

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: 446/2022

Date of hearing :16/10/2023

Date judgment delivered: 20/10/2023

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED

20/10/202

DATE

SIGNATURE

IN THE MATTER BETWEEN:

JOHANNES NTSIMANE MEKGWE

FIRST APPLICANT

PAULINA ESTER MEKGWE

SECOND APPLICANT

AND

TARIQ SULTAN HUNJRA

FIRST RESPONDENT

JUDGMENT

SIWENDU J

[1] The applicants, Mr Mekgwe and his wife, reside at Unit ■ Mynah, a sectional title complex situated at ■ L ■ Road, Crown Gardens. They seek orders to enforce a sale agreement entered with Mr Tariq Hunjra and Mrs Sandy Hunjra, (the respondents and to compel the transfer of Unit ■ and its parking bay, No. 15 plus the exclusive use areas Garden G6 and Garden G2 forming part of the common property (the property) purchased from the respondents in their name.

[2] It is common cause on the papers that from 2016, the applicants rented and occupied the property from the respondents. Early in 2018, the respondents approached the applicants with an offer to purchase the property. They concluded a sale agreement on 5 February 2018, and agreed on the purchase price of R450,000.00. The purchase price was payable in instalments, with the obligation to transfer the property postponed, to as "close the date of the final instalment payment as possible". The obligation to instruct conveyancers to effect transfer rested on the respondents, and the applicants would, on demand, pay all transfer costs and transfer duty.

[3] Despite the complaint by the respondents that the applicants at some point breached the payment terms of the sale agreement, there is no dispute that the applicants paid the respondents the purchase price for the property in full over the period from 1 March 2018 to June 2021. According to the applicants, what prompted the application is that the respondents refused to abide by the sale agreement and effect the transfer.

[4] The respondents opposed the application on the grounds that by 01 March 2022, the applicants owed to the respondents a total amount of R245 000.00 in monthly rental fees. The applicants were in arrears of R55 815.00 in respect of the levies. The respondents contended that they were amenable to “write-off” the amount on condition that the applicants pay to the respondents outstanding amounts of rental fees. The respondents claim that the monthly rental fees were agreed upon by both parties, which monies have never been paid by the applicants. In essence, the respondents are holding out for a “settlement agreement” for the rental due. The respondents state that they are in actual fact not refusing to sign transferring documents of the sold property to the applicants.

[5] At the hearing of the application, the respondents appeared in person, and Mrs Hunjra addressed the Court. She sought a postponement of the application. The reason for the application was that their attorney Mr Mothupi took ill and “the advocate was unavailable and was presiding as an Acting Magistrate” in a case scheduled to proceed at the same time as the hearing of the application. Counsel for the applicants, Mr Silana, opposed the application for postponement on the grounds that it is an abuse of the processes of the Court.

[6] In *Take and Save Trading CC and Others v Standard Bank*¹, Harms JA foreshadowing caution to practitioners, litigants, the courts and had this to say:

“One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a

¹2004(4) SA 1 (SCA)

practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.”

[7] While the above case is not on all fours with the current matter, it places the court on alert to guard its processes. On overview of the papers filed on record, it is clear that the attorneys may have assisted the respondents in the background. They did not place themselves on record, formally, accordingly, the respondents are not legally represented in law [draft note: purpose of attorney of record]. On questioning by the Court, and having deposed to answering affidavit and authored some of the correspondence addressed to the applicant’s attorney, Mrs Hunjra has set out sufficient facts to demonstrate direct personal knowledge of the disputed issue in the matter. They had signed all the court papers and processes personally and are familiar with the issues and the reasons for the refusal to effect the transfer to the applicants. They are in as good a position as an attorney to inform the court of the reasons thereto. I accordingly refused the postponement on the grounds that I considered them to be self- representing.

[8] Turning to the merits of the application, Mrs Hunjra informed the court that the reasons for refusing to effect the transfer boil down to (a) the outstanding levies (b) rates and (c) the claim for occupational rental. They claim based on Clause 4 for of the sale agreement that they never agreed to the occupation without monthly rental payable and say:

“As at date of occupation of the property, the 1st and or the 2nd Applicant and or both of them have never paid a single cent towards the fulfilment and compliance with the latter part of this Clause dealing with **the payment of the rental on monthly basis.**”

[9] Mr Silana for the applicants disputes that there was such agreement and contended that the question of the occupational interest is an “invented defence.” The respondents raised it for the first time in a letter of demand in March 2022 in

respect of Unit Number 81, Limerick Road, Crown Gardens, which has no relation to the properties sold or the applicants.

[10] The starting point is [Draft Note: Dispute of fact? Is it a genuine?] Recourse to be heard to the terms of the sale agreement two material terms embodied in Clauses 2 and 4 of the sale agreement are relevant to the application, and read as follows:

"2, PURCHASE PRICE

The purchase price is R450' 000.00 payable as follows:

A deposit of R _____ to be paid by

A second deposit of R _____ to be paid by _____

The balance of R _____ to be paid in monthly instalments of R5000.00

or more, on the 1st day of each month until the balance due is paid in full.

The Purchaser will also be responsible for the levy premium of R 1139.10. (or as per resolution/statement) payable in advance and due on the 1st of each month to Mynah Body Corporate.

The levy premium may be paid together with the monthly balance pay off, as per bank details below.

No interest will be payable on the balance due by the Purchaser, subject to the monthly payment agreement as stated above being adhered to.

4. OCCUPATION.

Occupation of the property shall be given to the Purchaser on the day of _____

If the date of occupation does not coincide with the date of registration of transfer, the party enjoying occupation of the property, whilst registered in the name of the other party shall pay to such party a rental of R Monthly instalment #2 per month payable from date of occupation. Pending registration of transfer on y the Purchaser and Immediately family members of the Purchaser shall be entitled to occupy the property and no alterations of any nature may be made to the property.

[11] The starting point is the interpretation of the sale agreement entered into by the applicants and the respondents. There is no question that the parties concluded a valid and binding sale agreement required for alienation of property. Like all other written instruments, the agreement must be interpreted in a unitary, holistic process, having regard to the words used, the contextual setting and the apparent intended purpose². The starting point being the language used. In this regard, the above Clause 4 hereof, deals with the occupation and occupational rental provisions. The applicants and the respondents left the date of occupation was left in blank. This appears to accord with the applicant's version that they were already in occupation when they agreed to purchase the property. This version by the applicants is not disputed by the respondents.

[12] Next for consideration is that aspect of the Clause 4, dealing with occupational rent and the amount payable. On a plain reading, the provision does not specify the amount due, but states "monthly instalment #2." Logically, the insertion means that the amount of occupational rental if any, must be construed in terms of Clause 2, which clause must be applied to determine the occupational amount of rent due. It merely states that "The balance of R _____ to be paid in monthly instalments of R5000.00."

[13] The dispute between the parties arises in this respect: While the respondents agreed that they received the monthly instalment towards the purchase price, they claim that over and above the monthly rental, occupational interest was payable. The applicant dispute this.

[14] What is the meaning to be ascribed to this reference? On this score, the observation of the Supreme Court of Appeal in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*³ is apposite, when

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18;

³ 2022(1) SA 100 (SCA) [2021] 3 ALL SA 647; [2021] ZASCA 99, Para 39

referring to Constitutional Court decision of *University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)*, affirmed that “an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended.”

[15] Here, it is undisputed that Clause 2 refers to the balance of the purchase price, which was to be paid in instalments of R 5000. This was paid. Mr Silana argued on the contrary the facts and context points to the absence of the provision for occupational interests., the respondents purported to send to the applicants a fresh agreement of sale. The new agreement makes no reference to the occupational interest claimed. It seems the issue about occupational interest was raised for the first time in the throes of the dispute. In an email dated 18 November 2018 at 8:40 to the applicant’s attorneys, the respondents state the following:

“Dear Giuliana

The Purchaser is currently paying me cash on a monthly basis for the levy and the municipal account. He has been doing this this since he took occupancy of the property, as agreed. I understand that as per the standard OTP it is the seller that needs to provide the clearance certificates, however this sale was under special circumstances. Why should I have to pay upfront for an account that he has been paying for the last couple of years? Also taking into account that we have lost interest and occupational rent on the property since occupancy. This deal was to the benefit of the Purchaser from the start. It was done in good faith as we trusted them. As mentioned previously we even overlooked short and overdue payments, considering the Purchasers financial situation at the time of due date. When we speak to Purchaser face to face an agreement is reached with regards to clearance certificates, however I get an email from you shortly thereafter with a different specification. Even though I have tried to sort out this matter amicably, we still seem to be running around in circles.”

[16] This email by the respondents supports the version by the applicant that there was no occupational interest payable. Had there been a contrary view, the agreement would have stated so expressly. Taking to account, (a) the cumulative financial impact of the occupational rent on the respondents' finances, and (b) the period over which it is submitted it has been outstanding, the respondents would have raised the issue earlier than they did instead of doing so belatedly. Mr Silana submitted that the claim will have prescribed. It is however not necessary for me to make a decision on the question of prescription to determine the rights of the applicants to the orders they seek. On the face of Clause 4 and the conspectus of the facts, I find that there is no genuine dispute about the meaning of the Clause 4 or the version that there was no agreement about the occupational interest. It was not agreed to or raised.

[17] What remains is the dispute about the levies payable, a question which stands on a different footing to the applicant's rights to the transfer. Firstly, given that the property is located in a sectional title scheme, the obligation to pay the levies is determined by the body corporate and the Rules of the Scheme. Secondly, the sale agreement expressly provided that the applicants would be liable for the payment of the monthly levies as stipulated therein.

[18] Although the liability for the levies flows from the agreement of sale, in my view, the dispute about the amount due is severable from the entitlement of the applicants to the transfer of the property. In any event, if the applicants refuse to pay the levies, it will not be due to an impediment by the respondents but due to their non-compliance. The Body Corporate would be entitled to withhold its consent to the transfer and to issue the relevant certificates in law.

[19] Mr Silana agreed that to the extent that the applicants owe the levies, they must settle the debt as envisaged in the sale agreement. Lastly, I have considered the question of costs and the submission to award a punitive cost order against

the respondents. Even though I frown upon aspects of their conduct, it was clear at the hearing that it was based on a misguided view. There is thus no basis to mulch them with a punitive cost order.

In the result, the following order is made:

1. The first and second respondents are directed to, within 5 (five) days from the granting of this order, instruct Hannes Gouws Attorneys to proceed with the transfer of:
 - 1.1. Unit ■ in the Sectional scheme known as Mynah SS113/1994, measuring 59 (fifty-nine) square metres and situated at ■ L ■ Road, Crown Gardens;
 - 1.2. Unit 15 in the sectional scheme known as Mynah SS113/1994, measuring 20 (twenty) square metres and situated at ■ L ■ Road, Crown Gardens;
 - 1.3. Exclusive use area Garden G6 and Garden G2 forming part of the common property of the sectional scheme known as Mynah SS113/1994.
 (“the property”)

In the names of the first and second applicants on the terms and conditions as set out in the agreement of sale entered into between the first and second respondents and the first and second applicants on 15 February 2018.

2. On receipt of notification from Hannes Gouws Attorneys, the first and second respondents are directed to, attend at the offices of Hannes Gouws Attorneys within five (5) days of being called upon to do so, and to sign all lawful documents required to effect the transfer and co-operate with Hannes Gouws Attorneys to obtain the necessary clearance certificates and declarations thereto.

3. Subject to receipt of any arrears levies due to the respondents by the applicants, the first and second respondents are directed to pay, within 10 days (ten) of being called upon by Hannes Gouws Attorneys, all amounts due and owing to the Mynah Body Corporate SS113/1994, to enable the body corporate to issue a levy clearance to Hannes Gouws Attorneys in respect of the property so that Hannes Gouws Attorneys are able to issue a certificate in terms of Section 15B (3) of the Sectional Title Act 95 of 1986;
4. The first and second respondents are directed to pay within 14 (fourteen) days of the granting of this order, all amounts that are due and payable to the local authority in order to enable Hannes Gouws Attorneys to obtain a rates clearance certificate (valid for 60 days in advance) from the local authority in respect of the Property.
5. It is ordered that the first and second respondents are directed to, before the transfer of the Property into the name of the first and second applicants, provide Hannes Gouws Attorneys with an electrical compliance certificate, at the cost of the first and second respondents, in respect of the Property.
6. The first and second respondents are liable for the applicants' costs on a party and party scale.

NTY SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:

16 October 2023

Judgment: 20 October 2023

Appearances:

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