

SOUTH AFRICA / JUDGMENT

Kok v Hill N.O and Others (2024/031287) [2025] ZAGPJHC 492 (20 May 2025)

[2025] ZAGPJHC 492**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Engelbrecht

CASE / FILE NUMBER

2024/031287

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 2024/031287****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED. No****20****May 2025****In**

the matter between:

PERCY
KOK
APPLICANT
and
TRACY
HILL N.O
FIRST RESPONDENT
(
in her capacity as duly appointed
provisional
trustees in the insolvent
estate
of Gcina Thmbelihle Manyaka)
RONALD
PETERSON N.O
SECOND RESPONDENT
(in
his capacity as duly appointed
estate
of Gcina Thmbelihle
Manyaka)
MASTER
OF THE HIGH COURT, PRETORIA
THIRD
RESPONDENT
EMFULENI
MUNICIPALITY
FOURTH RESPONDENT
THE
REGISTRAR OF DEEDS, PRETORIA
FIFTH RESPONDENT
MAKHOSONKE
SANGWENI
SIXTH RESPONDENT
This order is made an
Order of Court by the Judge whose name is reflected herein, duly
stamped by the Registrar of the Court and
is submitted electronically
to the Parties/their legal representatives by email. The Order
is further uploaded to the electronic
file of this matter on
Caselines by the Judge his/her secretary. The date of this
Order is deemed to be 20 May 2025..

JUDGMENT

ENGELBRECHT, AJ

Introduction

- [1] This is an application for the review and setting aside of an agreement of sale dated 22 March 2022 and the following further relief:
2. It is declared that the agreement of sale dated 28 March 2022 is valid
 3. The First and Second Respondents are ordered and directed to comply with the offer to purchase concluded with the applicant on 28 March 2022.
 4. The conveyancers appointed by the Applicant (hereinafter referred to as the conveyancers) are authorised and directed to take all steps necessary in order to procure the registration of transfer of ownership in the name of the Applicant at 2[...] C[...] Avenue, B[...] P[...] (“the property”).
 5. The First and Second Respondents shall, within 7 days after a demand is made therefore by the conveyancers.
 - 5.1 Provide the conveyancers with all the required information and documents for purposes of procuring the registration of transfer of ownership of the property into the name of the Applicant, which information and documentation includes but is not limited to:
 - 5.1.1 All information necessary to obtain the issue of a clearance certificate by the Third Respondent;
 - 5.1.2 The issue of a transfer duty receipt for a transfer duty exemption certificate, as the case may be, by the South African Revenue Services.
 - . 5.2 Sign or procure the signature of all documents, including but not limited to powers of attorneys, authorities to act, affidavit and declarations for the purposes of the transfer, including such documents as may be necessary in terms of the FICA.
 - 5.3 Generally do all things necessary to be done by the First and Second Respondents in order to give effect to the transfer of ownership of the Second Respondent’s property and to provide the transfer information and the transfer documents.
 6. In the event that the First and Second Respondents refuse and/or fail to give effect to the order in paragraph 5 above within a period of 7(seven) days of written demand given to the First and Second Respondents by the conveyancers, then in such event:
 - 6.1 The Sheriff of this Court or his lawfully appointed Deputy shall be authorised and is directed to sign all transfer documents on behalf of and in the place of the First and Second Respondents.

6.2 The Fourth Respondent is directed and authorised to provide the conveyancers on written demand made therefor with all information and documents with regard to the Second Respondent as may be necessary for purposes of the issue by the Fourth Respondent of a clearance certificate for purposes of the transfer.

7. Costs of the application be paid by any of the Respondents in the event of any opposition”.

[2] The First and Second Respondents opposed the matter and requested that the matter be dismissed with costs on an attorney-client scale, alternatively, Party and Party on Scale B. The First and Second Respondents also brought a point in limine as they allege that there are genuine facts in dispute and that the motion court proceedings are not designed to resolve genuine and bona fide disputes of fact. Therefore, this application should be dismissed on this basis alone.

[3] The issues to be determined are as outlined in the Joint Practice note:

[3.1] Whether there is a valid agreement of sale between the parties.

[3.2] Whether there are genuine and bona fide disputes of fact that are incapable of resolution on the affidavits and if so whether the applicant foresaw their occurrence.

[3.3] Whether the First and Second Respondents were within their rights, as trustees of the insolvent estate of Ms. Manyaka, to repudiate the aforementioned sales agreement.

[3.4] Whether the Applicant is entitled to claim transfer of the immovable property notwithstanding the supervening insolvency of Ms. Manyaka.

[3.5] Whether the Applicant can be considered a vulnerable purchaser.

[3.6] Whether the decision to repudiate stands to be reviewed and set aside.

FACTUAL MATRIX

[4] On 29 December 2017 the Applicant sold the property to Ms. Manyaka for an amount of R 600 000,00.

[4.1] On 28 March 2022 the Applicant purchased the property back from Ms. Manyaka for an amount of R 500 000,00 situated at 2[...] C[...] Avenue, B[...] P[...]k, Vereeniging. There was also an alleged arrangement between the Applicant and Ms. Manyaka that he will pay the rates and taxes and pay the remainder to Ms Manyaka. The exact agreement verbal is unclear regarding what was to be paid, when, and to whom.

[4.2] On 31 May 2022, the Applicant sold the property to the Sixth Respondent for an amount of R 1 550 000,00, who has effected renovations to the property. The property is presently being used as a student residence.

[4.3] Ms. Manyaka was provisionally sequestered on 22 August 2022 and finally sequestered on 16 November 2022. Applicant alleged that he was unaware of the sequestration.

[4.4] On 24 August 2023 the First and Second Respondents elected to repudiate the sales agreement entered into between the Applicant and Ms Manyaka on 28 March 2022.

[4.5] On 20 November 2023 an application (“the previous application”) was made to this court for an order to review and set aside the repudiation of the sales agreement and an order compelling the First and Second Respondents to take all steps necessary to ensure that the property is transferred to the Applicant.

[4.5.1] The Resolution Trust opposed the previous application, as the First and Second Respondents were not joined in this application and an answering affidavit was filed and deposed to by the First Respondent. The application was then withdrawn by the Applicant and reinstated on 22 March 2024, requesting the identical relief.

APPLICANT’S CASE

[6] During the argument, Advocate Mncwabe argued on behalf of the Applicant, that this application is a declarator. Applicant alleges that the sales agreement is valid as all the requirements of such a contract have been met. The Applicant further contended that part payment was tendered towards the sale and seeks to pay the remainder so that the property can be transferred.

[6.1] It is alleged that the Applicant is a bona fide purchaser and was at all times unaware of the provisions and final sequestration of the seller, Ms. Manyaka.

[6.2] Even though the full purchase price has not been paid to date, the Applicant alleges that it is still willing to pay the same once this sales agreement has been declared valid.

[6.3] Then the Applicant alleges that he is a “vulnerable purchaser” as he is likely to be sued by the Sixth Respondent and therefore needs protection by this court, which needs to investigate and assess whether he is a “vulnerable purchaser” and needs such protection.

[6.4] The Applicant alleges that the harm or prejudice he would suffer far exceeds the harm the Respondents will suffer as a result of the threat of being sued by the Sixth Respondent.

[6.5] During the argument, on behalf of the Applicant, it was conceded by Advocate Mncwabe that the trustees might have the powers to repudiate, but the question is whether those powers were exercised correctly.

FIRST AND SECOND RESPONDENTS’ CASE

[7] The First and Second Respondents did file a Notice for security for costs dated 22 May 2024, where the Applicant provided no security for such costs. Advocate De Oliveira disputes the allegation that this application is just for a declarator, as he argued that it is first a review of a decision by the First and Second Respondent, and only when that is granted, then the application for a declarator is to be considered.

[7.1] In this notice for security of costs, reference is made to the previous application, which was withdrawn although no payment was made for the legal costs of such previous application and that there is a dispute of fact to which the Applicant was alerted in the Answering Affidavit filed in the previous case.

[7.2] On behalf of the First and Second Respondents, it is argued that when the estate of the seller of immovable property is sequestrated, an existing contract falls to be determined in terms of the common law or in terms of section 22 of the Alienation of Land Act.68 of 1981. In terms of the common law, an immovable property sold by the insolvent but not transferred passes to the trustee, who cannot be compelled to perform under the sales agreement. In terms of section 20(1) of the Insolvency Act, 24 of 1936 the property of the insolvent vests in the trustee. The Trustee may elect to enforce or repudiate the sales agreement.

[7.3] This application is first and foremost a reviewing application and therefore the Applicant needs to plea some irregularity, procedural or otherwise, in the manner in which the First and Second Respondent have reached their decision. The First and Second Respondents allege that the Applicant did not set out any such grounds to allow this court to impugn the decision.

[7.4] Concerning the allegation that the Applicant is a “vulnerable purchaser”, the First and Second Respondents deny that he is, as the subject property is not his residential home, the purchase price was not paid in a year, and the agreement is not an instalment agreement.

[7.5] One major issue derived from the Applicant’s Founding Affidavit is that it is unclear how much was paid, to whom or for what it was paid or when it was paid.

[7.6] The Applicant was not authorised to sell the property to the Sixth Respondent prior to transfer or even payment of the full purchase price.

ANALYSIS

[8] In terms of the Notice of Motion, this application is, firstly, a review application and only when the repudiation of the sales agreement is granted can this court consider the further relief on the declaratory relief.

[8.1] Review applications are not concerned with the merits of the decision maker’s decision but with whether or not the decision was arrived at correctly and appropriately. In *Rustenburg Platinum Mines Ltd v Commission for conciliation, mediation and Arbitration*[1] it was held that:

“The focus of review applications is on the process and how the decision-maker came to a decision. The enquiry is not directed at whether the decision was right or wrong, but rather about issues such as (a) the impartiality of the decision-maker and (b) the admissibility of evidence that he or she takes into account”.

[8.1.1] In par 31 of the above-mentioned matter, it is further stated that

“In a review, the question is not whether the decision is capable of being justified...but whether the decision maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion”.

[8.2] When the estate of a seller is sequestrated, the existing contract falls to be dealt with in terms of the common law or in terms of section 22 of the Alienation of Land Act 68 of 1981. Under the common law, an immovable property sold by the insolvent but not transferred as yet passes to the trustee in terms of section 20 of the Insolvency Act, 24 of 1936. The Trustee can then not be compelled to perform under the contract, as it has the discretion to enforce the contract or repudiate the contract.

[8.3] In the *Sarahwitz v Maritz NO* matter Case No (81/2012) [2013] it was held that

“In terms of the common law, on sequestration, an immovable property sold by the insolvent but not yet transferred to the purchaser vests in the trustee. Accordingly, a purchaser who pays a portion of the purchase price, or even the whole of the purchase price, without receiving transfer of the property before the seller’s insolvency has no real right in the property and only a concurrent claim against the insolvent estate. (Mars Law if Insolvency, 9th Edition at 227. I

[8.4] In *Bryant & Flanagan (Pty) Ltd v Muller & Another* NNO 1977(1) SA 800 (N) Didcott J stated at 804F – H that:.....

“Whether or not the contract continues to operate depends on a decision of the trustee, who is allowed and indeed required to choose which shall happen. He is, of course, responsible to the creditors for his choice, but as between himself and the other party to the contract, the decision is his alone.

[8.5] In the Founding Affidavit, various payments were attached, but I agree with the First and Second Respondents that it is unclear to whom and for what purpose these payments were made. It is furthermore also unclear on whether these payments were related to the purchase price as same is not explained on the Founding Affidavit.

[8.6] Section 22 of the Alienation of Land Act, 68 of 1981, provides an exception to the common law. The Constitutional Court amended section 1 of the Alienation of Land Act in the *Sarahwitz v Maritz NO* and *Another* 2015(4) SA 491 (C C) matter when the definition of a vulnerable purchaser was included

“Vulnerable purchaser” means a purchaser who runs the risk of being rendered homeless by a seller’s insolvency. (my emphasis)

[8.7] The relevant portion of section 22 of the Alienation of Land Act, 68 of 1981 reads as follows:

“When the owner of land alienated under a contract becomes insolvent or a judgment creditor of the owner attached such land by virtue of a writ of execution, that land shall subject to the provision of the Deed Registries Act, be transferred to any person who purchased that land in terms of a contract or who is an intermediary in relation to that contract and who in accordance with the provisions of subsection (2) makes arrangement for the payment of all costs in connection with the transfer and of an amount equal to:

- (a) All amounts owing under the deed of alienation in terms of which that owner alienated the land or

[8.8] A “contract” is defined as:

- (a) “means a deed of alienation under which land is sold against payment by the purchaser to or to any person on behalf of the seller

of an amount of money in more than two instalments over a period exceeding one year:

- (b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take”.

[8.9] It is apparent from the definition of contract that this refers to a specified form of deed of sale which makes provision for the payment of the purchase price in more than two instalments exceeding a year. The Deed of Sale attached to the Applicant’s founding affidavit , is not an instalment agreement as it stipulates that:

3.1 The purchase price is the amount of R 500,000.00 (five hundred thousand rand) (inclusive of VAT) if applicable, but excluding VAT

and transfer duty, which is being held in the trust account of Stephina Motlhamme Attorneys.

3.2 It is recorded and agreed that this purchase is a cash sale.

[8.10] The Applicant alleges that he is a “vulnerable purchaser” and therefore needs the protection so provided in terms of these sections of the act.

[8.11] In considering whether the Applicant is a “vulnerable purchaser”, it is necessary to examine the facts presented to this court regarding the Applicant as the purchaser.

[8.12] In the Founding Affidavit, the Applicant states that the Sixth Respondent has a claim for millions of rands as a result of such repudiation but no evidence was attached, that he would suffer harm and that the First and Second Respondent is out to bully him and therefore he would suffer far more prejudice than the First and Second Respondents.

[8.12.1] The First and Second Respondents answered thereto and indicated that they dispute the sales agreement entered into between the Applicant and the Sixth Respondent, that he had no authorisation to sell the property to the Sixth Respondent and that any damages so alleged are irrelevant to the question on whether or not they had the right to repudiate the agreement. These facts are in dispute according to the First and Second Respondent.

[8.12.2] The Applicant then filed a Supplementary Affidavit attaching two letters from the Sixth Respondent in which they threaten legal action against the Applicant. In the letter dated 31 August 2023, it is alleged that the Applicant referred to himself in the sales agreement as the “owner.” In this letter, reference is also just made to major expenses, and no detail is provided.

[8.13] It is common cause that the subject property is used for student accommodation and is therefore not the primary residential residence of the Applicant. In the *Sarahwitz v Maritz NO* and another

[2015] ZACC14 matter the Constitutional Court specifically mentioned the fact that “this case is about homelessness and vulnerability”.

[8.14] The Applicant states in his Founding Affidavit that he resides at 27 King Fisher, Rabie Ridge, which is not the same address as the subject property situated at 2[...] C[...] Avenue, B[...] P[...] , Vereeniging. There is no evidence placed before me on how the Applicant is to be “homeless” as a result of selling a property for which the Applicant to date has not paid the full amount, as alleged to the Sixth Respondent he is the owner and no transfer was even requested. I can therefore not find that he is a “vulnerable purchaser” on the papers before me.

[8.15] As shown in the applicable legislation, the First and Second Respondents as the trustees, acted within their discretion to repudiate the agreements and acted to the benefit of the general body of creditors. I cannot find any irregularity or bias procedurally or otherwise. If funds were paid to Ms. Mnayaka, the Applicant has a concurrent claim against the insolvent estate.

[8.16] I cannot find any reason why the repudiation of the sales agreement by the First and Second Respondents is to be reviewed and set aside. As a result thereof, I do not have to deal with the other relief so claimed by the Applicant.

COSTS

[9] What remains for me to consider is the question of costs. I cannot find any reason why the costs cannot be granted to the successful party.

[9.1] The First and Second Respondent requests costs on an attorney-client scale alternatively Party and Part Scale B as the Applicant was forewarned that he had no right to claim the transfer from the Insolvent Estate in terms of the applicable legislation and caselaw in the legal opinion dated 6 July 2023.

ORDER

[10] Therefore, the following order is made.

[10.1] Condonation is granted for the filing of the Supplementary Affidavit by the Applicant.

[10.2] The application is dismissed with costs on Party and Party Scale B including the costs of Counsel.

ENGELBRECHT T

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 20 May 2025.

Appearances:

For the Applicant: Advocate Mncwabe

For the Respondent: Advocate De Oliveira

Date of Hearing: 19 March 2025

Date of Judgment: 20 May 2025

[1] 2007(1) SA 576 (SCA) at [31]

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