



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A149/2021

In the matter between:

**MAUREEN LABUSCHAGNE
WILLEM ADRIAAN LABUSCHAGNE**

First Appellant
Second Appellant

and

ELLA VAN STRAATEN

Respondent

In re:

Case no.: 819/2019
Case no.: 4623/2019

The matter between:

ELLA VAN STRAATEN

Applicant

and

**WILLEM ADRIAAN LABUSCHAGNE
MAUREEN LABUSCHAGNE**

First Respondent
Second Respondent

CORAM: LOUBSER, J, OPPERMAN, J *et* KHOOE, AJ

JUDGMENT BY: KHOOE, AJ

HEARD ON: 30 NOVEMBER 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 25 APRIL 2023. The date and time for hand-down is deemed to be 25 APRIL 2023 at 14:00

1. This is an appeal against the following judgements of this court:

- 1.1 The whole order of Molitsoane, J dated 12 September 2019 under Case number 819/2019 (rectification and cancellation order). Leave to appeal was granted on 22 November 2021.
- 1.2 The whole order of Naidoo, J dated 20 February 2020 under case number 4623/2019 (rescission and eviction order). Leave to appeal was granted on 28 October 2020.

2. The grounds of appeal against the order of Molitsoane, J are the following:

- 2.1 The order for cancellation of the agreement is contrary to the principles and findings of the Constitutional Court in the matter of **Amardien and Others v Registrar of Deeds and Others**¹ wherein it was held, *inter alia*:
 - i) There is an obligation on a seller in a contract for sale of land on instalments to register the Contract of Sale at the Deeds Office;
 - ii) A seller is not entitled to receive consideration prior to the registration
- 2.2 As such, payment and performance in terms of the contract would only have become due and payable subsequent to the recordal of the agreement at the Deeds Office.
- 2.3 The purchasers were accordingly not in default, nor was the seller entitled to claim for cancellation in these circumstances.
- 2.4 The respondent failed to comply with the prescripts of the **National Credit Act**² in demanding payment and cancellation and informing the purchasers of their rights.

¹ 2019 (3) SA 341 (CC).

² Act 34 of 2005.

- 2.5 The forfeiture order is contrary to the Constitutional Court judgment of **Botha and Another v Rich N.O and Others**³ where the Court held *inter alia*, that the granting of cancellation and forfeiture where more than three quarters of the purchase price in the sale of land on instalments was paid would amount to a penalty breach.
- 2.6 No case for a punitive cost order was made out.
- 2.7 No case was made out for granting of the order for rectification.
3. The grounds of appeal against Naidoo, J's order are the following:
- 3.1 She erred in not finding that there exists a good cause for the default order to be rescinded considering the nature and the effect of the order and the legal position as set out in paragraph 2.1 herein *supra*.
- 3.2 She erred in not finding that the order was erroneously sought and granted.
- 3.3 She erred in not granting the appellants the opportunity to obtain proper legal assistance when leave was granted for their legal representatives to withdraw.
- 3.4 She erred in deciding the eviction application where there was non-compliance with the order of the Honourable Justice Opperman dated 10 October 2019 when the Sheriff was tasked to investigate and make inquiries regarding the adult occupants on the property.
- 3.5 She erred in making an order and determining the eviction in terms of the **Prevention of Illegal Eviction and Unlawful Occupation of Land**⁴ whereas it is clear from allegations contained in the founding affidavit that the property is a designated farm and accordingly fell within the prescripts of the **Extension of Security of Tenure Act**⁵.

³ 2014 (4) SA 124 (CC).

⁴ Act 19 of 1998.

⁵ Act 62 of 1997.

4. I will deal with Molitsoane, J's order mainly as Naidoo, J's order will only be valid should Molitsoane, J's order not be set aside.

BACKGROUND

5. This matter has a long history but it is not necessary to restate the whole history. The facts of the matter are common cause. What is before us, is only legal argument. In their notice of appeal, the appellants for the first time put their version on record which they had failed to do on numerous occasions before the courts *a quo* for various reasons, which include not having legal representation or that their legal representative had withdrawn at last minute. Their version consists in fact that the Deed of Sale was never registered by the respondent, who featured as the seller in the Deed. In terms of the judgement in Amardien *supra* they were therefore under no duty to pay the instalments.
6. Molitsoane, J said the following in his judgment in the application for leave to appeal:

"While I understand the defence raised by the applicants in showing that they have good prospects of success on appeal, it has to be borne in mind that the defence raised in this application was not raised before court, either in an answering affidavit (as same was not filed) or when the matter was heard in court. The applicants have, however, indicated that they intend to approach the Court of Appeal with an application for leave to adduce further evidence. Section 19 (c) of the Superior Courts Act 10 of 2013 provides that:

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may be specifically provided in any other law remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of such further evidence as the Supreme Court of Appeal or the Division deems necessary."

7. Before us, the appellants did not bring a formal application to tender further evidence. They did, however, raise their defence in their notice of appeal and in argument before this court. For the sake of justice and finality, this court was not

overly technical and allowed the appellants to place their version before court as pleaded in their notice of appeal.

8. Now it appears from the facts that around 2011, the parties entered into an instalment agreement of sale of land. The contract is governed by the **Alienation of Land Act (ALA)**.⁶ This act provides as follows:

“Section 20 (1) (a): “A seller, whether he is owner of the land concerned or not shall cause the contract to be recorded by the registrar concerned in the prescribed manner provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded in terms of the section.”

Section 26 (1): “No person shall by virtue of a deed of alienation relating to an erf or unit receive any consideration until-

(a) Such erf or unit is registrable; and

(b) In case the deed of alienation is a contract required to be recorded in terms of S20, such recording has been effected.”

9. It is not in dispute on appeal that the agreement between the parties constitutes the sale of land on instalment, it is also not in dispute that the respondent did not register the contract as prescribed by the ALA. The provisions of the ALA and the judgement in Amardien are binding on this court. However, these facts were not placed on record in the courts *a quo*, and are now raised for the first time on appeal, without any application to lead further evidence on appeal as far as these issues are concerned. This court has to decide the matter within the four corners of the records in the courts *a quo*. As a consequence, this court cannot take any notice of the fact that the Deed of Sale in question was never registered in the determination of the appeal.
10. At the hearing of this matter, it was pointed out that regardless of what this court decides, there was going to be some form of injustice. The respondent in this case is an elderly lady who finds herself bleeding money to pay a bond on a property she has already sold to buyers who are enjoying the property without servicing the bond.

⁶ Act 68 of 1981.

On the other hand, we have buyers who also do not have financial means having to come to court to fight for the home which more than ten (10) years later has still not been registered in their names.

11. Having regard to the record in the courts *a quo* as they stand, we cannot find fault with the orders of the two judges concerned. It follows that the appeal cannot succeed. There is no reason why costs should not follow the result.

12. In the circumstances, I make the following order:

1. The appeal is dismissed with costs.


N. J. Khooe, AJ

I concur.


P. J. Loubser, J

I concur:


M. Opperman, J

On behalf of appellant:

Adv. L. A. Roux

Instructed by:

Van Eeden Attorneys

BLOEMFONTEIN

On behalf of respondent:

Adv. K. N. Peterson

Instructed by:

Horn & Van Rensburg Attorneys

BLOEMFONTEIN