



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 20763/2017

In the matter between

PHILOMENA CHICHI AGU

Applicant

and

GIDEON JOHANNES KRIGE

First Respondent

RONEL SWART

Second Respondent

SA HOME LOANS (PTY) LTD

Third Respondent

BLUE SHEILD INVESTMENTS 01 (RF) LIMITED

Fourth Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Fifth Respondent

JUDGEMENT DELIVERED ON 28 MARCH 2019

FRANCIS, AJ

INTRODUCTION

1. This is an application by Philomena Chichi Agu (“the Applicant”) for an order that Gideon Johannes Krige (“the First Respondent”) transfer the property purchased from him by the Applicant in terms of a Deed of Sale, and for certain ancillary relief.
2. The purchase price was paid by the Applicant to the First Respondent’s nominated conveyancer, Ronel Swart (“the Second Respondent”), who misappropriated the money paid to her by the Applicant.
3. SA Home Loans (Pty) Ltd (“the Third Respondent”), Blue Shield Investments 01 (RF) Limited (“the Fourth Respondent”), and the Registrar of Deeds, Cape Town (“the Fifth Respondent”) were cited because of their interest in this application, but no relief was sought against any of them. The Fourth Respondent holds a mortgage bond in its favour over the property whilst the Third Respondent is cited because of the Fourth Respondent’s affiliation to it. Both the Fourth and Fifth Respondent did not participate in these proceedings on the understanding that their interests will be protected whatever the outcome of this judgement.

BACKGROUND

4. The following relevant facts were either common cause or were not seriously disputed by the parties:

4.1 The Applicant and the First Respondent entered into a Deed of Sale on 31 July 2017, the material, relevant terms of which are as follows:

4.1.1 The Applicant purchased the following sectional title unit situated at 1 Ringwood Drive, Parklands, Western Cape, held under Deed of Transfer no. ST6980/2009 (“the property”):

(a) Section No 13 as shown and more fully described on Sectional Plan No. SS 224/2000 in the scheme known as Maple Grove, in respect of the land and building or buildings situate at Parklands, in the City of Cape Town, Division Cape, province of the Western Cape, of which section the floor area, according to the said sectional plan is 62 (sixty two) square meters in extent; and

(b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

4.1.2 The purchase price for the property was R720 000 which, in terms of clause 1.1 of the Deed of Sale, was payable as follows:

“A cash deposit of R720, 000,00 (Seven Hundred and Twenty Thousand Rand) payable within 3 (three) days of acceptance hereof to be held by the Conveyancers in trust in an interest-bearing account in terms of Section 78(2A) of the Attorneys Act, 1979, interest to accrue for the benefit of the Purchaser pending registration of transfer when the capital shall be paid to the Seller and the interest to the Purchaser.”

4.1.3 The property was subject to a valid lease agreement and it was agreed that the Applicant would not take possession and vacant occupation of the property on the date of registration of transfer, although all the risks and benefits of ownership would pass to the Applicant on the date of registration of transfer (clause 2 of the Deed of Sale).

4.1.4 Clause 4 of the Deed of Sale deals with the transfer of the property and states as follows:

“Transfer shall be effected on or by 01/10/2017 by the Seller’s Attorneys at the Purchaser’s expense namely: RONEL SWART ATTORNEYS, 6 VILLAGE CENTRE, CORAL ROAD, BETTY’S BAY, 7141; TEL. 028 – 272 9151, EMAIL: ronel@ronelswartattorneys.co.za. The Purchaser shall be responsible for all the normal transfer fees which shall be payable immediately upon request by the Conveyancers.”

4.1.5 Estate agent’s commission was payable and was deemed to be earned on conclusion of the sale. In this regard, clause 5.2 of the Deed of Sale states as follows: *“the Seller by their signature hereto irrevocably authorizes and instructs the Conveyancers to pay the estate agent its commission in terms hereof, upon registration of transfer”*.

4.1.6 All compliance certificates were to be supplied at the First Respondent’s expense. These certificates include an electrical compliance certificate, an entomology certificate, a gas compliance certificate, a plumbing compliance certificate, and an electrical fence compliance certificate (clause 9 of the deed of sale).

- 4.2 On 31 July 2017, the Second Respondent sent an e-mail to the Applicant and advised her that the Second Respondent's firm had received instructions to attend to the transfer of the property and reminded the Applicant that the purchase price of R720 000 was payable into her trust account, the details of which she provided to the Applicant.
- 4.3 The Applicant duly paid the R720 000 into the nominated bank account as well as an amount of R16 700 towards the "normal transfer fees" as contemplated by clause 4 of the Deed of Sale. After a period of time, and after some interaction between the Applicant, the First Respondent, and the Second Respondent and/or their legal representatives, it transpired that the Second Respondent had misappropriated the monies paid to her by the Applicant.
- 4.4 The Applicant furnished a letter of demand on the First Respondent to effect transfer of the property, tendering performance of her remaining obligations, specifically the payment of the remainder of the transfer fees relating to transfer duty and the like; these payments were, of course, not due to the First Respondent but were payable to other third parties.
- 4.5 The First Respondent denied liability, although it did lodge a claim with the Attorneys Fidelity Fund; the latter advised the First Respondent that it could not entertain the claim because, in the Fund's view, it was

in fact the Applicant that had suffered the loss. The First Respondent communicated the Fund's view to the Applicant who, on the advice of her attorneys, disputed the correctness of the advice proffered by the Fund and persisted with her demand that the First Respondent comply with his obligation to transfer the property to her.

ISSUE FOR DETERMINATION

5. The main issue for determination is whether payment made by the Applicant to the Second Respondent constitutes payment by the Applicant to the First Respondent. Put differently, if the Second Respondent was not the First Respondent's agent for the purpose of receiving payment from the Applicant, the Applicant's claim that she had discharged her obligations by paying the Second Respondent the full purchase price, cannot succeed.

SUBMISSIONS OF THE PARTIES:

6. Both Mr LA Rose-Innes SC (assisted by Mr GGM Quixley), for the Applicant, and Mr D van der Merwe, for the First Respondent, filed comprehensive heads of argument, referencing the leading cases on the issue in dispute. I found their exposition of the legal principles garnered from the case-law very helpful. I will, for the purposes of this decision, only make reference to those cases which I consider relevant to my decision.

Applicant's Submissions

7. According to the Applicant, her obligation under the Deed of Sale was to pay the full purchase price to the First Respondent's nominated conveyancer.
8. The Second Respondent was nominated by the First Respondent as his attorney and agent to receive payment of the purchase price.
9. The Applicant paid the full purchase price timeously to the Second Respondent and, by making payment to the Second Respondent, the Applicant, in effect, paid the purchase price to the First Respondent. Nothing further is required from her and she is entitled to receive transfer of the property.
10. In arguing the case on behalf of the Applicant, Mr Rose-Innes relied principally on the then Appellate Division's decision in ***Baker v Probert 1985 (3) SA 429 (AD)***. *In casu*, the Court held that the estate agent nominated by the seller had received payment of the purchase price on the seller's behalf. In reaching this decision, the Appellate Division had to interpret clause 3 of the sale agreement which dealt with the manner in which the purchase price was to be paid. The clause provided that "*all payments made in terms of this paragraph shall be made to the agents to be held by them in trust for payment to the sellers on the effective date provided that the sellers have complied with the provision of paragraph 5 hereof,*" (***Baker v Probert supra*** at 437D) – clause 5 dealt with the sellers' obligation to deliver the share block certificates to the agent. The Court

stated that clause 3 of the contract explicitly required payment under the contract to be made to the agent and it was clearly implicit that the agent was authorised by the seller to receive the purchase price. Were it not so, the purchaser would have been obliged to pay the purchase price directly to the seller. Mr Rose-Innes stated that the same consideration applied in the present case; the Deed of Sale required the Applicant to make payment of the purchase price by way of a deposit to the Second Respondent and did not require the Applicant to pay the purchase price to the First Respondent. Thus, he submitted, payment to the Second Respondent was equated with payment to the First Respondent and operated as a complete discharge of the Applicant's obligations under the contract. As in the ***Baker v Probert*** case, once the Applicant had paid the purchase price to the Second Respondent, she had no further obligations under the contract.

11. Mr Rose Innes SC also made reference to ***Verbeek v Maher 1978 (1) SA 61 (N)***, a decision of a full bench of the then Natal Provincial Division, the facts of which are similar to the present case. In the ***Verbeek*** case, the sale agreement provided for a deposit to be paid to the agent, which the purchaser did. The agent was subsequently wound up and did not pay a portion of the deposit to the seller. As in the present case, the purchaser sought to compel the seller to effect transfer, which the seller resisted. The court found in favour of the purchaser, concluding that the purchaser had complied with his obligation to pay the deposit and ordered the seller to pass transfer. The court found that the contract

stipulated the manner in which the deposit was to be paid, namely by payment to the agent, and that the purchaser had done so, thus discharging his obligation. In reaching its decision, the court did not determine the matter on the basis of agency but instead regarded the crux of the matter to be whether the relevant payment portion of the sale agreement “*merely provides for a mode of ensuring that payment will be made or a mode of actual payment. If the former had been intended, then it would have been easy for the parties to have stipulated that the price was to be payable in cash against the transfer, such price to be secured in the meanwhile by payment of a deposit*” (**Verbeek** *supra* at 68 F-G). Mr Rose-Innes submitted that on the authority of the **Verbeek** decision, the Deed of Sale in the present matter provides for a “mode of actual payment” and that once the Applicant made payment, she had discharged her obligations under the Deed of Sale, and the First Respondent, accordingly, had the reciprocal obligation to pass transfer.

First Respondent’s Submissions

12. The First Respondent does not dispute that the Applicant paid the purchase price for the property to the Second Respondent who was nominated as the conveyancer to effect the transfer.

13. The gist of the First Respondent’s case, however, is that despite the Applicant paying the purchase price to the Second Respondent, the Applicant has not satisfied her obligation under the Deed of Sale to pay the purchase price since

this obligation will only be satisfied once the First Respondent himself receives payment.

14. The underlying contention of the First Respondent is that payment to the Second Respondent did not amount to payment to him. The parties had agreed in terms of clause 4 of the Deed of Sale that the money paid by the Applicant would be placed in an interest-bearing account for the benefit of the Applicant and would only be paid to the First Respondent on registration of transfer. Accordingly, the money was being held by the Second Respondent on behalf of the Applicant. Since transfer had not yet taken place, the First Respondent had not received payment and, therefore, the Applicant had not complied with her obligation. Thus, there was no obligation on the First Respondent to ensure that the property was transferred to the Applicant until payment was actually received by the former.

15. Mr van der Merwe submitted on behalf of the First Respondent that a proper and correct interpretation of the clause relating to the payment of the purchase price (clause 4) indicates that payment to the Second Respondent did not constitute payment to the First Respondent. This clause simply constitutes a method of payment whereby the purchase price was secured in order to ensure that payment and delivery, being the registration of the transfer of ownership of the property, took place *pari passu* (see ***Breytenbach v Van Wijk 1923 AD 541***, and ***Wehr v Botha NO 1965 (3) SA 46 (A)***). The Second Respondent was, in effect, a conduit for payment to the First Respondent but was not an agent of the First

Respondent to receive payment on the latter's behalf. Indeed, if anything, according to Mr van der Merwe, the Second Respondent acted as agent for both parties (see, ***Basson v Remini and Another 1992 (2) SA 322 (N)***). The purchase price was being held on behalf of the Applicant as a "deposit" pending transfer. Payment would only be made to the First Respondent on transfer whilst the interest accrued would be paid to the Applicant on transfer (cf. ***Minister of Agriculture & Land Affairs and Another v De Klerk and Others 2014 (1) SA 212 (SCA)***).

EVALUATION OF LEGAL PRINCIPLES

16. The issue of whether a conveyancing attorney entrusted to hold a portion or the whole of the purchase price until registration of transfer, receives the money as the agent of the seller, or of the purchaser, or of both, or as trustee for both to await the event, is a somewhat vexed question (see the comments of the Supreme Court of Appeal in ***Royal Anthem Investments 129 (Pty) Ltd v Lau and Another [2014] ZASCA 19 at para 17***, and the conflicting judgements in the ***Minister of Agriculture and Land Affairs and Another v De Klerk and Others supra***).
17. What is apparent from the decided cases, however, is that each case must be considered in the light of its own facts and the particular contractual terms under which the conveyancer received payment.

18. In the matter at hand, it is apparent from the sale agreement that the Second Respondent was appointed as conveyancer by the First Respondent. This much was accepted by the First Respondent. If the conveyancer was appointed as the agent to receive payment, then payment to the conveyancer is equivalent to payment to the Seller (see, ***Baker v Probert supra*** at 438 G-H). Similarly, the obligation to make payment is discharged if made to a person recognised by law as competent to receive payment in discharge of the obligation (***Harrismith Board of Executors v Odendaal 1923 AD 530***). Whether or not the Second Respondent was appointed as agent thus depends on the terms of the Deed of Sale read in context and having regard to the purpose of the relevant provisions of the Deed of Sale and the background, preparation and production of the document (see, ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 604C***).
19. Clause 1 read with clause 4 of the Deed of Sale records that the conveyancing shall be effected by the First Respondent's attorneys namely, the Second Respondent. The Applicant never appointed the conveyancer. Indeed, as part of her reply, the Applicant filed an affidavit by Nhlonipho Tankwa, who described himself as the "active agent" dealing with the Applicant and the First Respondent in matters pertaining to the sale of the property. Mr Tankwa states that when negotiating the transaction, the Applicant wished to use her own attorneys but the First Respondent was vehemently insistent on using the Second Respondent as his transferring attorney, indicating that he had dealings with her for the

previous 5 years. Although counsel for the First Respondent objected to this “new” evidence being raised in reply, I am prepared to admit this evidence. The First Respondent pertinently raised the issue relating to the appointment of the conveyancer in his answering affidavit. The First Respondent stated that the Applicant had agreed to the nomination of the conveyancer and had she proposed a different conveyancer to deal with the transaction, he would have considered this. Quite clearly, in my view, the Applicant, given her case, was obliged to respond to this averment. The First Respondent certainly did not indicate what prejudice, if any, he had suffered due to the Applicant’s response (see, *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd [2017] ZAGPJHC 177 at para 15*). In any event, the Applicant’s response is consistent with the undisputed, and admitted, fact that the First Respondent appointed the Second Respondent as his conveyancer and that the Second Respondent was his attorney as well.

20. It does not necessarily mean, however, that because the First Respondent appointed the Second Respondent as conveyancer that the latter was the First Respondent’s agent for receiving payment of the purchase price (see, *Minister of Agriculture and Land Affairs and Another v De Klerk and Others supra at 218 E-F*). In considering whether the Second Respondent was the agent for the First Respondent for receiving payment of the purchase price, it is important at the outset to bear in mind what the expression “agent” means in the present

context. In ***Baker v Probert supra at 439 D-G***, Botha JA described the meaning of “agency” within this context as follows:

“It means no more than the person authorised by the defendant to accept payment of the purchase price by the plaintiff. It connotes a mandate by which the seller confers authority on the agent (his mandatory) to represent him in the acceptance of the payment of the purchase price, with the consequence, in law, that payment to the agent is equivalent to payment to the seller.”

The court in ***Baker v Probert*** then analysed the relevant provisions of the contract entered into between the parties, which is similar to the facts of the matter at hand, and concluded as follows:

“In clause 3 it is expressly stipulated that all payments made in terms of it (including, on the facts here, the payment of the full purchase price) shall be made to the “agents”, being York Estate. It is clearly implicit that York Estate is authorised by the defendant to receive the purchase price, for, were it not so, the purchaser would have been obliged to pay it to the defendant. York Estate, when it received the payment with knowledge of the provisions of clause 3, prima facie accepted the mandate from the defendant to do so as the agent of the defendant, to whom it was obliged to pay over the money when he had complied with his own obligation to deliver the

share certificates in terms of clause 5. Moreover, the parties clearly intended that payment by the plaintiff to York Estate would operate as a complete discharge of her obligation under the contract, thus equating payment to York Estate with payment to the Defendant. If, instead of cancelling the contract, the Plaintiff had claimed delivery of the share certificates from the defendant, the latter would have had no answer to the claim” (Baker v Probert supra 439 F-I).

21. By parity of reasoning, clause 1 read with clause 4 of the Deed of Sale expressly stipulates that all payments made in terms of the Deed of Sale would be paid to the First Respondent’s attorneys as the conveyancer for the transaction; this can only mean that the Second Respondent was the First Respondent’s agent for the purpose of receiving payment and, moreover, that payment to the First Respondent would operate as a complete discharge of the Applicant’s obligations under the contract. Payment to the Second Respondent equates to payment to the First Respondent. It must be remembered that the appointment of a conveyancer is no trifling matter. The conveyancer plays a pivotal role in any property transaction involving the conveyance of immovable property from one person to another (see, ***Margalit v Standard Bank of South Africa Ltd and Another [2012] ZASCA 208 at para 25***). The appointment of a conveyancer is as much a term of the agreement of sale, requiring negotiation and agreement between the parties, as are other material terms such as, for example, the

payment of estate agents' commission and the payments of transfer costs (cf. ***Meyer v Kirner 1974 (4) SA 90 (N) at 100G-H and 101E-F***). The conveyancer not only attends to the formal transfer of real rights in terms of the Deeds Registries Act 47 of 1937 but is also responsible for all the financial aspects of the transfer. In the present matter, the conveyancer was more than a mere holder of the purchase price pending transfer. The Second Respondent was the First respondent's attorney of longstanding and was entrusted with the responsibility to disburse payments from the purchase price on behalf of the First Respondent as at the date of transfer, including the payment of estate agent's commission.

22. Counsel for the First Respondent submitted that because clause 1.1 of the Deed of Sale stipulated that the purchase price would be held in trust in an interest-bearing account and that the interest earned would be paid to the Applicant on registration of transfer, the Second Respondent was holding the amount paid by the Applicant on behalf of the latter. However, as Mr Rose-Innes submitted, clause 1.1 of the Deed of Sale does not stipulate on whose behalf the funds would be held and the fact that interest will accrue for the benefit of the Applicant did not necessarily mean that the funds were being held in trust for the Applicant. The interest provision simply catered for the commercial reality that the Applicant was required to pay the purchase price within 3 (three) days of acceptance of the offer but the Applicant would only obtain title to the property at some later date. In ***Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments***

129 (Pty) Ltd and Others [2014] ZACC 39, the Constitutional Court was called upon to consider whether payment to the conveyancing attorney, appointed by the seller, during the course of an abortive conveyancing transaction should be regarded as payment to the seller. The clause in question in the sale agreement, which is of similar import to clause 1 read with clause 4 of the Deed of Sale, reads as follows:

“Cash: ... [payable...after acceptance hereof which amount is to be deposited at the Conveyancing Attorneys. The amount will be invested in accordance with [s]ection 78 (2A) of the Attorneys Act No 53 of 1979, ... pending the registration of transfer of the property in the name of the [purchasers]. The deposit and any other amounts will be paid over to the [attorneys] on date of registration of the property in the name of the [purchasers]. Interest earned will be for the benefit of the [purchasers].”

(quoted in fn. 3 in **Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others supra**).

The Constitutional Court interpreted the foregoing clause to mean that payment into the attorney’s account ought to be regarded as payment to the seller (**Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others supra at para 30**).

23. Counsel for the First Respondent also sought to rely on **Basson v Remini** where, on the facts of that case, the Court held that the conveyancer acted as

agent for both parties. In my view, *Basson v Remini* is not authority for the proposition that a conveyancer **must** act for both parties but merely that a conveyancer, depending on the circumstances, **may** act for both parties. The mere fact that a conveyancer is nominated by one of the parties does not mean that the conveyancer acts exclusively as agent for that party. As in the matter at hand, the Second Respondent acted as agent for the First Respondent in terms of the receipt of payment of the purchase price and, simultaneously, acted as agent for the Applicant when it came to the investment of the purchase price pending the registration of transfer. The Applicant would certainly have a claim against the Second Respondent if the latter did not account for any interest that may have been earned on the said monies at the registration of transfer.

24. On a conspectus of the evidence before me, the Applicant complied with her obligation in terms of the deed of sale by making payment of the purchase price to the Second Respondent who was nominated by the First Respondent to receive payment of the purchase price on the latter's behalf. In addition, the Deed of Sale provided for the mode of actual payment of the purchase price and once this was done, the Applicant had discharged her obligations. She did what was required contractually in respect of the purchase price and had no control of the process thereafter. The Applicant, of course, has tendered payment of the outstanding transfer costs, which are not payable to the First Respondent, in order to effect the transfer. The First Respondent is, accordingly, obliged to comply with his obligation to effect transfer.

ORDER

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

25.1 The First Respondent is directed to take all such steps as may be necessary to ensure that the property described in paragraph 18.2 below is transferred to the Applicant, including

25.1.1 attending to procuring the compliance certificates contemplated by the agreement of sale pertaining to the property concluded between the Applicant and the First Respondent on 31 July 2017; and

25.1.2 paying to the Applicant's attorneys nominated trust account, within 21 days of this Court's order, the amount necessary to discharge the mortgage bond over the property, such amount to be:

25.1.2.1 held by the Applicant's attorneys on trust pending transfer to the Applicant; and

25.1.2.2 paid to the Fourth Respondent upon registration of transfer;

25.2 The property referred to in paragraph 18.1 is the following sectional title unit situated at 1 Ringwood Drive, Parklands, Western Cape, held under Deed of Transfer no.ST6980/2009:

25.2.1 section no.13 as shown and more fully described on Sectional Plan No.SS 224/2000 in the scheme known as Maple Grove in respect of the land and buildings situate at Parklands in the City of Cape Town, Division Cape, Province of the Western Cape, of which section the floor area, according to the said sectional plan, is 62 square meters in extent; and

25.2.2 an undivided share in the common property in the scheme appointed to the said section in accordance with the participation quota as endorsed on the said sectional plan.

25.3 Subject to paragraph 18.4 below, in the event that the First Respondent fails, within 5 days of written request, to take any of the steps required to ensure that the property is transferred to the Applicant, the Sheriff of the above Honourable Court be authorised and directed to take such steps on the First Respondent's behalf.

25.4 Transfer of the property will not be effected without the First Respondent's obligations under the indemnity bond, registered over

the property described in paragraph 18.2 above in favour of the SA Home Loans Guarantee Trust being discharged.

25.5 The First Respondent is to pay the Applicant's costs, excluding the costs attendant upon the employment of senior counsel.

FRANCIS, AJ