IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. 10054/08

In the matter between:

TSHEKO PATRICK SEHLARE	**1st APPLICANT**
SEBAETSENG DORAH SEHLARE	**2nd APPLICANT**

AND

DE JONGH & PIENAAR	**1st RESPONDENT**
DAVID DU PLESSIS	**2nd RESPONDENT**
BEAULAH DU PLESSIS	**3rd RESPONDENT**
STEYN LYELL & MAEYANE INC.	**4th RESPONDENT**

JUDGEMENT

MAKGOKA. AJ

[1] The appellants seek orders, in the alternate, against the first, second, third and fourth respondents in the following terms:

> *"1 Directing the first respondent to pay to the applicants or their order the amount of R 192,000.00 plus interest thereon calculated at 15,5% per annum from 1 August 2007 until date of payment;*
>
> *2. In the alternative to paragraph 1 thereof, judgment against the second and third respondents jointly for payment of R192,000.00 plus interest thereon*

calculated at 15,5% per annum a tempore morae;

3. In the alternative to paragraphs 1 and 2 hereof, judgement against the Fourth Respondent for payment of R192 000,00 plus interest thereon calculated at 15,5% per annum a tempore morae;

4. Costs this application against the first respondent and any other respondent who may oppose the application, jointly and severally, to be taxed on a scale as between attorney and client;

5. Further and/or alternative relief."

[2] The dispute among the parties arise from an agreement involving purchase of immovable property signed between the applicants on one hand, and the second and third respondents, on the other. The property is situated at Lyttleton, Centurion, Pretoria.

[3] The first and second applicants are married to each other in community of property. The first respondent ("De Jongh & Pienaar") is a firm of attorneys who were to act as transferring conveyancers. The second and third respondents ("the Du Plessis') are also married to each other. The third respondent, apart from being the seller, was also an estate agent in the transaction. The fourth respondent ("Steyn Lyell") is also a firm of attorneys, who attended to the transfer of the applicant's property in Vanderbijlpark.

[4] For illustrative purposes, the following facts are common cause between the parties:

4.1 On 22 April 2007 the applicants signed an offer to purchase Erf number 771 Lyttleton Manor, Centurion, Pretoria, to the Du Plessis, which offer was accepted by the latter on the same date. The said agreement is annexure **"TPS1"** to the founding affidavit;

4.2 The material terms of the agreement were the following:

4.2.1 the purchase price for the property was R860 000.00, to be paid as

follows:

4.2.1.1 R150 000.00 on or before 18 May 2007, to be held in trust until registration or termination (as the case may be) and;

4.2.1.2 the balance of R710 000.00 against registration of the property in the applicants' name.

4.2.2 the whole agreement was subject to the suspensive condition that the applicants obtain a mortgage loan for R710 000.00 within 12 days from 22 April 2007, failing which the agreement shall be cancelled and neither of the parties shall have any further obligations to each other;

4.3 The applicants did not obtain a bond loan with a mortgage institution by 5 May 2007, upon which the agreement lapsed.

4.4 On 22 May 2007 SA Home Loans approved the applicant's loan.

4.5 On 25 May 2007 the first applicant requested the third respondent to lodge a new application at ABSA, as he was not happy with the interest rate that SA Home Loans had granted. The third respondent complied with the first applicant's request.

4.6 On 28 May 2007 the first applicant requested the third applicant to facilitate a bond application also to Nedbank.

4.7 On 30 May 2007 it was established that both ABSA and Nedbank had approved the applicants' bond application. The first applicant decided that the applicants would accept the loan from Nedbank.

4.8 On the same day, 30 May 2007, the applicants and the Du Plessis' signed a document titled **"ADDENDUM".** The said document is annexure **"BP4"** of the answering affidavit. It is a terse document that reads:

"Transfer attorneys are changed from Brink Bosman & De Bruyn to De Jongh & Pienaar in order to expedite the matter."

4.9 On 4 June 2007, pursuant to the addendum, Nedbank provided a revised

approval, appointing De Jongh & Pienaar as the attorneys attending to the registration of the bond.

4.10 On 2 July 2007, the second applicant indicated to the De Jongh & Pienaar that the applicants were not prepared to sign the transfer documents before their immovable property in Vanderbijlpark, had been transferred. On the same date the second applicant provided De Jongh & Pienaar with the contact information of Steyn Lyell, the fourth respondent, who were in the process of transferring the applicants' property in Vanderbijlpark to the name of the purchasers. De Jongh & Pienaar must have contacted Steyn Lyell immediately after the conversation of 2 July 2007 with the second applicant. This is so because on 5 July 2007, Steyn Lyell accounted to the applicants, wherein it appeared that an amount of R192 000.00 was paid over to De Jongh & Pienaar.

[5] It appears that upon receipt of the R192 000.00, De Jongh & Pienaar paid an amount of R50 000.00 to the third respondent. This amount ostensibly represented commission due to the third respondent, who, as indicated above, also acted as an estate agent in the transaction. In terms of the agreement, clause 6.3 thereof, the applicants, as purchasers, would be liable for the estate agent's commission in the event where the purchaser had neglected to meet its obligations in accordance with the agreement. It is the third respondent's argument that, once the applicants failed to sign transfer documents, they committed a breach of agreement, which entitled the third respondent to fall back on clause 6.3 of the agreement.

[6] The applicants' case is that the suspensive clause of the agreement not having been fulfilled by 5 May 2007, the agreement lapsed and subsequent approvals of their bond application were of no force and effect. As a result, neither party can have any obligations towards each other.

[7] The respondents, on the other hand, contend that, the conduct of the parties subsequent to the lapsing of the agreement, plus the signature of the addendum, were a clear indication that the parties still considered themselves bound by the agreement. Accordingly, the argument goes, the signing of the addendum revived or reinstated the agreement on the same terms , though without the suspensive condition. In my view that would amount to a material amendment to the agreement.

[8] That aspect was dealt with in *Fairoaks Investment Holdings (Pty) Ltd v Olivier 2008 (4) SA 302 (SCA)* at 311B, where it was held as follows:

> " Not only is it alleged that the parties by way of the letters B1 and C1 "agreed in writing ... to revive the lapsed agreement of sale' it is alleged that it was an express term of the revived agreement that clause 13.2 thereof be amended to the effect that compliance therewith was to occur upon or before transfer of the property. The amendment is material as the time allowed in clause 13.2 for the fulfilment of the condition was inserted in order to create certainty as to the fate of the contract and affected both parties. The contract which had lapsed because of the non-fulfilment of the condition had become, as a result of the amendment, subject to a new material condition, the time for fulfilment of which had not been stipulated. It follows that the parties by agreeing to revive the lapsed agreement with amendments, entered into an agreement to buy and sell on terms different from the terms previously agreed to. Such an agreement has to comply with the provisions of s 2(1) of the Act. Even if the amendment had been agreed to prior to the lapsing of the agreement of sale it would, in order to be valid, have had to comply with the provisions of s 2(1) of the Act'".

[9] It is common cause that the addendum does not comply with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981.That should put to rest the argument.

[10] It was further contended on behalf of the respondents that the suspensive clause was for the benefit of the Du Plessis', which could, and was waived. I do not agree with this contention. First, there is no express clause in the agreement to that effect. Second, even if there was, there is no indication that the Du Plessis' at any stage purported to waive non-compliance. On the contrary, it appears that all parties were oblivious to the lapsing of the agreement when the addendum was signed. I find this to be an afterthought when papers were prepared.

[11] I am therefore satisfied that no obligations flow from the agreement signed by the parties on 22 April 2007, as a result of non-fulfilment of the suspensive clause. It follows, accordingly, that the amount of R192 000.00 should be paid back. De Jongh & Pienaar have stated in the papers that in principle, there is no objection in the amount of R142 000.00 being paid back. The R50 000 has been paid already to the third respondent as commission.

[12] Regarding the said amount of R50 000.00 paid by De Jongh & Pienaar to the third respondent, if one accepts, as is common cause, that the agreement has lapsed due to non-fulfilment of the suspensive condition, and that such agreement was not validly revived, it follows then that respondent had not earned a commission. There is no suggestion that the Applicants were in any way responsible for such non-fulfillment of the suspensive condition.

[13] The third respondent was therefore not entitled to receive the R50 000.00. There is one more reason why the amount of R192 000.00 should be paid back. That relates to attorney and client relationship. This amount was part of the nett proceeds from the sale of the applicants' property. It was therefore held in trust by Steyn Lyell to the credit of the applicants. See section 26 of the Attorneys Act 53, of 1979.

[14] There is one more reason why the amount of R192 000.00 should be paid back. That relates to attorney and client relationship. This amount was part of the nett proceeds from the safe of the applicants1 property. It was therefore held in trust by Steyn Lyell to the credit of the applicants. See section 26 of the Attorneys Act 53,of 1979.

[15] A fiduciary relationship came into being between the applicants and Steyn Lyell. The latter did not have the authority of the applicants to pay the money to De Jongh & Pienaar, which is common cause. Steyn Lyell allege that De Jongh & Pienaar misrepresented to them that they had such authority from the applicants. De Jongh & Pienaar did not file an answering affidavit to deal with this allegation. Even in their answering affidavit to the applicants' founding affidavit, the circumstances under which Steyn & Lyell were requested to pay the money over to De Jongh & Pienaar have not been set out. Under the circumstances, I would accept the version of Steyn Lyell, that the money was paid on the basis of misrepresentation.

[16] However, even if the money was paid with due authority of the applicants, it remained trust money in the Trust account of De Jongh & Pienaar, to the credit of the applicants. The same principle would apply, namely, De Jongh & Pienaar could only dispose of the money on instruction of the applicants. De Jongh & Pienaar could therefore not deal with the money without obtaining instructions from the applicants.

[17] Regard being had to the totality of the factors, I am of the view that the applicants have made out a case entitling them to the relief sought. As regards costs, both the applicants and the fourth respondent, who supported the applicants' case, have requested that costs should be ordered against the first, second and third respondent on an attorney and client scale. However, after careful and anxious consideration, I have decided not to exercise my discretion in that direction. Costs would be ordered on the normal scale.

[18] In conclusion, the involvement of De Jongh & Pienaar in this matter, the manner in which it obtained payment from Steyn Lyell, and the disposal of part thereof, concerned me a great deal. I have considered the matter and have decided to afford the said firm of attorneys, an opportunity, to provide me with reasons why I should not bring their conduct to the attention of the Law Society of the Northern Provinces.

[19] In the premises the order I make is the following:

19.1 That the first, second and third respondents, jointly and severally, the one paying the others to be absolved, are to pay the applicants in the amount of R192 000.00 plus interest thereof calculated at 15,5% per annum from 1 August 2007 to date of payment.

19.2 That the first, second and third respondents, jointly and severally, the one paying the others to be absolved, are to pay the costs of this application.

19.3 That the firm of attorneys De Jongh & Pienaar is directed to furnish this court with written submissions within 10 days of this order, why their conduct in this matter should not be brought to the attention of the Law Society of the Northern Provinces.

TM MAKGOKA

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

DATE HEARD ; 6 OCTOBER 2008

JUDGEMENT DELIVERED : 25 NOVEMBER 2008