

SOUTH AFRICA / JUDGMENT

Gerber N.O and Others v Maluleka and Others (2023/078290) [2024] ZAGPJHC 1063 (21 October 2024) [2024] ZAGPJHC 1063

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Mahon

CASE / FILE NUMBER

2023/078290

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Policy

FLYNOTES:

EVICTION – Sale agreement –
Deposit misappropriated –
Payment of deposit by purchasers
to conveyancer appropriated – Not due to any fault by seller
or purchasers –
Suspensive condition not timeously fulfilled
– Misappropriation of deposit by conveyancer resulted in
breach of purchasers’
obligations under agreement –
Entitled seller to cancel agreement – Payment to conveyancer
was not equivalent
to payment to seller – Did not discharge
obligation to pay purchase price to seller – Eviction
granted.
REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE NO: 2023/078290

(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED. NO
SIGNATURE
DATE
21 October 2024

In the matter between:

NICOLAAS
MATHEUS GERBER N.O
First Applicant
MARIETTE
PRITCHARD N.O
Second Applicant
NICOLAAS
MATHEUS GERBER N.O
Third Applicant
CHARISSA
VAN STRATEN N.O
Fourth Applicant
JACQUES
PIETER THERON N.O
Fifth Applicant
DIRK
JACOBS WINTERBACH N.O
Sixth Applicant
and
MAHUNISI
ISAAC MALULEKA
First Respondent
ZELDA
MALULEKA
Second Respondent
ANY
OTHER UNLAWFUL OCCUPANTS
OF
PORTION 17 OF ERF 1[...], 9[...] L[...] ROAD, MEYERSDAL
Third
Respondent
CITY
OF EKURHULENI
METROPOLITAN
MUNICIPALITY
Fourth
Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 23 October 2024.

MAHON AJ:

- [1] This is an application for the eviction of the first and second respondents. It is common cause between the parties that all the procedural requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 have been complied with.
- [2] The first to sixth applicants are the appointed trustees of the Gerber Family Trust, IT3021/1993 (the "Seller").
- [3] The Seller and the first and second respondents ("the Purchasers") concluded a written sale agreement for the sale of an immovable property in Meyersdal ("the Property").
- [4] In terms of the sale agreement (and a subsequent addendum thereto):
 - [4.1] the first and second respondents purchased the Property for an amount of R3,500.000.00;
 - [4.2] the purchase price would be payable by way of an initial deposit of R2 million to be paid to the conveyancer;
 - [4.3] the balance of the purchase price would be paid to the Seller upon registration of the Property into the name of the Purchasers and would be secured by means of a bankers or approved guarantee.
- [5] In addition, the sale agreement was conditional upon the loan being granted within ten working days of signature of the agreement. The ten working-day period expired on 4 June 2021.
- [6] Occupation of the Property was provided on 15 December 2021.
- [7] After payment of the deposit by the Purchasers to the conveyancer, it became known to the parties that the conveyancer did not hold a fidelity fund certificate and was the subject of an application to be suspended as a legal practitioner. The deposit which had been paid by the Purchasers to the conveyancer had seemingly been appropriated by him and was therefore no longer available to serve as security for part-payment of the purchase price. This, of course, was not due to any fault on the part of either the Seller or the Purchasers.
- [8] On 30 August 2022 the High Court Pretoria granted an order in favour of the Legal Practice Council suspending the conveyancer from practising as a legal practitioner.

- [9] The order also provided for the appointment of a curator bonis to administer and control the conveyancer's trust accounts, to take possession of his accounting records, to recover funds paid unlawfully from the trust account, to ascertain from his accounting records the names of all persons on whose account he held or received trust monies (which is defined in the order as the "trust creditors") and to call upon such trust creditors to prove their claims as well as the amount of their claims and importantly, to pay such claims in full subject to the approval of the Board of Control of the Fund.
- [10] As a consequence of this state of affairs, Purchasers laid a criminal complaint and lodged a claim with the Fidelity Fund for payment arising out of the misappropriation of their R2 million deposit.
- [11] These developments inevitably disrupted the sale process, and the parties involved allowed considerable time for this matter to be resolved, with the expectation that the Fidelity Fund would pay the deposit amount, thereby enabling the fulfilment of the sale agreement. However, mindful of the fact that the sale agreement provided for payment of a deposit to secure the balance of the purchase price, the Seller adopted the view that,
- because the deposit did not remain available to secure part-payment of the purchase price, the obligation to secure the purchase price by way of the deposit had not been fulfilled.
- [12] The Seller nonetheless afforded the Purchasers a substantial period of seven months to secure the deposit required for the transfer to proceed. However, after the lapse of this significant period, the Seller was understandably not willing to wait any longer and cancelled the sale agreement on 8 May 2023.
- [13] The Seller accordingly contends that the Purchasers are in unlawful occupation of the Property. It relies on two alternative bases to conclude that the Sale Agreement is no longer extant:

[13.1] Firstly, it contends that the suspensive condition requiring the grant of bond finance was not met within the stipulated ten working day period; and

[13.2] Secondly, it contends that if the agreement became extant, it validly cancelled the agreement as a result of the Purchasers' failure to comply with their obligation to secure a portion of the purchase price by way of deposit.

THE SUSPENSIVE CONDITION

- [14] Clause 2.1 of the agreement stipulates that the offer is contingent upon the bond amount of R1.5 million being granted within ten working days of the signing of the agreement. The agreement was concluded on 21 May 2021, with the ten-day period for the Purchasers to provide confirmation of the bond having been granted expiring on 4 June 2021.

- [15] In the answering affidavit, no confirmation has been provided indicating that the bond amount of R1.5 million was granted, nor that it was granted on or before 4 June 2021. Indeed, the Purchasers failed to present a single fact demonstrating that the suspensive condition was fulfilled. This issue was specifically raised in the founding affidavit and remained unaddressed by the Purchasers in their answering affidavit.
- [16] During the course of argument, I enquired from the Purchasers' counsel, where in the affidavits I would be able to locate the assertion that the suspensive condition had been fulfilled and any evidence in support of such an assertion. In response, I was directed to the allegation in the answering affidavit stating that the Purchasers had complied with their obligations in terms of the agreement. This allegation, however, did not address the question of whether the suspensive condition had been fulfilled and I therefore invited the Purchasers' counsel to use the opportunity presented by the overnight adjournment which had arisen due the lateness of the day, to locate the necessary averments and evidence relevant to my enquiry.
- [17] After the adjournment of the matter, however, a series of documents were uploaded by the Purchasers onto Caselines, under a heading designated "Documents requested by Judge". This heading is inaccurate because I did not request that any documents be provided. What I requested was for the Purchasers' counsel to direct me to any part of the affidavits which had thus far been filed, which demonstrated compliance with the suspensive condition in question. It was presumably because this could not be done, that the additional documents were uploaded in order address the lacuna in the Purchasers' defence. As it turned out, the Seller did not object to the introduction of these further documents as it held the view that the further documents, in fact, demonstrated that the suspensive condition had not been timeously fulfilled.
- [18] Upon consideration of the documents, I agree with the Seller. The primary document which was sought to be introduced was an agreement of loan concluded between the Purchasers and Nedbank. The Purchasers' counsel confirmed that this was the document upon which the Purchasers relied for purposes of asserting that the suspensive condition had been fulfilled. However, this document did not assist the Purchasers because it was concluded more than 10 days after the conclusion of the sale agreement and, therefore, did not result in the condition being timeously fulfilled.
- [19] Presumably in an effort overcome this difficulty, the Purchaser then sought to argue that the non-fulfilment of the suspensive condition had been condoned by the Seller. However, this argument was not raised on the papers before me and would have to have been raised in order for the Seller to be given an opportunity to deal therewith.

[20] In the result, there is no evidence before me which inclines me toward the conclusion that the suspensive condition had been timeously fulfilled. The Purchasers were given every opportunity to deal with the point but neglected to do so pertinently. Contrary to what was pressed by the Purchasers' counsel, the evidence provided to me demonstrates that the suspensive condition was not fulfilled.

[21] But even if I am incorrect in this assessment and one assumes in the Purchasers' favour that the suspensive condition was timeously fulfilled, the unfortunate turn of events which resulted in the R2 million deposit becoming unavailable to secure part payment of the purchase price, resulted in a breach of the Purchasers' obligations under the agreement which entitled the Seller to cancel the agreement, as it subsequently did on 8 May 2023.

[22] I now turn to this aspect.

THE DEPOSIT

[23] The question of whether a conveyancing attorney, entrusted with holding part or all of the purchase price until the registration of transfer, acts as the agent of the seller, the purchaser, or both parties, or as a trustee for both to await the event, is a complex one. This issue is highlighted by the Supreme Court of Appeal in *Royal Anthem Investments 129 (Pty) Ltd v Lau and Another* [2014] ZASCA 19 at para 17, and was pertinently considered in *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* 2014 (1) SA 212 (SCA).

[24] It is also complicated by divergent outcomes in the relevant case law, based on similar facts. In this regard, compare *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* 2014 (1) SA 212 (SCA) with *Agu v Krige* 2019 JDR 0716 (WCC).

[25] However, what emerges from the case law is that each matter must be evaluated on its specific facts and the particular contractual terms under which the conveyancer received the payment. If the conveyancer was appointed as an agent to receive the payment, then payment to the conveyancer is considered as payment to the Seller (see *Baker v Probert* 1985 (3) SA 429 (AD) at 438 G-H). Likewise, an obligation to make payment is fulfilled if the payment is made to a person legally recognised as competent to receive it (see *Harrismith Board of Executors v Odendaal* 1923 AD 530).

[26] Whether the conveyancer was appointed as an agent depends on the terms of the Deed of Sale, which must be interpreted in context, taking into account the purpose of its provisions as well as the background, preparation, and drafting of the document (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at 604C).

[27] On the facts of the present matter, I find myself adopting the approach of the majority in *Minister of Agriculture and Land Affairs and Another v De Klerk and Others*.

- [28] The Purchasers' obligation is to pay the full purchase price to the Seller. The other relevant clauses must be interpreted with this primary obligation in mind.
- [29] Clause 1.1 sets out the Purchasers' instruction to the conveyancer regarding the deposit paid into the conveyancer's trust account. The conveyancer is required to invest the deposit in an interest-bearing account in accordance with section 78(2A) of the Attorneys Act 53 of 1979, for the benefit of the Purchasers. Quite clearly, the amount is to be paid to the Seller upon registration of transfer.
- [30] The balance of the purchase price is to be paid to the Seller once the Seller performs its reciprocal obligation of transferring the Property to the Purchasers. The Seller is not entitled to any portion of the purchase price before the transfer is registered.
- [31] In my view, the provisions of the deed of sale do not establish either an express or tacit authorisation for the conveyancer to receive the purchase price, or any part of it, on the Seller's behalf. The amount was to be paid as security. Not as an advance payment of part of the purchase price. In order for the payment to serve as security, which clearly was its purpose, it would have to remain in the conveyancer's account until registration of transfer. If this were not the case, the Seller would have been entitled to demand that the amount be paid over to it. It clearly was not, as this would have been contrary to the very notion of having secured that amount, as opposed to paying it to the Seller.
- [32] I am fortified in this view by two further factors:-
- [32.1] Firstly, although not determinative, the sale agreement provides that the deposit be held in an interest bearing account for the benefit of the Purchasers. This, in my view, is an arrangement which is contrary
- to the notion that payment of such deposit constitutes payment to the Seller;
- [32.2] Secondly, it was the Purchasers who lodged a claim for payment with the Fidelity Fund. In terms of section 55 of the Legal Practice Act 28 of 2014, such a claim lies with "... persons who suffer pecuniary loss... as a result of theft of any money or other property given in trust to a trust account practice in the course of the practice of the attorney or an advocate referred to in section 34 (2) (b) as such...". It is inconceivable that the Purchasers could have contended to have suffered a loss as a result of the misappropriation by the conveyancer, unless it was their funds which were misappropriated. The funds could not have been their funds, if the payment by them to the conveyancer had constituted payment to the Seller.
- [33] Consequently, payment to the conveyancer was not equivalent to payment to the Seller and did not discharge the Purchasers' obligation to pay the purchase price to the Seller.

- [34] In my view, the sale agreement clearly contemplates, not only that the deposit ought to have been paid to the conveyancer, but that it also remained with the conveyancer to serve as security for part payment of the purchase price, pending registration of transfer. Therefore, once the payment of the purchase price was no longer secured, the Purchasers were in breach of the agreement and the Seller was entitled to cancel, which it duly did.
- [35] Therefore, even if the suspensive condition was fulfilled, the agreement nonetheless came to an end upon written notice of cancellation by the Seller. On any basis, therefore, the Purchasers are in unlawful occupation of the Property and the Seller is entitled to the vindicatory relief sought, in the form of an eviction order.
- [36] However, the period of seven days within which to vacate the Property, as proposed by the Seller in its notice of motion, is insufficient. In my view, a period of one month would be appropriate.
- [37] As for costs, I am of the view that they must follow the result. Although a punitive order of costs was sought in the Seller's notice of motion, such an order is not warranted. During the course of argument, both parties indicated that scale C would be appropriate. However, I am of the view that the matter is not sufficiently complex as to warrant scale C. In my view, scale B is appropriate.
- [38] In the circumstances, the following order is made:
1. The first and second respondents and all persons claiming any right or interest of occupation through the first and second respondents are to vacate the property known as Portion 17 of Erf 1[...], 9[...] L[...] Road, Meyersdal ("the premises"), within one month after service of this order upon the first and second respondents.
 2. Should the persons referred to in paragraph 1 above fail to vacate the premises within one month after service of this order, the Sheriff is hereby authorised and directed to evict such persons from the premises.
 3. The first and second respondent are directed to pay the applicants' costs of the application, jointly and severally, the one paying, the other to be absolved, in accordance with scale B.

D MAHON

Acting Judge of the High Court

Johannesburg

Date of hearing: 21 August 2024, 22 August 2024

Date of judgment: 23 October 2024

APPEARANCES:

For the Applicant: Adv C Gibson Instructed by: Senekal Simmonds Inc For the Respondent: Adv K Letswalo Instructed by: Maluleke Msimang & Associates

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