

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

Case No: 3010/2015

DELETE WHICHEVER IS NOT APPLICABLE

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

21 August 2024

In the application between:

NDLOVU SPUTNIK RICHARD

First Applicant

NDLOVU JULIA TOLLAS

Second Applicant

and

NWAEZE NOBLE IKECHUKWU

First Respondent

ABSA BANK LIMITED

Second Respondent

PETER KARL MAERLENDER

Third Respondent

**SHERIFF FOR THE DISTRICT OF
JOHANNESBURG EAST**

Fourth Respondent

REGISTRAR OF DEEDS PRETORIA

Fifth Respondent

JUDGMENT

NHARMURAVATE AJ

Introduction

[1] This is an application where in the Applicants seeks a relief in the following terms as per the notice of motion filed that :

- “1.Declare the sale in execution on ERF null and void.VIEW (the "Property*") carried out on the 30 January 2014 to be null and void and no force or effect;*
- 2. Declaring that the sheriff was not authorised to transfer the Property to the first respondent as a result of the sale in execution being a nullity;*
- 3.Declaring that the applicants are entitled to have the Property transferred into their name against payment of the outstanding amount in terms of the instalment sale agreement between the applicants and the third respondent.*
- 4.Declaring that the applicants have a right to occupy the Property pending payment of the amounts referred to in Order 3 above;*
- 5.Granted further and/or alternative relief;*
- 6.Directing that the costs of this application are to be paid by any party opposing the application.”*

[2] The Applicants main basis of argument is that ABSA (who is the Second Respondent) did not comply with the Alienation of Land Act 68 of 1981 as amended and the contract between the Applicant and the Third Respondent still subsist therefore the execution over the property is null and void.

[3] The matter is only opposed by the Second Respondent ABSA Bank Limited on the basis the contract of sale was cancelled by the Third Respondent and the Alienation of land Act under the circumstances is not applicable alternatively ABSA complied with same.

BACKGROUND FACTS

[4] On the 5 of April 2002 the Applicants concluded an instalment sale agreement in respect of the sale of property with the Third Respondent for the property known as Erf 7[...] B[...] view extension [...] with a full purchase price of R 150 000,00 which would be paid in instalments of R 2 083.

[5] The Applicants allege that Clause 5 of the contract recorded that the property was mortgaged in favor of Absa, as is required in terms of section 6(1)(d) of the Alienation of Land Act. The terms of the contract were not explained to them. They were under the impression that the property was previously bonded in favor of Absa, and that mortgage had been released. The instalment sale agreement was duly recorded by the Registrar of Deeds in terms of section 20 of the Alienation of Land Act, and the conveyancers Engelbrecht & Engelbrecht duly ensured that Absa was notified of the agreement.

[6] At the end of April 2004 as alleged, the Applicants had made 24 payments in line with contract. They had at least paid R 50 170 in satisfaction of the instalment sale agreement. In 2005 January the Applicants applied for a bond to cover the full purchase price of the property which was approved on 28 February 2005. There after they arranged with the Third Respondent to have the property transferred into their name. The Third Respondent promised to pass on the documents to his conveyancers, but the conveyancers failed to act on the bond and it lapsed.

[7] They applied for another bond in May 2007 from Standard Bank, which was approved on 5 June 2007 this was also unsuccessful, due to the inaction of the Third Respondent and his Attorneys, the bond lapsed. Subsequent to that they had a number of disputes with the Third Respondent. They tried to invoke clause 18 in the instalment sale agreement and refer the matter to arbitration which was not successful.

[8] The Third Respondent then launched proceedings in court to cancel the instalment sale agreement and evict the Applicant. This application was not

successful since then, the whereabouts of the Third Respondent are not known. All attempts have been made to trace the Third Respondent to no avail last attempt being in 2012.

[9] Thereafter on the 12 August 2010 ABSA left a notice at the property addressed to the Third Respondent, warning him that his bond account was in arrears and that legal action would be taken against him if no payment was made. This letter was then taken to the Applicants attorney at the time. They attempted to negotiate with Absa for the purchase of the property with no success. Their Attorney failed to keep them abreast with the developments with Absa. They were not informed of the Absa's Attorneys letter dated the 17 February 2011. As a result, they could not file an application to intervene. They were also not given any advice in respect of our rights.

[10] On the 18 April 2011, ABSA's attorneys sent an email to the Applicants attorneys indicating that the Third respondent's account was in arrears to sum of R 83 685.76, and that it intended to proceed to attach the property. The Applicants offered to settle this amount with ABSA to no avail. As a result of their Attorneys' failure to communicate with them they then sought new attorneys between the end of 2011 and the beginning of 2012. At that stage they could not afford a private attorney they attempted to secure legal representation through Pro Bono.org.

[11] A notice of sale in execution was served on the property on 4 April 2012 scheduling the sale for 12 April 2012 they had cite of it. The Applicants were subsequently aware of all the execution notices as they were served on their property. Additional attempts were made to settle with ABSA to no avail. The property was then sold and transferred to the First Respondent. They made attempts to buy it from the First Respondent, he offered to sell to them at R250 000 plus the cost he incurred from the auction. They could not afford that amount in cash but only in instalments. This attempt also proved unsuccessful.

[12] The First Respondent then proceeded to issue eviction proceedings against the Applicants on the 19th of May 2014 in the Johannesburg Magistrate's Court. Those proceedings are still pending.

[13] The Applicants takes issue with the Second Respondent for not complying with several provisions within the Alienation of Land Act that is section 20, section 9, and section 7 of the Act, that is before execution over the property. Further, the argue that the contract between the Applicants and the Third Respondent was not cancelled in line with the Makgoka J, 2009 judgement.

[14] The Respondent is opposing the matter based on the fact that the Third Respondent validly cancelled the sale agreement therefore the Act as alleged is not applicable.

The Makgoka Judgement

[15] This is a judgment which was handed down on the 11th of November 2009. The Third Respondent was the Applicant in this matter and the Applicants were the Respondents. In this application the Third Respondent sort to declare the installment of sale agreement entered into between the parties on the 6th of April 2002 to have been lawfully cancelled on the 21 of June 2008. Additionally, He sought to evict the Applicants from the property and authorization to direct the this the Registrar of deeds to cancel the registration of the instalment sale agreement entered into between him and the Applicants in this matter.

[16] The findings made in this matter were as follows:

1. The matter was postponed *sine die*.
2. The Third Respondent was granted leave to re-attest his founding affidavit.
3. The Applicants were ordered to make an arrangement to settle the amount outstanding on the purchase price and interest. The amount due to the City of Johannesburg in respect of the monthly rates, lights and water.
4. The arrangements and payments were supposed to be affected on or before the 31st of March 2010.
5. The Third Respondent was granted leave to set the matter down on an earlier date should the Applicants fail to make the necessary arrangements for payments referred to in or the 3(a) and 3(b) of the order.
6. The issue of costs was reserved.

[17] In my view, the agreement was not declared cancelled by the court because the application was defective. The application had been attested to by a Professional Assistant of the same firm which was representing the Third Respondent at the time. Hence the defect seen by the court as later there was a subsequent appeal which was later withdrawn. However, the Judge was prepared to hear the matter and later granted the Third Respondent leave to re-attest to the founding affidavit.

[18] However, it is important to note that in this judgment in paragraph 12 the exchange held as follows that: *"I am satisfied that the respondents have breached the agreement as contended by the applicant and the applicant would under normal circumstances be entitled to the relief sought. However I have taken into account that this is a matter that concerns a basic right entrenched in the constitution....."*

[19] In line with the judgment the Applicants were granted an indulgence to try and remedy the breach which they had committed. The court further directed that the Applicants had to make a payment plan to settle the outstanding amounts of the purchase price and that they should demonstrate that a payment plan with the 4th respondent was in place and had been adhered to for the settlement of the arrears in respect of the utility charges on the property. Makgoka J directed that a period of four months was sufficient for the Applicants to make such arrangements.

[20] It is of importance to highlight and as rightfully argued by the Second Respondent Counsel that in line with the contract of sale signed between the Applicant and the Third Respondent there was no need for the Third Respondent to endorse his cancellation by way of a court application.

[21] Clause 19 highlights that :*"should the purchaser fail to comply with any obligation in terms of the agreement the seller will be entitled and without prejudice to any other rights available to the seller in law to terminate this contract and withdraw there from in which event the purchaser shall forfeit the right to claim restitution of anything performed by the purchaser in terms of this contract and notwithstanding such withdrawal the seller shall be entitled to claim payment of all areas instalments and performance of all and any other area obligations that the*

purchaser has failed to perform by the date of such withdrawal this remedy to be by way of penalty as a liquidated damage or as payment on the subject of prejudices agreed upon as being suffered by the seller as a result of the purchasers failure to comply with this contract”

[22] The existence of the contract signed by the Applicants and the Third Party was in relation to the property known as Erf 7[...] B[...] view ext. [...] with this agreement each party had to perform its obligations in line with the terms and conditions outlined in this agreement. One of the most important terms being that the Applicants will pay the deposit of 10,000, 24 installments at 2083 and by the Applicants own admission they have only paid R50 170.00 (which is contrary to the amount reflected on the Makgoka J judgement.). This was to be paid towards the purchase price of R150 000.00.

[23] When the Third Respondents brought the cancellation application the court acknowledged that the Applicants were in breach. The court did not confirm the orders sought simply to grant the Applicants an indulgence to make a payment arrangement which the applicants have not demonstrated and satisfied even during the hearing of this application in April 2024. When contracts are written down it is to bring certainty on what the obligations of each party are. The conduct of the Applicants in failing to adhere to the court's directives including going to court to seek a further indulgence if they could not make such payment arrangements in my view amounts to a repudiation of the contract.

[24] The Third Respondent through its Attorneys in a letter dated 27th Sept 2010 granted the Applicants 5 months to pay the amounts due on their own version and they further gave them 5 days to state what they thought they owe and an additional 10 days to produce a written payment plan. This they failed to do despite the fact that they had up to 27 February 2011 to satisfy their debt with the Third Applicant. Thereafter there was no response from the Applicants. Confusingly, the Applicants in their replying affidavit allege that their own Attorney failed to provide them with information requested and therefore it was impossible for them to comply, but they do not explain to this court how they got to be in possession of this correspondence.

[25] The Applicants did not take any positive steps towards satisfying the orders granted in 2009 neither did they go to court to seek a further indulgence in line with the orders made. This in my view showed a disregard for the courts directive when the Applicants knew very well that the orders were catered especially for them so as to not lose the property.

[26] The Applicant cannot thereafter claim to have any right or claim that the contract was not cancelled simply because the Third Respondent did not re-enroll the matter to persist on his orders. In my view, the cancelation of the contract through confirmation by the court is not one of the terms of the contract signed by the parties as long as the Applicants were notified of the cancelation that was enough.

[27] Most importantly, the Applicants were aware on the 12th of August 2010 that the Second Respondent left a notice at the property addressed to the Third Respondent warning him that his bond was in arrears and that legal action would be taken against him if no payment was made. They took the same notice to their Attorneys making attempts to negotiate a settlement. They alleged that it was their own Attorney who did not keep them abreast of the developments with the Second Respondent in particular they alleged that they were not informed of the correspondence dated 17 February 2011 as a result they could not file an application to intervene, and they were also not advised of their rights by their very own Attorneys.

[28] On the 18th of April 2011, the Second Respondent sent an email through their Attorneys indicating that the Third Respondent's account was in arrears and that they intended to proceed to attach the property. Once again, the Applicants are blaming their Attorneys for their failure to communicate with them. Thereafter they started looking for new attorneys towards the end of 2011 beginning of 2012. The Applicants again have not taken this court into confidence to explain how they received this email if indeed their Attorney did not communicate as such.

[29] The Applicants received all the execution notifications, and they sent same to their Attorneys. They were even aware of the sale that took place on the 30th of

January 2014 by the First Respondent without even rescinding any of these orders to put their version forward. Even upon the property being transferred to the First Respondents name on the 24th of April 2014 nothing was done up until this stage.

[30] This application just like the application which previously was before Makgoka J in 2009 is lacking in material facts specially their financial circumstances. This court draws an inference that the disregard of the orders by Makgoka J were deliberate without any *bona fide* reasons. Simply because had the reasons existed, they would have been mentioned in the papers. When the court through its order declared the property especially executable, they had still not complied with the court order which was providing them with a lifeline.

[31] Even in the founding papers, there is no mention of what they think they owe the Third Respondent and what they owe and have paid towards their services that is rates, water and electricity. Attempts were made by the Applicant to adduce this evidence from the bar which was rightfully objected to which I subsequently disallowed. Neither do the Applicants set out how they intend to pay, let alone informing the court what is owed through the municipality usage. In my view this is all deliberate and it has been going on for far too long. In my view, the Applicants put the blame on the door steps of their own Attorneys for not intervening in the execution not the Second Respondent as argued. This fault cannot be borne by the Second Respondent in this regard.

[32] In my view the court order that declared the property specially executed still stands and was rightfully issued by the court in line with the contract that was signed between the Second and Third Respondent. The contract between the Applicants and the Third Respondent did not include a provision that the cancellation of the contract had to be endorsed by the court. In fact, the Third Respondent wanted to have a smooth process by doing so. Even the court's finding in 2009 found that "*I am satisfied that the respondents have breached the agreement as contended by the applicant and the applicant under normal circumstances would be entitled to the relief sought.*"

[33] The court even went further to caution the Applicants that they should understand that their continued failure to meet their obligations would result in them losing their home and forfeiting a substantial amount already paid towards the purchase price. Even on the date the matter was argued the Applicants had still not complied with their obligations under the contract and the courts directives which had a cutoff date being the 31st of March 2010. In my view this order provided the said protection to the Applicants until the 31st of March 2010. Thereafter the Applicants cannot be still laboring under the impression that such a contract exist¹.

[34] It is trite that a decision by a contracting party to cancel a contract concluded between two private parties, cannot form the subject of judicial review – the power of courts to review the lawfulness, reasonableness and procedural fairness of decisions or actions taken by public bodies.

[35] In *Strachan v Prinsloo*² The court held that to *determine “if cancellation was justified the other test to apply was whether the plaintiff had failed to perform a vital term, expressed or implied through the agreement the most important factor and in deciding whether such a term was vital was the question whether the defendant would have entered into the agreement in the absence of such term. The plaintiff had in fact failed to perform a vital term. The defendant was therefore justified in terminating the contract.”*

[36] In my view the cancellation of this contract took effect from the time it was communicated to the Applicants in 2008 June 21³ which was further affirmed in the 2009 judgment by Makgoka J although not fully ordered. The Applicants were in breach even when the orders were made, and the Judge was of the view that the Third Respondent was entitled to his orders but wanted to give a benefit of a doubt to the Applicants.

[37] In line with the contract of sale, for the Applicants to occupy the property, there were valid terms of agreement one of them was that they were to pay towards

¹ Stewart Wrightson (Pty) Ltd v Thorpe [1977] (1) PH A15 (AD) the cancellation is a unilateral juristic act performed by the innocent party and does not require the consent of the guilty party.

² 1925(6) PHA9 (TPD)

³ Bekker v Schmidt Bou Ontwikkelings CC [2007] 4 ALL SA 1231(C) par 17

the Third Respondent installments which they subsequently failed to pay as far back as 2008. The Third Respondent elected to cancel the agreement in line with the contract and such decision was communicated through the Applicants. Tritely, the election to cancel is a unilateral juristic act it does not require a court order. If a court order is made it is there to merely confirm that the election which was made by that party was appropriate⁴. The decision made by the Third Respondent in this regard was final.

[38] What is also alarming is that the Applicants papers (the founding affidavit) were attested to on the 28th of January 2015 no further supplementary was filed to rectify important issues. This matter was only heard by this court in April 2024. In other words, the Applicants have not been adhering to the contract which they deem still exist at least since 2008. They made no allegations towards paying what was due to the Third Respondent in their own terms and they did not take this court into confidence to explain why that did not take place. There was also no condonation sought during the hearing before me by the Applicants for the non- compliance with the orders.

[39] Counsel for the Applicants made an attempt to address these issues from the bar which this court cannot consider as it amounts to prejudice for the Respondents as they would have not had the opportunity to address those issues in their answer. Additionally, if those averments had been addressed on paper maybe more Respondents would have wanted to oppose the matter. The Applicants stands and falls by their papers.

[40] One can deduce from the prayers sought in the notice of motion that the Applicants fell short in either making the arrangements or settling the amounts due on the purchase price and interest and the amount due to the City of Johannesburg in respect of the rates, lights and water.

[41] It is my view that when execution was ordered against the property the contract no longer existed. Despite the fact that the Third Respondent was permitted

⁴ Segal v Mazzur 1920 CPD 634

to re-enrol the matter for whatever reason but he was not bound to do so on the face of a cancelation in line with the contract.

CAN THE SALE IN EXECUTION BE DECLARED NULL AND VOID

[42] The Applicant seeks to declare the execution of the property null and void the execution that took place in July 2014. It is my opinion that such a declaration cannot be made by this court simply because the execution that took place was in light of a court order. In order to enable this court to venture into such a declaration it would have to be faced with a rescission application or a review application which is not what is before this court.

[43] This court does not have power to pronounce on such a declaration on the face of existing court orders which in line with the constitution remains binding and has to be obeyed by all⁵. Even if the view taken by the Applicant is that, that order which directed the execution was in error that order remains applicable up until the time it has been overturned by a competent court.

[44] I am not seized with the rescission or review application therefore I cannot make such a finding. This said property was declared especially executable on the 15^h of February 2011 by Judge Barrie. This court order and others which subsequently followed can only be overturned by a rescission application which is not before me. I therefore cannot declare that the execution of this property was null and void on the face of a canceled contract and the existing court orders in this regard.

[45] In light of the foregoing the actions of the Sheriff in transferring such property cannot be declared null and void as he was performing his duties in light of a court order which is still in existence.

THE DECLARATION UPON PAYMENT OF THE FULL AMOUNT

⁵ Section 165 (5) of the constitution states that an: *“order or decision issued by a court binds all persons to whom and organs of state to which it applies”*

[46] The Applicants further to their notice of motion seek to declare the property transferable to the Applicants upon payment of the full amount. The application drafted by the Applicants is unsatisfactory in that it is lacking material facts which need to be addressed to this court, for such a finding to be made. I say so simply because in their application they alleged that the Third Respondent cannot be traced and found as they made such attempts in 2012. This court is not addressed on who will be paid and how? Bearing in mind that the contract was between the Applicant and the Third Respondent.

[47] What amount is outstanding? Is it the purchase price? Is it rates, water and lights and to whom are these outstanding? Why are these amounts still outstanding? What became of the courts directives in November 2009. Why is the Applicant making reference to a full amount without explaining what are the full amounts outstanding both from the municipality perspective and the agreement? It is incumbent upon the Applicant to show this court that it comes before it with clean hands which has not been demonstrated in the papers.

[48] The Applicants have failed to demonstrate that such a declaration can be made by this court as the application lacks averments which are necessary for the court to make such an order. A court cannot make orders that cannot be effected. The Applicants have not demonstrated what occurred from the court's directives in 2009 up to this point. All that the Applicants have addressed is that they cannot trace the Third Respondent and how do they propose to pay him the outstanding amounts? The last attempt which they made to trace him was in 2012. It was not demonstrated that they made any attempts recently to locate him.

[49] In *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*,⁶ the court held that:-

“Consequently, the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action, that is, the founding affidavit must be self-contained. The replying affidavit (and in this instance the supplementary affidavit) cannot be used to augment the applicant's case.”

⁶ [2022] ZAGPJHC 410 at para 9.

[50] The Applicants have not demonstrated to the satisfaction of this court that they are entitled to this order sought.

The Right to Occupy

[51] The declaratory order sought to occupy the property upon payment of the amounts referred to in my view the Applicants do not have a right to occupy the property. That right is now currently vested with the First Respondent simply because that right was obtained by the Second Respondent through the 15th of February 2011 under case number 48419/10. Declaring the property specially executable puts in force a judgement of possession and directs law enforcement personnel to begin the transfer of property as a result of the legal judgement in that parties name. This court order granted the rights to this property to the Second Respondent as far back as 2011. This court order still remains valid under the circumstances.

[52] On the face of this court order the Applicants do not have a right to occupy the property. The papers do not demonstrate any adherence to the Makgoka J judgement which forewarned the Applicants that they may lose their right over the property. The court order directing the Applicants to make payment was made 15 years ago. The Applicants were given up to March 2010 to make an arrangement and effect payment. If they had issues with same, they should have gone back to court to ask for a further extension, but they have not done so. The duty to make payment arrangements was placed on the Applicants its not clear why it kept seeking information from the Third Respondent as opposed to making an arrangement and if that information was so important they would have proceeded to court to compel him to produce such timeously before 31 March 2010.

[53] In para 22 of the Makgoka J order the court clearly cautioned the Applicants as follows: *“the respondents on the other hand, should understand that their continued failure to meet their obligations, if not attended to, would result in them losing their home and forfeiting the substantial amount already paid towards the purchase thereof.”*

[54] Hypothecation of immovable property as security entitles the creditor to have such immovable property declared executable. The right over the property was acquired by the Second Respondent through the loan agreement and secondly by the court endorsing the execution of the property. The Applicants therefore have no right to occupy the property in light of the existence of the court order which gave the Second Respondent the right over this property inclusive of the canceled contract between the Applicants and the Third Respondent.

CONCLUSION

[55] In my view, the Alienation of Land Act 68 of 1981 is not applicable under the circumstances simply because, the contract between the parties was cancelled as far back as June 2008 which was later also confirmed by the Makgoka J judgement although not ordered as such this was before the execution was embarked upon by the Second Respondent. The Applicants have enjoyed usage of this property without paying their dues at the very least since the Makgoka J judgement was handed down which was 15 years ago. Whereas the First Respondent who took transfer of the property in 2014 has been deprived of his right to use and enjoy his property as he wishes.

[56] The Applicant failed to persuade this court in its favor due to unsatisfactory papers filed as far back as 2016, not to mention how this matter was uploaded on caselines which was a nightmare to follow as documents were not uploaded coherently and in line with this court's directive. Documents were all over the place which caused unnecessary delay in formulating the judgement.

[57] In the circumstances the following order is made:

1. The Applicants application is dismissed with no order as to costs.

**NHARMURAVATE AJ
JUDGE OF HIGH COURT
JOHANNESBURG**

For the Applicant: Ms Maharaj
Instructed by: Ishana Maharaj Inc

For the Respondents: Adv Scholtz
Instructed by: Lowndes Dlamini Attorneys

Argument took place on 29 April 2024
Date of judgment: 16th August 2024