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

CASE NO: 2023/078290

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED. YES

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SIGNATURE

DATE 9 January 2025

MAHUNISI ISAAC MALULEKA

First Applicant / Respondent

ZELDA MALULEKA

Second Applicant / Respondent

and

NICOLAAS MATHEUS GERBER N.O

First Respondent / Applicant

MARIETTE PRITCHARD N.O

Second Respondent / Applicant

NICOLAAS MATHEUS GERBER N.O

Third Respondent / Applicant

CHARISSA VAN STRATEN N.O

Fourth Respondent / Applicant

JACQUES PIETER THERON N.O

Fifth Respondent / Applicant

DIRK JACOBS WINTERBACH N.O

Sixth Respondent / Applicant

In re:

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| NICOLAAS MATHEUS GERBER N.O | First Applicant |
| MARIETTE PRITCHARD N.O | Second Applicant |
| NICOLAAS MATHEUS GERBER N.O | Third Applicant |
| CHARISSA VAN STRATEN N.O | Fourth Applicant |
| JACQUES PIETER THERON N.O | Fifth Applicant |
| DIRK JACOBS WINTERBACH N.O | Sixth Applicant |

and

| | |
|---|-------------------|
| MAHUNISI ISAAC MALULEKA | First Respondent |
| ZELDA MALULEKA | Second Respondent |
| ANY OTHER UNLAWFUL OCCUPANTS OF PORTION 17 OF ERF 1[...], 9[...] L[...] ROAD, M[...] | Third Respondent |
| CITY OF EKURHULENI METROPOLITAN MUNICIPALITY | Fourth Respondent |

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 9 January 2025.

MAHON AJ:

Introduction

[1] This is an application for leave to appeal against the judgment delivered by me in the main application for the eviction of the respondents from the property situated at Portion 17 of Erf 1[...], 9[...] L[...] Road, M[...]. The applicants were the trustees of the Gerber Family Trust, and the respondents included the purchasers, Mahunisi Isaac Maluleka and Zelda Maluleka.

[2] The respondents (purchasers) have now applied for leave to appeal against my judgment granting the eviction order. In their application for leave to appeal, the purchasers have raised several grounds of appeal, which require careful consideration.

[3] Notably, counsel for the purchasers confirmed that the non-joinder point raised in the application for leave to appeal was not persisted with during the hearing of the application for leave to appeal. The remaining grounds of appeal relied upon by the purchasers primarily turn on two broad issues:

[3.1] the "*vexed question*" (as it was described by the Supreme Court of Appeal in *Royal Anthem Investments 129 (Pty) Ltd v Lau and Another 2014 (3) SA 626 (SCA)*) of whether payment to the transferring attorney constitutes payment to the sellers in partial discharge of the purchasers' obligation to pay the purchase price; and

[3.2] the issue concerning the fulfilment or non-fulfilment of the suspensive condition in the sale agreement.

Grounds of Appeal

[4] The purchasers contend that I erred in my findings. The gravamen of their complaint is that:

- [4.1] the court failed to appreciate that payment of the deposit to the transferring attorney constituted part payment of the purchase price to the sellers, and therefore discharged the purchasers' obligation in this regard;
- [4.2] the court misdirected itself by concluding that the issue of the suspensive condition had been properly raised in the founding affidavit of the applicants; and
- [4.3] the court did not give due regard to the facts from which it could be inferred that the sellers' right to rely on the non-fulfilment of the suspensive condition had been waived through their conduct.

The Issue Relating to the Deposit

[5] The first issue relates to the role of the transferring attorney in the transaction. The purchasers argue that payment to the transferring attorney constituted payment to the sellers, thereby fulfilling their obligation to pay the deposit. The sellers, on the other hand, maintained that the transferring attorney acted as a mere stakeholder and that payment to the attorney did not amount to payment to the sellers, such payment only taking place when the deposit was released to the sellers upon transfer of the property.

[6] In *Royal Anthem Investments 129 (Pty) Ltd v Lau and Another 2014 (3) SA 626 (SCA)*, the following was said of this issue:

"[17] The appellant sought to meet this by arguing that the first defendant had received the deposit as the appellant's agent, so that the payment to the first defendant was thus, effectively, a payment to it. This raises the somewhat vexed question as to whether a conveyancing attorney in circumstances such as the present, entrusted to hold a portion or the whole of the purchase price until registration of transfer, receives the sum as agent of the seller, or of the buyer, or of both, or as 'trustee for both to await the event' — see in this

regard the conflicting judgments in Minister of Agriculture and Land Affairs and Another v De Klerk and Others 2014 (1) SA 212 (SCA). This is an issue unnecessary to decide as even if the payment to the first defendant is to be regarded as a payment to the appellant, as to which I refrain from expressing an opinion, the deposit had to be repaid unless it can be construed as falling within the category of 'any other amounts payable' referred to in clause 6."

[7] This issue has thus been described as a "*vexed question*" because of conflicting judicial pronouncements on the matter. The purchasers argue that the conflicting judgments provide a compelling basis for granting leave to appeal, enabling the Supreme Court of Appeal to definitively resolve this contentious issue once and for all.

Applicable Legal Standard

[8] The test for leave to appeal is set out in section 17(1) of the Superior Courts Act, 10 of 2013, which provides that leave to appeal may only be granted where the judge is of the opinion that:

- [8.1] the appeal would have a reasonable prospect of success; or
- [8.2] there is some other compelling reason why the appeal should be heard, including conflicting judgments on the issue under consideration.

[9] In *Mont Chevaux Trust v Tina Goosen 2014 JDR 2325 (LCC)*, it was held that the threshold for granting leave to appeal is now higher under the Superior Courts Act than it was under the previous regime. A mere possibility of success is not sufficient; a reasonable prospect must exist that another court would come to a different conclusion.

[10] In my view, although the facts of the matter support the conclusion that payment to the transferring attorney is merely security (for the reasons identified in my judgment in the main application), the existence of conflicting judgments and the recognition by higher courts that this is a complex and contentious issue suggest that

there is a reasonable prospect that another court might come to a different conclusion.

[11] Nevertheless, for leave to appeal to be granted, the purchasers must prevail on both issues raised in this application—the "*vexed question*" and the issue concerning the suspensive condition—as success on only one issue would not alter the outcome on appeal. Counsel for the purchasers, quite properly, accepted this proposition. Accordingly, I now turn to the matter of the suspensive condition.

The Suspensive Condition

[12] The second broad ground of appeal concerns the alleged non-fulfilment of the suspensive condition in the sale agreement. In my view, the relevant paragraphs of the applicants' founding affidavit, specifically paragraphs 20 to 23, raise a clear query regarding whether the suspensive condition had been fulfilled.

[13] The sellers indicated that they had enquired into the fulfilment of the condition and asserted that if the condition had not been fulfilled, the sale agreement will have lapsed. This, in my view, was sufficient to put the purchasers on notice that the point would be taken and to require them to demonstrate that the suspensive condition had been fulfilled.

[14] Indeed, the purchasers belatedly attempted to meet the point. The purchasers attempted to introduce documents at a late stage to show fulfilment of the condition. Notably, the purchasers' unsuccessful attempt to demonstrate the fulfilment of the condition also somewhat undermined their concurrent assertion that the sellers had waived the condition or the right to rely on its non-fulfilment. Nevertheless, as I noted in my judgment, these documents suggested that the suspensive condition had, in fact, *not* been fulfilled timeously.

[15] However, counsel for the purchasers argued that waiver of the right to rely on such non-fulfilment had been properly raised by implication, citing the sellers' conduct and the addendum to the agreement, both of which are to be viewed in the

context of the significant lapse of time before any enquiry into the fulfilment of the condition had been made.

[16] In my view, whilst those facts might support an argument for waiver or estoppel, it was incumbent upon the purchasers to explicitly articulate their reliance on those doctrines.

[17] As an aside, it is pertinent to note that the parties brought to my attention an affidavit uploaded by the purchasers on the eve of the hearing of this application for leave to appeal. This affidavit annexed certain documents purportedly intended to demonstrate that the suspensive condition had, in fact, been timeously fulfilled. However, as rightly conceded by the purchasers' counsel, I am precluded from considering this new evidence, as my deliberation must be confined to the papers that were before me during the hearing of the main application. The only inference to be drawn from this development is that the purchasers appear to intend seeking leave to adduce further evidence on appeal to establish compliance with the suspensive condition. While this may potentially alter the factual complexion of the matter, it falls outside the scope of the present inquiry, and nothing further need be said on this point as I am precluded from considering it for purposes of this judgment.

Reasonable Prospect of a Different Conclusion

[18] Despite my findings on the suspensive condition issue, I acknowledge that there is a reasonable prospect that another court will take a different view on whether the issue of the suspensive condition was properly raised by the sellers in their founding affidavit and whether the purchasers had sufficiently articulated a basis to overcome the non-fulfilment of the suspensive condition in their answering papers.

Conclusion

[19] Given the conflicting judgments on the "*vexed question*" and the possibility of a different conclusion on the suspensive condition, I am persuaded that leave to appeal should be granted.

[20] Counsel for the purchasers submitted that it would be appropriate for the appeal to be heard by the Supreme Court of Appeal, given the importance of resolving the "*vexed question*" definitively. I agree with this submission.

Order

[21] In the result, leave to appeal to the Supreme Court of Appeal is granted. The costs of this application shall be costs in the appeal.

D MAHON

Acting Judge of the High Court

Johannesburg

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| Date of hearing: | 7 January 2025 |
| Date of judgment: | 9 January 2025 |
| Revised Date: | 9 February 2025 |

APPEARANCES:

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| For the Applicant: | Adv C Gibson |
| Instructed by: | Senekal Simmonds Inc |

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| For the Respondent: | Adv J'O Williams SC |
| | Adv JBW Mouton |
| Instructed by: | Maluleke Msimang & Associates |