

Case: Gerber N.O and Others v Maluleka and Others

(2023/078290) [2024] ZAGPJHC 1063
(21 October 2024)

By **Ondwela Masikhwa** (Candidate Attorney),
checked by **Thiavna Subroyen** (Associate),
and released by **Charissa Kok** (Partner)

15 April 2025

INTRODUCTION

The case of *Maluluka and Another v Gerber N.O and Others* (2023/078290) [2025] ZAGPJHC 100 deals with the question of whether payment to the transferring attorney constitutes payment to the sellers, which may further result in partial discharge of purchasers' obligation to pay the purchase price for the property to the sellers.

BACKGROUND

The appointed trustees of the Gerber Family Trust ("**the Applicants**") had entered into a written sale agreement with one Mr and Mrs Maluleka ("**the Respondents**") for purposes of purchasing a property situated in Meyersdal ("**the property**").

In the sale agreement, there were three specific terms which determined the process of payment by the Respondents for the purchase price of the property as follows:

1. The Respondents would purchase the property for R 3.5 million Rand;
2. A partial payment of R 2 million Rand ("**the deposit**") would be paid over to the conveyancer; and
3. The balance of the R 1.5 million Rand payment would be paid to the Applicants upon registration of the property in the Respondents' name, with a bank guarantee to be used as security.

The written sale agreement was also subject to a loan being granted to the Respondents within 10 (**ten**) working days from signature by the Purchasers of the agreement.

When the Respondents had attended to making payment of the deposit, it was brought to their attention that the appointed conveyancer did not hold a fidelity fund certificate. Furthermore, the conveyancer in question was the subject of an application to suspend them from practising as a legal practitioner.

It was also brought to the Respondents attention that the deposit could not be utilised as partial security for

the property's purchase price, as the conveyancer had appropriated the deposit money. Aggrieved by the conveyancer's conduct, the Respondents consequently laid a criminal complaint and lodged a claim with the Fidelity Fund for the payment arising out of the misappropriation of their deposit. These processes essentially disrupted the sale process. The Applicants were of the view that since the R 2 million Rand deposit was no longer available as security, the suspensive condition was not adhered to. The Applicants however afforded the Respondents a 7-month grace period to ensure that the deposit is made. The Respondents dissented to the Applicant's view and held that the deposit amount paid to the conveyancer is deemed to be the money paid to the Applicants. The Respondents failed to pay the deposit within the 7-month grace period and the Applicants subsequently approached the High Court with an eviction application.

EVICITION APPLICATION BEFORE THE SOUTH GAUTENG HIGH COURT

In the eviction application before the High Court of South Africa, Gauteng Division ("**the High Court**"), the Applicants averred that the Respondents were in unlawful occupation of the property as a result of the non-fulfillment of the suspensive condition (payments of deposit) in the written agreement of sale.

In its findings, the High Court relied on the case of *Baker v Probert*¹ to illustrate that if the conveyancer was appointed as an agent to receive the payment, then the payments to the conveyancer are considered, by proxy, as payment to the seller.

The High Court *in casu* held that the terms outlined in the written sale agreement did not provide any clear or implicit instruction for the conveyancer to accept the purchase price, or any portion of it, on behalf of the Applicants. The payment was meant to be held as security rather than as partial advance on the purchase price. For the payment to function as security, which was evidently its intended purpose, it would need to stay in the conveyancer's account until the transfer was registered to the Respondents.

Otherwise, the Applicants would have had the right to request that the amount be immediately paid to them. This was clearly not the case, as it would contravene the very principle of securing that amount instead of transferring it to the Applicants.

CONCLUSION

The High Court expressed that even though the sale agreement stated that the deposit be held in an interest-bearing account for the benefit of the purchaser, this arrangement did not entail that such funds would constitute a “deposit” to the Applicants. The High Court further stated that it was the Respondents who lodged a claim for payment for the misappropriated funds with the Fidelity Fund entailing that the Respondents were the parties who suffered a pecuniary loss as the result of theft of money.

In its concluding remarks, the High Court held that even if the suspensive condition was fulfilled, the agreement came to an end upon written notice of cancellation by the Applicants. Therefore, on that basis, the Respondents were in unlawful possession of the property. The court granted the relief of eviction sought by the Applicants and gave the Respondents a month to vacate the property.

On or about 9 January 2025, a leave to appeal application was granted in favor of the Applicants, who were the appellants in the application.² The Supreme court of appeal is yet to decide on the facts of this matter and as such this judgement is stayed in terms of section 18 of the Superior Court act.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.

¹*Baker v Probert* 1985(3) SA 429 (AD) at 438 G-H.

²*Gerber and Others v Malukeke and Others* (2023/078290) [2025] ZAGPJHC 9.



Charissa Kok
(Partner)



Thiavna Subroyen
(Associate)



Ondwela Masikhwa
(Candidate Attorney)