

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

Case Number: 11223/21

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
26 November 2024 _____	
DATE	SIGNATURE

In the matter between:

MPATAMETSE JUDAS TSHOMA	First Applicant
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LEPHALALE FRANCISCA TSHOMA	Second Applicant
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and

EXECUTRIX IN THE ESTATE LATE MORUTHANE DANIEL PHALA N.O	First Respondent
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ALINA LEBOGANG MAFANYOLLE	Second Respondent
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TUSO ATTORNEYS	Third Respondent
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SEBOLA PROPERTIES	Fourth Respondent
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DEEDS OFFICE	Fifth Respondent
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JUDGMENT

[1] The applicants, Mpatametse Judas Tshoma and Lephallale Francisca Tshoma, purchased the immovable property known as Erf 1[...] V[...] Township, Tembisa, also known as 1[...] V[...] Street, Tembisa, 16323 (“the property”) subsequent to which transfer of ownership was registered in the names of the said applicants. Subsequent to the transfer of ownership and attempting to take occupation of the property, the applicants discovered that the property was occupied, and the occupants disavowed any knowledge of the sale and / or transfer of ownership.

[2] The discovery of other occupants in the property lead to the applicants desiring to withdraw from the sale, have the transaction, including the subsequent registration of transfer of ownership cancelled and obtaining an order for the repayment of the amounts paid in bringing the transaction to finality.

[3] The cancellation of the transaction is premised upon the following facts as they appear from the founding affidavit:

- 3.1. The applicants, prior to presenting the owners of the property with an offer to purchase attended the property but was only able to view the property on the exterior by virtue of the keys to the house not having been available.
- 3.2. Notwithstanding not having been able to view the interior of the house on the property, the applicants signed a written offer to purchase the property in the amount of R350,000.00.
- 3.3. It would appear as if the offer to purchase was accepted in that the applicants duly effected payment of the purchase price and transfer of ownership was duly effected in the name of the applicants.

[4] The present application was launched on 8 March 2021 and was subsequently provided to the Sheriff of this Court to effect service thereof on the

Executrix of Estate of the late Moruthane Daniel Phala (first respondent), the representative of the Estate, Alina Lebogang Mafanyolle (second respondent), the transferring attorneys, Tuso Attorneys (third respondent), the estate agency having facilitated the sale transaction, Sebola Properties (fourth respondent) and the Registrar of Deeds, Pretoria (fifth respondent).

[5] The application to have the sale transaction set aside, is predicated upon a purported fraud having been committed on the applicants. This fraud, so the applicants allege, occurred with their signatures on the offer to purchase having been forged in that their signatures, in certain places in the offer to purchase, were not theirs. It is however not denied that the applicants did append their signature on the offer to purchase with the intention to present an offer to purchase the property.

[6] A purported copy of the offer to purchase is annexed to the founding affidavit, annexure MJT 5. The sellers are recorded as “THOMAS ...” and “SHANE ...” and the purchaser is recorded as Sebola Properties. Furthermore, the purchase price is recorded as R400,000.00. It would seem that the pleaded essentialia in the founding affidavit do not accord with the content of annexure MJT5.

[7] I have been provided with only two returns of services confirming service of the application on third respondent and the Registrar of Deeds Pretoria, the fifth respondent. A notice of intention to oppose the application was delivered on behalf of the third respondent, however I also note that a notice of withdrawal of attorneys of record was filed by and on behalf of the second and fourth respondents which seems to suggest that the application must have been served on the second and fourth respondents as well. There is no indication that the application was served on the first respondent, the Executrix of the deceased estate. On this aspect alone I am entitled to refuse to entertain the application by virtue of a necessary party having a direct and substantial interest in these proceedings not having been served with the application.

[8] The third respondent, the only respondent opposing the application, alleges that it had received instructions to attend to the registration of transfer of ownership on 10 October 2019 in respect of a sale transaction to the value of R200,000.00 (“the

first transaction”). A copy of the offer to purchase is annexed to the answering affidavit as “TP1”. The second transaction involved a cash sale from the second respondent to the applicants in the amount of R350,000.00. A copy of the offer to purchase underlying the second transaction, is annexed as annexure “TP3” and it records the seller as Lina Mafanyolle and the purchasers as the applicants. The purchase price of R350,000.00 is recorded therein. Annexure “TP3” is an entirely different offer to purchase to the one presented by the applicants, annexure MJT5.

[9] It is trite that an applicant must stand and fall by the allegations in his/her founding affidavit and cannot make out his/her case in the replying affidavit.¹ The founding papers in an application are not the equivalent of a declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in motion proceedings be sufficient to resist an objection that a case has not been adequately made out. The founding papers take the place not only of the declaration but also of the essential evidence that would be led at a trial. If the facts that are necessary for determination of the issues in the applicant’s favour are absent from the founding papers, an objection that the founding papers do not support the relief claimed, is sound.² Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts on which they are based, are nothing more than a deponent’s own conclusions and accordingly do not constitute evidential material capable of supporting a cause of action.³ A party to motion proceedings who bears the *onus* is required to set out the evidence on which it relies to discharge such *onus*.⁴

¹ Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another 4 1980 (1) SA 313 (D) at 315H – 316; Obsidian Health (Pty) Ltd v Makhuvha [2019] JOL 46118 (GJ); Shaftesbury Sectional Title Scheme v Rippert’s Estate and Others 2003 (5) SA 1 (C)

² Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469 C – E which was approved, *inter alia*, in Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 323 G - J

³ Radebe and Others v Eastern Transvaal Development Board 1988 (2) SAT 785 (A) at 793 C – E; Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003 (4) SA 207 (C) at 217 B - E

⁴ Swissborough Diamond Mines (Pty) Ltd *supra* at 323 F – 325 C; Academy of Learning (Pty) Ltd v Hancock and Others 2001 (1) SA 941 (C) at 955 H - I

[10] The third respondent in answer to the allegation in the founding affidavit inter alia alleges that she, in preparation for the registration of the transaction, had called the parties to schedule appointments for the signing of the transfer documents and the documents were duly completed and signed by the parties. In response to these allegations the applicants under reply allege that these allegations were noted.

[11] On the principles set out above as well as the fact that in the event of where a dispute of fact exists, the application should be decided on the version of the respondents⁵, I am unable to find in favour of the applicants.

RELIEF

[12] In the result I make the following order:

12.1. The application is dismissed.

12.2. The first and second applicants, jointly and severally, the one paying the other to be absolved, are directed to pay the third respondent's costs of this application, such costs to be taxed on scale B of Rule 67A of the Uniform Rules of Court.

**S AUCAMP
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on-26 November 2024*

HEARD ON:

DATE OF JUDGEMENT:

For the Applicant: Adv MJ Ranala
Instructed by: ML Mateme Incorporated Attorneys

⁵ Palscon – Evans Paints (TvL) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623

For the Respondent: Adv SM Nkabinde
Instructed by: Tusso Attorneys Incorporated