counter application and to confirm the interim order. Counsel urged the court to order the first respondent to pay costs on an attorney and client scale in respect of the interdict application and on a party and party scale in respect of the counter application.

[20] Meanwhile, Ms Carey-Wessels, who appeared for the first respondent, contended that May and Associates Inc was hostile towards the first respondent, notwithstanding that she is advanced in age. Ms Carey-Wessels argued that the first respondent felt intimidated by the manner May and Associates dealt with her. She contended that the first respondent had to appoint attorneys due to the hostility she received from May and Associates. Ms Carey-Wessels submitted that the applicant's conduct, ostensibly through the transferring attorneys' amounted to 'bullying' because of the way the transferring attorneys sought to illicit specific performance from the first respondent in terms of the sale agreement especially when one considered the events of 05 July 2022, in which the Sheriff was sent with the first respondent's landlord to serve the transfer documents upon the respondent.

[21] Counsel contended that the applicant sought to introduce a condition attached to specific performance which was not contained in the agreement. In terms of the sale agreement, the first respondent was required to perform by giving transfer which she did. Therefore, the applicant's conduct by introducing a condition that was not

agreed to in writing, so the argument proceeded, is not binding between the parties or has any effect, and this constituted repudiation of the sale agreement.

## **RELEVANT LEGAL PRINCIPLES AND DISCUSSION**

[22] For completeness, I will consider the issues in dispute sequentially. The issue in dispute that I will consider first is whether the first respondent validly cancelled the sale agreement based on the alleged repudiation thereof by the applicant. The law on repudiation is well established in our law and does not need an extensive elaboration. A repudiatory breach of contract is one which justifies the injured party in resiling from the contract. Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to repudiate the contract. *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated. See *Discovery life Ltd v Hogan and Another* 2021 (5) SA 466 (SCA) at para 16 and 17. The test as to whether conduct amounts to such a repudiation to justify cancellation is whether, fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to be bound. See *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] All SA 295 (SCA).

[23] Reverting to this matter, it is common cause that the parties engaged in settlement negotiations in a quest to find common ground or mutual understanding

between them. The talks continued even on the return date on 16 November 2022. On the return date, the parties could not reach a settlement, and the matter was postponed for hearing to 18 November 2022. After the first respondent signed the transfer documents, she instructed the conveyancer to proceed with the property transfer in the applicant's name. There was a dispute on the costs. The applicant wanted the respondent to pay the costs of the application on a punitive scale. A proposed settlement agreement in writing was sent to the first respondent's attorney, together with the transfer documents for signature. The first respondent signed the transfer documents and refused to sign the settlement agreement. Pursuant thereto, the purchaser instructed the conveyancer to hold the transfer process in abeyance pending the final determination of the application so that the court could determine costs.

[24] Clause 9.1 of the sale agreement, which deals with breach of the agreement by either party, provides as follows:

“9.1 Should either one of the parties breach any of the terms of this agreement (the defaulting party) and fail to remedy such breach within 7 (seven) days after the dispatch of a written notice by the other party (the aggrieved party) demanding that the breach be rectified, then the aggrieved party may, without prejudice to his/her other rights:

9.1.1 either claim specific performance;

9.1.2 cancel this agreement immediately, without further notice; and recover damages from the defaulting party.”

[25] It is abundantly clear from the reading of this clause that to cancel the sale agreement, either one of the parties must be in breach of any of the terms of the sale agreement. The argument of Ms Carey-Wessels that the applicant has not performed as is required by the sale agreement cannot be correct. It must be stressed that there was an intervention by the court when the first respondent purportedly cancelled the sale agreement. From the applicant's letter holding the transfer in abeyance, it is evident that the applicant intended to perform as soon as the matter is finalised and the issue of costs is determined by the court. It cannot be said that the applicant unequivocally intended not to be bound or to be fully bound by the sale contract. Instead, it was the first respondent who repudiated the sale agreement when she unequivocally expressed her intention to resile from the contract. I find the quote in LAWSA vol 9, 3<sup>rd</sup> Ed, para 408, to be apposite in this matter. The author states:

“Repudiation consists in words or positive conduct indicating an unequivocal intention on the part of either of the parties not to be bound, or not to be fully bound, by the contract. Repudiation is a form of anticipatory breach of contract because it always predicts another form of breach of contract: the repudiator indicates by words or conduct, for example, that he or she is not going to perform timeously or at all (*mora debitoris*) or that he or she will not accept performance timeously or at all (*mora creditoris*) or that his or her performance will be defective or incomplete (positive malperformance).”

[26] Notably, the Supreme Court of Appeal has consistently said that the test for repudiation is not subjective but objective. The test is whether a notional reasonable

person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention, as manifested by objective external conduct, accordingly serves as the criterion for determining the nature of the threatened actual breach. See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA); *Discovery life Ltd v Hogan and Another* 2021 (5) SA 466 (SCA) at para 17.

[27] On the objective facts placed before this court, it cannot be said that the applicant's instructions to defer the transfer pending a determination on the issue of costs by this court amounted to repudiation of the contract. The applicant brought the application for specific performance against the applicant as it was considered bound by the contract. Significantly, it was known to all the parties that the applicant's application for an interdict and specific performance was pending before this court. A return date of 16 November 2022 was also known to both parties. Pending the hearing of the matter on the return date, the parties engaged in settlement negotiations. The parties knew that the court would hear and adjudicate the matter on the return date if their negotiations failed.

[28] In my view, the applicant's insistence that the transfer of the property be held in abeyance pending the finalisation of this application does not at all constitute a repudiation of the contract or a breach as envisaged in clause 9.1 of the sale agreement. The applicant did not, by words or conduct, indicate that it will not perform in terms of the agreement. Instead, what can be inferred from the correspondence addressed to the first respondent's attorneys is that the applicant

regarded itself bound by the agreement and wanted the court to determine the issue relating to the costs for launching the interdict application.

[29] It follows in my view, that the counter-application must fail. This leads me to the second disputed issue, namely, whether a good case has been made for the confirmation of the Rule Nisi. It is common cause that on 16 August 2022, the first respondent signed the transfer documents as contemplated in para 1.3 of the Rule Nisi, before the return date. The first respondent essentially complied with the terms of the interim order. The first and the second respondent did not challenge or oppose the applicant's application for an interdict on the merits. The only issue that the first respondent refuted, is the prayer for costs on a punitive scale. In my view, a proper case has been made for the confirmation of the interim order.

[30] This leads me to the final issue for consideration, namely, the issue of costs in respect of both applications. It is a trite principle of our law that a court considering an order of costs exercises a discretion that must be exercised judicially. *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A. The applicant seeks costs against the respondent on an attorney and client scale. During argument, the court was informed that the applicant would be out of pocket if costs on a party and party scale were granted.

[31] In considering the issue of costs, it is essential to note that the sale agreement between the parties does not specify the scale at which costs should be levied in case of a breach. Undoubtedly, it is instructive for this court to look at the

circumstances of this case holistically in considering the issue of costs. It is common cause that the first respondent is 93 years old. She is advanced in age and depends on her daughters to communicate with the estate agent and the transferring attorneys. She appointed the conveyancer to effect the transfer of the property. Clause 2.3 of the sale agreement makes it abundantly clear that the conveyancer, May and Associates, is appointed by the seller to effect the transfer of the property.

[32] It is regrettable that May and Associates jettisoned the instructions of the first respondent and, instead, took instructions from the purchaser and ensured that same were carried out against those of the first respondent who instructed them. May and Associate, in my view, straddled its relationship with the purchaser and first respondent so much so that the purchaser was eventually considered to be their client as opposed to the first respondent. Importantly, the counter-application was launched after the purchaser instructed May and Associates to stay the registration pending the outcome of the application. This was despite the first respondent's instructions to the May and Associates to proceed with the registration of the property. In my view, this conduct is unsettling and highly concerning. I will be directing the Registrar of this court to forward a copy of this judgment to the Legal Practice Council – Western Cape Provincial office for possible investigation on the conduct of May and Associate regarding this matter.

[33] As adumbrated above, the first respondent is an elderly person, a nonagenarian. In my view, the time has come for the courts to bear in mind the *Ubuntu* principle when considering costs especially in deserving cases such as this. This principle underscores the need for respect for human dignity, whatever the

circumstances. See *S v Makwanyane* 1995 (3) SA 391 (CC) at para 307. At the very least, in my view, this concept emphasises the virtues of empathy and compassion for a fellow man, especially the elderly, like the first respondent.

[34] The first respondent complied with the interim order timeously, but she nonetheless caused the applicant to incur the costs of bringing the application and obtaining the interim order. Therefore, she must bear those costs. However, her refusal to pay those costs during the settlement negotiations cannot become a new condition in the contract of sale. In my view, the applicant and the conveyancer were wrong to make it a condition and to refuse to proceed with registration of transfer. On a conspectus of all the facts placed before court, I am of the view that a punitive costs order against the first respondent is not warranted. Such an order in my view, would be bereft of *Ubuntu* and prejudicial to the first respondent. More so, the scale of attorney and client sought by the applicant against the first respondent is extraordinary. It should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. See *Plastic Converters Association of South Africa on behalf of members v National Union of Metal Workers of SA* [2016] 37 2815 (LAC) para 16.

## **ORDER**

[35] In the result, having read all the evidential material placed before court, and having heard from both parties, the following order is granted:

35.1 The Rule Nisi issued on 14 July 2022 is hereby confirmed.



35.2 The first respondent's counter-application is hereby dismissed.

35.3 The first respondent is ordered to pay costs on a party and party scale for both applications.

35.4 The transferring attorneys May and Associates Inc are authorised and directed to effect transfer of the immovable property (Erf 5[...], Yzerfontein) in accordance with the sale agreement dated 11 and 12 April 2022, to the applicant as soon as practically possible.

35.5 May and Associates Inc are authorised to deduct taxed or agreed costs on a party and party scale, referred to in para 35.3 above, from the purchase price of the immovable property held in their trust account in respect of the transfer of the said property into the applicant's name before paying the proceeds of the sale to the first respondent.

35.6 The Registrar of this court is directed to forward a copy of this judgment to the Practice Legal Council - Western Cape Provincial office for a possible investigation of the conduct of May and Associates regarding this matter.

---

**LEKHULENI JD**

**JUDGE OF THE HIGH COURT**

**Appearances:**

For the Applicant: Adv L Venter

Instructed by: Geldenhuys Jonker Inc

For the First Respondent: Adv E Carey-Wessels

Instructed by: Roopa Potgieter Inc