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

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

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

[redacted]

SIGNATURE DATE: 4 July 2024

Case No. 2022/059691

In the matter between:

THOBEDI COLLINS MOHLALA	Applicant
and	
LAWRENCE MASHAMAITE	First Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent
REGISTRAR OF DEEDS, JOHANNESBURG	Third Respondent

JUDGMENT

WILSON J:

1 The applicant, Mr. Mohlala, purchased ERF [redacted] Winnie Mandela Zone 2, Tembisa, from the first respondent, Mr. Mashamaite. The purchase agreement was concluded on 30 June 2001. The purchase price was R8000. The price was payable in instalments. The first instalment, apparently paid on signature

of the agreement, was R4000. The balance of the price was to be settled in monthly instalments of R500. The final instalment was paid on 28 February 2002. Mr. Mohlala was in occupation of the property at the time the purchase agreement was concluded and remained in occupation thereafter. In 2002, he improved the property by constructing seven rooms which he let out to tenants. He continued to reside at the property until 17 November 2022.

2 Sometime in 2016 or 2017 (the parties do not give a precise date) the property was further improved by the construction of a state-subsidised house. That triggered the dispute which is presently before me. Although it is not clear from the papers who was supposed to benefit from the housing subsidy used to construct the house (and presumably to buy the land), the subsidy beneficiary was likely Mr. Mashamaite. It is a fair inference from the papers that the state allocated the land to him. He had then sold the property in its unimproved condition, and felt short-changed when, a decade and a half after he did so, the state finally constructed a house on it.

3 Once the subsidised house was built, Mr. Mashamaite asserted that he still owned the property, and sought to evict Mr. Mohlala from it. On 15 March 2022, the Tembisa Magistrates' Court stayed Mr. Mashamaite's eviction application for two months, directing the parties to approach the High Court for "an appropriate order". Although the Magistrate's reasons are not a model of clarity, it appears that the Magistrate took the view that he had no jurisdiction to decide the central issues in the case. He identified those issues as whether there was a sale agreement between the parties, and whether, if there was, it was valid.

4 On 29 April 2022, in the urgent court of this division, Mr. Mashamaite obtained an order for Mr. Mohlala's eviction from the property. The order appears to have been granted under section 5 of the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 ("the PIE Act"). Section 5 authorises the urgent interim removal of an unlawful occupier pending the outcome of an application for a final eviction order if the jurisdictional requirements set out in section 5 are met. The 29 April 2022 order is, on its face, final rather than interim. Mr. Mohlala says he was not given notice of the proceedings that led to it being granted. If, despite appearances, the section 5 order was interim in nature, the eviction proceedings in which it was granted do not appear to have been finalised.

5 It was, to put it mildly, unfortunate that an urgent eviction order under section 5 of the PIE Act was granted at all in a case like this. The circumstances in which the order was obtained underscore, in my view, the need for a court to approach applications under section 5 of the PIE Act with circumspection, and to act under that provision only once the court is satisfied that the relevant jurisdictional requirements have been met. It seems clear to me that those requirements were absent in this case, if only because the eviction order was not executed until 17 November 2022, around six and a half months after it was granted. Be that as it may, since the 29 April 2022 order is not at issue before me, I need say no more about it.

6 On 6 December 2022, undeterred by his exclusion from the property, Mr. Mohlala instituted the application now before me. In it, he seeks a declaration that he owns the property, pursuant to the 30 June 2001 sale agreement; an

order directing the second respondent, the Municipality, to amend its records to reflect his ownership; and an order directing the third respondent, the Registrar of Deeds, to register the property in his name.

The validity of the sale agreement

7 The fact of the sale agreement is not seriously disputed. Mr. Mohlala annexes to his founding papers three affidavits in which the material terms of the sale agreement are recorded by Mr. Mashamaite. The affidavits were commissioned at the Tembisa Police Station. Annexed to the third affidavit is a schedule purporting to record the payment of each of the instalments due under the agreement. That schedule is signed by Mr. Mohlala and Mr. Mashamaite.

8 In his answering affidavit, Mr. Mashamaite flatly denies that he entered into the sale agreement. He also denies that he received the payments due under it. However, Mr. Mashamaite does not address the three affidavits or the annexure upon which Mr. Mohlala relies. He does not even suggest that they were forged. On any fair analysis, Mr. Mashamaite does no more than meet Mr. Mohlala's case based on those documents with a series of bare denials. As counsel for Mr. Mashamaite was constrained to accept before me, those denials are so vague, far-fetched and untenable that they must be rejected. The affidavits and the annexure may safely be accepted as genuine. It follows that Mr. Mashamaite's assertion that he never entered into the agreement they embody is plainly false.

9 The real issue between the parties is in fact whether the documents that embody the sale agreement are a "deed of alienation" for the purposes of

section 2 (1) of the Alienation of Land Act 68 of 1981. That provision states that “no alienation of land . . . shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority”. The Act defines “deed of alienation” as “a document or documents under which land is alienated”. This obviously allows for a situation in which several documents read together constitute a valid deed. If the documents upon which Mr. Mohlala relies are a valid deed, then the sale agreement is, on its face, enforceable. If the documents are not a valid deed, then the sale agreement could never have served as a basis on which Mr. Mohlala acquired ownership of the property.

10 In *Cooper NO v Curro Heights Properties (Pty) Ltd* 2023 (5) SA 402 (SCA) at paragraph 16, Meyer JA, relying on a long line of authority, held that a valid deed of alienation under section 2 (1) is one in which the whole contract – “its material terms” – is reduced to writing. Depending on the circumstances, the material terms may extend well beyond the essentials of the contract – the parties, the price and the thing sold – to any other term that “materially affects the rights and obligations of the parties” to the particular agreement at issue.

11 It seems to me that, read together, the three affidavits and the annexure upon which Mr. Mohlala relies constitute a “deed of alienation” in this sense. They contain the essentials of the contract, and they record the time and manner of payment of each of the instalments. They confirm that the property was “handed over” to Mr. Mohlala on 28 February 2002. The schedule of instalments annexed to the third affidavit was signed by both parties. Neither

party identifies in their papers any other material term that was not recorded in the affidavits and the annexure.

12 There is a further complication. Because it is an instalment sale agreement, the deed of alienation ought also to have complied with section 6 of the Act, which prescribes the content of instalment sale agreements for the sale of land. It is common cause, though, that the deed leaves out several of the terms that section 6 prescribes. The main point of debate at the hearing was accordingly whether, assuming that they constituted a valid deed of alienation under section 2 (1), the documents on which Mr. Mohlala relies were nonetheless void for non-compliance with section 6 of the Act.

13 If any of the terms identified in section 6 were a material part of the agreement between Mr. Mohlala and Mr. Mashamaite that had failed to find their way into the deed, then the deed would of course be void. But that would not be because of non-compliance with section 6, but because, contrary to section 2 (1), material terms agreed between the parties had not been reduced to writing. It was not suggested that any of the terms set out in section 6 were of that nature. That leaves the question of whether section 6 voids a deed of alienation merely because the deed fails to contain all the terms prescribed in section 6, notwithstanding that those terms were not material to the parties' rights and obligations under the agreement.

14 In this respect, I agree with the decision of Kairinos AJ in *Chetty v ERF 311 Southcrest CC* 2020 (3) SA 181 (GJ), in which it was held that non-compliance with section 6 of the Act does not in itself render a deed of alienation void from the outset, but merely voidable at the election of the purchaser. The purpose

of section 6 is to protect the interests of the purchaser. Assessed in light of that purpose, the effect of section 6 cannot be to void a deed of alienation a purchaser wishes to enforce merely because the deed leaves out a term that section 6 prescribes, but which is not material to the agreement between the parties.

15 It follows from all this that the deed of alienation on which Mr. Mohlala relies is a valid one for the purposes of the Act. The deed complies with section 2 (1) of the Act. The absence from the deed of some of the terms prescribed in section 6 does not render the deed void, because the excluded terms were never material to the agreement struck between Mr. Mohlala and Mr. Mashamaite.

Remedy

16 It remains, however, for me to consider whether this means that I can, without more, declare Mr. Mohlala to be the owner of the property. There is no evidence before me that Mr. Mashamaite in fact owned the land at the time he purported to sell it, other than a municipal account in Mr. Mashamaite's name, and the fact that the parties agree that Mr. Mashmaite owned the property at the point of purchase. I have not seen a title deed evidencing Mr. Mashamaite's ownership of the property, apparently because title deeds for the state subsidised houses constructed at Winnie Mandela have not yet been issued.

17 In a perfect world, I would have been content to draw the inference, merely on the basis that neither the Registrar of Deeds nor the Municipality have responded to this application, that they are satisfied that Mr. Mashamaite had

the rights of ownership he purported to alienate to Mr. Mohlala in the sale agreement. Modern bureaucracy being what it is, however, I cannot realistically be confident that either the Registrar or the Municipality regard this case as anything more than a private dispute between Mr. Mohlala and Mr. Mashamaite in which they play no role, and to which they need not apply their minds.

18 Because of the involvement of the state in making the property available and constructing a house on it, I do not think that is the correct approach in this case. I know that Mr. Mashamaite was allocated the property under the terms of the national housing subsidy scheme, but I do not know what rights that allocation gave him at the time when he sold the property to Mr. Mohlala. If Mr. Mashamaite did not in fact have the right to alienate the land allocated to him at the point he entered into the sale agreement with Mr. Mohlala, then the Municipality or the Registrar should, given the opportunity, be able to say so.

19 Moreover, section 10A of the Housing Act 107 of 1997 states that it is a condition of every housing subsidy that a "dwelling or serviced site” acquired under the subsidy will not be alienated within eight years of its acquisition, unless the property has first been offered for sale back to the relevant provincial housing department that allocated the site or dwelling to the subsidy beneficiary. The offer must be for a price not exceeding the value of the subsidy used to purchase and develop the site or dwelling. The parties accept that this did not happen before Mr. Mashamaite sold the property to Mr. Mohlala. At first blush, it seems to me that non-compliance with section 10A does not void the sale, but rather gives the provincial government a right of

recourse against the seller – in this case Mr. Mashamaite. Nonetheless, I think that it is necessary that the provincial government be given an opportunity to raise any objections it may have to the relief Mr. Mohlala seeks. The MEC may also be able to shed light on what rights Mr. Mashamaite actually had at the point the sale agreement was entered into.

Order

20 For all these reasons –

20.1 The MEC for Human Settlements (Gauteng) is joined as the fourth respondent in these proceedings.

20.2 A *rule nisi* is issued calling on the second, third and fourth respondents to show cause, at 10am on Thursday 8 August 2024 or as soon thereafter as counsel may be heard, why the following order should not be granted –

"1. It is declared that annexures TCM 1, TCM 2 and TCM 3 to the applicant's founding affidavit constitute a valid deed of alienation for the purposes of section 2 (1) of the Alienation of Land Act 68 of 1981.

2. It is declared that the applicant, Thobedi Collins Mohlala, is the owner of the property situated at ERF [redacted] Winnie Mandela, Zone 2, Tembisa, Gauteng Province ("the property").

3. The second respondent, the Ekurhuleni Municipality, is directed forthwith to amend its records to reflect the applicant as the owner of the property.

4. The third respondent, the Registrar of Deeds, is directed forthwith to register the property in the applicant's name."

20.3 The applicant's attorney is directed, by no later than 11 July 2024, to serve –

20.3.1 a copy of this judgment on the second to fourth respondents, and to draw those respondents' attention to the *rule nisi* it contains; and

20.3.2 a copy the application papers on the fourth respondent.

20.4 The registrar of this court is directed forthwith to draw the second to fourth respondents' attention to this judgment, and the *rule nisi* it contains.

20.5 The costs of the application to date are reserved.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 July 2024.

HEARD ON:	30 May 2024
DECIDED ON:	4 July 2024
For the Applicant:	MV Sehunane Instructed by Sehunane Attorneys Inc
For the First Respondent:	Sithi and Thabela Attorneys