

SOUTH AFRICA / JUDGMENT

Abraham v Arkle and Others (2019/3591) [2021] ZAGPJHC 549 (18 October 2021)

[2021] ZAGPJHC 549

COURT

South Gauteng High Court, Johannesburg

BEFORE

MJ Engelbrecht

CASE / FILE NUMBER

2019/3591

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/3591

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: YES

REVISED.

In

the matter between:

DONNE
ABRAHAM (BORN DICKS)
Applicant
and
KEITH
PATTERSON
ARKLE
First
respondent
CLIVE
ANTHONY
ARKLE
Second respondent
MAUREEN
CASH
Third
respondent
MARYNA
ESTELLE SYMES & RETHA
STOCKHOFF
N.O. (THE
PROVISIONAL
TRUSTEE OF THE
INSOLVENT
ESTATE OF MANUEL
FERNANDO
MARTINS
COSTA)
Fourth respondent
ATANASI
SAKULIAS
Fifth
respondent

JUDGMENT

engelbrecht, AJ:

Introduction

1. This is an application to secure the transfer of property to the applicant, in circumstances where she made payment of the purchase price to the trust account of the attorney nominated by the respondents, who is also one of the registered owners of the property in question. The attorney did not effect the transfer, absconded with the money, and has subsequently been finally sequestered.

2. The crisp issue before this court is whether the applicant complied with her obligations in terms of the sale agreement and, if so, whether the applicant is entitled to registration of transfer of ownership into her name.

Background

and relevant facts

3. The first to third and fifth respondents, together with Manuel Fernando Martins Costa (Mr Costa) are the registered owners of an undivided one fifth share of the immovable property described as Erf [...] Northmead Extension 4, Township Registration Division IR, Gauteng (also described as [...] A[...] Street, Northmead Extension 4, Benoni) (the Property).
4. On 2 February 2018, the applicant signed an Offer to Purchase in respect of the Property. On 5 February 2018, the Offer was accepted by the respondents, who are the registered owners of the Property.
5. The terms of the agreement that came into being was that the applicant would purchase the Property from the respondents at a purchase price of one million one hundred thousand Rand (R1 100 000), with the purchase price due on or before 9 February 2018. Mr Costa of Martin Costa Attorneys was to attend to the registration of the Property into the applicant's name, within a reasonable time, and the parties would sign all documents required to effect transfer of the Property into the applicant's name within five business days of a request from the conveyancers. In the event of breach and failure to remedy, either damages or specific performance could be claimed.
6. The full purchase price was paid to Martins Costa Attorneys, the conveyancers nominated in the sale agreement, in February 2018, as appears from proof of payment that has been provided.
7. Unfortunately, Mr Costa absconded and no steps were taken to transfer the Property into the name of the applicant. His practice has been closed, and in the founding papers he was said to be under investigation by the Law Society of the Northern Provinces. The applicant was told that Costa would not be able to attend to the transfer of the Property. The applicants' attorneys subsequently established that the power of attorney to transfer the Property to her had been duly signed by all of the respondents, except for Costa. However, on 6 December 2018, the power of attorney was terminated, and respondent's attorneys advised the applicant's representatives that the respondents no longer intended to transfer the Property.
8. On 5 December 2018, the applicant's attorneys directed a letter of demand to the Mr Costa, affording him a period of seven days to remedy his breach. On 7 December 2018, letters of demand were also sent to the remaining respondents. The letters of demand elicited no response.

9. The applicant elected to claim specific performance, and issued the present application on 12 March 2019. In circumstances where Costa had absconded, the applicant sought an order that the sheriff of this court be authorised to sign the required power of attorney and other documents required to effect transfer of the Property on behalf of Costa. The applicant sought similar relief in respect of the remaining respondents, in the event that they were unable or unwilling to sign the requisite documents. She also sought an order that Tuckers Incorporated be authorised to attend to the transfer of the Property, in circumstances where Mr Costa could patently no longer attend to this. (Alternative relief sought in Part B of the application is no longer relevant to the

determination

of this application.)

10. The application was duly served on the respondents other than Mr Costa, and the applicant ensured service upon Costa not only at his chosen domicile, but also at his erstwhile address. However, information obtained from a tracing agent indicates that Mr Costa has left the country.
11. The respondents other than Mr Costa opposed the application.
12. They raised a point in limine concerning the difference between the surname of the applicant and the signatory to the purchase agreement. The matter has been disposed of by the explanation that the applicant's changed name is due to a change in marital status, supported by a marriage certificate. Nothing further need be said about this point in limine.
13. In addition to complaining of non-service on Costa, the respondents explained in answer that Mr Costa had been finally sequestered by order of this court granted on 12 February 2019. They took the point that the applicant was not entitled to proceed with the application in the absence of Mr Costa's trustee being a party to the litigation. This issue has been resolved. The applicant sought amendment to introduce the trustees as fourth respondent in the stead of Mr Costa, and on 5 October 2020 the trustees confirmed receipt of the application. They indicated that they, now cited as the fourth respondent, would not oppose the application. That preliminary issue has equally been disposed of.
14. On the merits, the respondents quarrel with the factual allegations concerning the agreement, on which they wish to place a construction different from the one advanced by the applicant. Moreover, they assert that Martins Costa Attorneys held such portion of the purchase price as had been paid, although they at the same time deny that any portion had been paid. The position adopted by the respondents is that they were not obliged to cause transfer of the Property into the name of the applicant until guarantees were provided for the purchase price and all costs of transfer.
15. In reply, the applicant provided proof that the purchase price, together with transfer costs, had in fact been paid into the trust account of Martin Costa Attorneys.

16. The remaining respondents also take a point that it is common cause that the applicant has been in occupation of the Property, but despite this, she has not paid occupational rental. On this, the applicant says that the payment of occupational rental is not a prerequisite for the transfer of the Property, and that any claim that the remaining respondents have may be quantified as a precursor to the resolution of that issue.

Analysis

of the respondents' defence

17. The first to third and fifth respondents (the remaining respondents) say that, in terms of the sale agreement,
 - 17.1. a guarantee for payment of the full purchase price to the respondents was due within seven working days from conclusion of the agreement;
 - 17.2. all costs of transfer duty including transfer duty and all costs require for the obtaining of a clearance figure, were to be paid by the applicant within five days of signature of the transfer and bond documents with the conveyancer.
18. Essentially, the remaining respondents argue that the applicant elected to make payment of the full purchase price at her peril, and that she should bear the consequence of Mr Costa absconding with the purchase price and transfer fees that she had made payment in respect of. In heads of argument the point is made that: "it is the version of the applicant that she paid the purchase price prior to signature of the transfer documents by all the respondents. That the applicant is aggrieved that such payment, which is not in discharge of the applicants [sic] obligation to provide a guarantee for payment of the full purchase price, has apparently been misappropriated from her does not entitle the applicant to the relief sought, and to registration of transfer without the applicant providing a guarantee for payment of the full purchase price to the respondents, and payment of the transfer costs".
19. The remaining respondents argue, further that "No attempt is alleged by the applicant to have been made by her to obtain a refund of the purchase price paid to the conveyancer. As the respondents have no entitlement to such purchase price prior to registration of transfer, no such attempt can (validly) be made by them, and the respondents have no obligation to make any such attempt. Absent an agreement that a conveyancer hold the purchase price of an immovable property on behalf of the seller pending registration of transfer, and/or that the conveyancer is entitled to pay out, or otherwise release, the purchase price prior to the registration of transfer, it will create very undesirable precedent or authority for a court to find in such terms. Such agreement neither exists, nor is it alleged to exist, in this application."
20. The determination whether the relief sought may competently be granted lies in a proper interpretation of the sale agreement, in accordance with the trite principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] and reiterated in *Bothma-Batho*

Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk.[2] Documents must be interpreted by way of an objective process that leads to a “sensible” meaning. Context must be borne in mind and provisions must be read in light of the document as a whole, and the circumstances attendant

upon its coming into existence. Judges ought not to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

21. What is required, therefore, is proper consideration of the agreement itself.
22. The sale agreement in the present case was filled out on a standard form. The transaction details are recorded in clause 1, with purchase price indicated as R1,1 million and the recordal that a “nil” deposit was payable.
23. In clause 1.3 of the standard form, provision is made for insertion of the “deposit due date”, but the word “deposit” is scratched out; in its stead, the words “the purchase price” was inserted, together with the recordal of that date being 9 February 2018.
24. Clause 1.4 of the standard form provides for a “guarantee date”. Such guarantee is to be provided within seven business days of fulfilment of the suspensive condition in clause 8 or a certain

number of days after the deposit due date. The guarantee date provision does not find application in the circumstances of the case,

since (i) clause 8 finds no application (it is scratched out, and the clause applies in any event only if the purchase price is financed through a mortgage bond, which it was not in the present case); and (ii) no time period for the provision of a guarantee in the event of a cash purchase was filled out (i.e. no provision for the date of a guarantee was agreed upon).

25. Clause 3 provides that the purchaser “shall pay the cash deposit as stated in paragraph 1.2 on the deposit due date as stated in paragraph 1.3”. As indicated the “deposit due date” was changed in clause 1.3 to read “the purchase price due date”. A businesslike interpretation of the agreement in the context must mean that clause 3 is to be read with the necessary changes, i.e. clause 3 required payment of the “purchase price”. Under clause 3.1, such payment had to be made to the conveyancer’s trust account. In the circumstances, clause 4 found no application, because there was no balance to be paid. No other reasonable construction can be placed on the agreement. Since the agreement provided for payment of the full purchase price by 9 February 2018, through amendment of the clause that ordinarily provides for the deposit, and the clause providing such payment to be made to the conveyancer’s trust account, the intention of the parties clearly was for payment to be made to the conveyancer’s trust account. Simply put, the agreement, which requires payment of the purchase price by the indicated date makes no provision for payment of the purchase price into any other account. Payment to the conveyancer’s trust account was therefore to be treated as payment of the purchase price in accordance with the terms of the agreement.

26. Clause 5 makes plain that the sellers (the respondents) exercised the right to appoint the conveyancer. That conveyancer was identified in clause 1.7 as Martin Costa Attorneys. Under clause 5, the conveyancer was instructed to “attend to registration of the property into the name of the Purchaser within reasonable time provided that all the terms of this agreement have been fulfilled”. In terms of clause 6, the costs of transfer were to be paid by the purchaser within five days of signature of the transfer and bond documents.
27. Any submission that transfer costs were to be paid as a precursor to transfer is inconsistent with the plain wording of the agreement. In any event, the applicant has, in response to the point taken in the answering affidavit that transfer costs were to have been so paid, shown that payment of transfer costs was indeed effected on the basis of a pro forma invoice for such costs.
28. The payment to the conveyancer in the present case constitutes payment of the purchase price in accordance with the terms of the agreement, as discussed hereinabove. The question, then, is whether the judgment in *Minister of Agriculture and Land Affairs and another v De Klerk*[3] stands in the way of this court granting the relief sought.

28.1. De Klerk was the registered owner of two farms in Mpumalanga in respect of which claims were lodged in terms of the Restitution of Land Rights Act. Under threat of expropriation, De Klerk entered into a deed of sale with the National Department of Land Affairs. The latter insisted that its appointed conveyancer (who was a stranger to De Klerk) must attend to the transfer. De Klerk acquiesced, and did not appoint her own conveyancer. The purchase price of R3,7 million was paid into the conveyancer’s trust account, and transfer occurred. However, the conveyancer stole just over R1 million of the purchase price. De Klerk sued the Minister (as the representative of the Department). De Klerk succeeded in the High Court, but the Minister appealed to the Supreme Court of Appeal (SCA), on the basis that the Department had paid the full purchase price to the conveyancer, and was thus off the hook. The majority held that in this specific instance the conveyancer was the Department’s agent only, and did not receive the purchase price on behalf of De Klerk. The Minister had to pay up, with interest.

28.2. The situation in De Klerk is clearly distinguishable. The SCA considered that the agreement there under consideration “tilt[ed] the scales firmly in favour of the proposition that the conveyancers acted as the agents of the purchaser and not of the seller. That being the case, the money had not been paid to the plaintiff or to her agent”. The situation is not the same here. In the present instance the purchase price was paid into the trust account of the conveyancer in accordance with the terms of the sale agreement. In other words, the applicant discharged her duty under the sale agreement, as envisaged by the SCA in De Klerk,[4] by reference to the jurisprudence in *Baker v Probert*. [5] The provisions of the sale agreement relating to payment of the purchase price confirm that the sellers conferred authority on Mr. Costa’s firm to accept payment of the purchase price as their agent. The express authorization to the conveyancer to effect transfer upon compliance with the requirements of the sale agreement supports this conclusion. Of course, in the present case, the conveyancer authorised to accept the payment into his trust account was one of the joint sellers of the property, again reinforcing the conclusion

that the payment to the conveyancer as envisaged in the sale agreement constituted payment to the agent of the sellers. They who chose their strange bedfellow and who authorised him to accept payment of the purchase price must lie in the bed that they have made for themselves. It makes no difference to my conclusion that the interest on the purchase amount paid into the conveyancer's

account was to be for the benefit of the purchaser. Notably, the respondents other than Mr. Costa signed a power of attorney to

transfer the property in the name of the applicant (before later withdrawing it). This fact, which is admitted, gives credence to a conclusion that these respondents considered payment of the purchase price into the conveyancer's trust account as a basis to provide authority to the conveyancer to effect transfer.

29. Contrary to the assertions of the respondents, the conclusions reached do not set "dangerous precedent"; rather they are conclusions reached on the basis of the facts of the particular case and the terms of the particular agreement.

Procedural

issues

30. At this juncture is appropriate to record that the respondents took the position that the applicant's proof of payment of the purchase price into the trust account of the conveyancer ought to be disregarded for being attached only to the replying affidavit. The same was said in respect of the payment of the transfer costs.
31. The fact of payment of the transfer costs is irrelevant, because the sale agreement placed no obligation on the applicant to make payment of the transfer costs prior to registration.
32. Insofar as the provision of proof of payment of the purchase price is concerned, the point raised is ill-conceived. The applicant made the allegation in the founding papers that she had made payment in accordance with terms of the sale agreement. In the face of a denial founded in an alleged absence of knowledge on the part of the respondents other than Mr. Costa, she provided the proof in reply. Although it might have been desirable for the applicant to have attached the proof to the founding affidavit, there is no such requirement in the Uniform Rules. Simply put, the allegation on which the applicant relied (payment of the purchase price) was set out in the founding papers. The appropriate response to that challenge was to provide the proof in the reply. There is no basis for the court to disregard that proof. In any event, the respondents did not, as intimated, make application for the proof of payment to be struck and nor did they seek leave to file a further affidavit to deal with that issue. the facts and circumstances prevailing in this case provide no basis for the court to decline adjudication on the facts as they are set out in the three permitted affidavits. The respondents were well aware of the allegation that payment had been made, and they were not prejudiced in any way by the fact that proof of the allegation came only later.

33. The court also records that there has been a regrettable delay in the rendering of this judgment. At the hearing of this application on 10 August 2021, the parties were informed that the respondents' heads of argument were not available to the court. Indeed, a consideration of the uploaded documents on the CaseLines system would have made that apparent to the parties. The respondents' representative, in argument, sought to make reference to submissions that were not before the court. In order to avoid delay in the hearing of the matter, the respondents were requested to make the submissions relied on available to the court. In the event that those submissions were different to the submissions that had been served on the applicant's representatives, the applicant would be entitled to respond to such additional written submissions. As it happened, the respondents never complied with the request to provide the submissions. Eventually, on 13 October 2021, the applicant's representatives were requested to upload the respondents' heads of argument for the benefit of the court. On 14 October 2021, the applicant complied with that request. This enabled finalisation of the judgment.

Conclusion

34. In all of the circumstances, the applicant is entitled to the relief sought. The applicant complied with her duties under the sale agreement. She is entitled to transfer of the property into her name. Any consequential claims that the respondents may have, whether against the estate of Mr. Costa or against the applicant in respect of occupation rental, are not the subject-matter of this application.
35. Accordingly, I make the following order:
- 35.1. the sheriff of this court is authorised to and shall sign the required power of attorney and all other such documents as may be required to pass transfer of Erf [...] Northmead Extension 4, Township Registration Division IR, Gauteng (also described as [...] A[...] Street, Northmead Extension 4, Benoni) (the Property) to the applicant on behalf of the respondents;
- 35.2. Tuckers Incorporated is authorised to attend to the transfer of the Property into the applicant's name;
- 35.3. the first, second, third and fifth respondents are jointly and severally liable for the applicant's costs in this application.

MJ ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 October 2021.

Date of hearing: 10 August 2021

Date of judgment: 18 October 2021

Appearances

For the applicant: Adv D Whittington

Instructed by:

Tuckers Attorneys

For the respondents: Mr K Engelbrecht

Instructed by:

Louis Weinstein & Associates

[1]

[2012] 2 All SA 262 (SCA).

[2] 2014 (2) SA 494 (SCA).

[3] 2014

(1) SA 212 (SCA).

[4] At paras 13 – 14.

[5] 1985

(3) SA 429 (AD) at 439D and 440A-C.

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