

SOUTH AFRICA / JUDGMENT

Anderson v Chimuchere and Others (20075/2022) [2023]

ZAGPJHC 713 (13 June 2023)

[2023] ZAGPJHC 713

COURT

South Gauteng High Court, Johannesburg

BEFORE

Smit AJ

CASE / FILE NUMBER

20075/2022

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case number:

20075/2022

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

In the matter between: ANDERSON, MICHAEL
STUART
Applicant
and
CHIMUCHERE, GIDEON
WILLIAM CHATAIKA
First Respondent
CHIMUCHERE, SILIVIA
Second Respondent
CITY OF
JOHANNESBURG
Third Respondent

JUDGMENT

SMIT AJ

INTRODUCTION

1. Mr Gideon and Ms Silvia Chimuchere reside on an agricultural holding in Chartwell, Johannesburg. Mr Anderson is the registered owner of the property. Mr Anderson applies for an order evicting Mr and Ms Chimuchere from the property.

Factual background

2. The matter has a long history. Mr Chimuchere and Mr Anderson entered into a written agreement of sale in relation to the property during June 2020 (first agreement). The purchase price was R4.75 million payable in instalments, with the full price to be paid by 31 January 2021. Transfer would only occur once the full purchase price was paid. Occupational rental in a monthly amount of R40,000.00 (payable monthly in advance) would be payable only if Mr Chimuchere failed to comply with payment of the purchase price.
3. Mr Chimuchere made several payments, but it is common cause that by 31 January 2021, R2.89 million remained outstanding. Mr Anderson proceeded to cancel the contract and applied for the eviction of the Chimucheres on 26 April 2021.
4. The first eviction application was not persisted with, and the parties entered into a further written agreement on 31 July 2021 (second agreement). The second agreement substituted Mr Chimuchere with Ms Chimuchere as the purchaser of the property. The parties further agreed that, as of 28 July 2021, the amount outstanding was the sum of R3,511,074.16 plus interest. This amount apparently included arrear occupational rental, electricity and amounts due to the municipality and for insurance.

5. Importantly, the second agreement provided, in relation to the outstanding amount, that “guarantees will be provided by the substituted Purchaser within 14 days of date of signature hereof.” The second agreement incorporated the other terms of the first agreement by reference.
6. It is common cause that, by 17 August 2021, no guarantees had been provided. On that day, Mr Anderson’s attorney directed a letter to the Chimucheres recording that no guarantees had been provided. The attorney further demanded, in terms of the breach clause of the first agreement, that this be rectified within 7 days of the date of the letter (17 August 2021), failing which she asserted that Mr Anderson would be entitled to cancel the agreement of sale without further notice.
7. On 19 August 2021, SA Home Loans (Pty) Ltd issued a letter to Ms Chimuchere which advised her that her home loan application had been approved. The letter attached a “letter of acceptance” recording a “total loan amount” of R2.5 million.
8. Ms Chimuchere’s answering affidavit states that this “bond offer” was sent to Mr Anderson’s transferring attorney within two days of having been received. I assume in favour of the Chimucheres that it was sent before 25 August 2021.
9. On that day, Mr Anderson’s attorney sent a further letter to the Chimucheres. The letter stated that she was still not in receipt of the necessary guarantees and that the Chimucheres have not rectified their breach asserted in the letter of 17 August 2021. The letter further stated that Mr Anderson cancelled the agreement.
10. There were further interactions and negotiations between the parties. They culminated on 9 June 2022 in Mr Anderson instituting this eviction application.

The parties’ contentions

11. Mr Anderson contends that he validly cancelled the sale on 25 August 2021 and that the Chimucheres are, accordingly, in unlawful occupation of the property.
12. Ms Chimuchere contends that the cancellation of the sale on 25 August 2021 was invalid. She contends that the communications from SA Home Loans constituted the guarantees required by the second agreement. Appreciating that the bond amount of R2.5 million specified in those communications did not cover the full outstanding amount of approximately R3.5 million, she contends as follows:

“The bond offer had a shortfall on the full purchase price, based on the deposit paid and the bond itself, which shortfall was agreed to be paid in cash at the time of transfer.”
13. Although Ms Chimuchere does not specify when, how or by whom this alleged agreement was reached, she states – in the course of dealing with further negotiations following the cancellation letter of 25 August 2021 – that:

“I then [apparently after 11 October 2021] informed the applicant that I already have a bond to cover the shortfall and the cash as well...”

14. In relation to whether an eviction would be just and equitable, Ms Chimuchere took a point in limine that Mr Anderson did not deal with factors bearing on this issue (other than the lawfulness or otherwise of her occupation). She also contends that it would not be just and equitable to make an eviction order, because she heads the household and she resides with her helper, her husband and their child on the property. It is common cause that the helper was previously employed by Mr Anderson.

Discussion

15. The main issues in dispute are: (a) whether Mr Anderson was required to deal, in his founding affidavit, with those factors pertaining to the Chimucheres which make it just and equitable (or not) to grant the order; (b) whether the Chimucheres are in unlawful occupation of the property; and (c) whether it is just and equitable to grant an eviction order. It is convenient first to deal with the question whether the Chimucheres are in unlawful occupation, and then with the remaining issues regarding the just and equitable enquiry.

The status of the Chimuchere's occupation of the property

16. As explained above, Ms Chimuchere contended that the sale was not validly cancelled, because the communications with SA Home Loans constituted compliance (within the seven-day period permitted to rectify a breach) with the requirement to furnish guarantees. She also contended that it was agreed that the shortfall would be made up with cash, payable on transfer. She therefore contends that the sale was not validly cancelled, because she had complied with her obligations under the agreements.
17. In my view, Ms Chimuchere did not comply with the obligation to furnish guarantees for the outstanding amount of approximately R3.5 million, either within the initial period of fourteen days (from 31 July 2021) or within the seven-day period afforded to rectify her breach (between 14 August and 24 August 2021).
18. In the first place, neither the letter from SA Home Loans, nor the attached letter of acceptance constituted a guarantee. The letter from SA Home Loans advised Ms Chimuchere that it “does not constitute the final and binding agreement in respect of your home loan”. The letter of acceptance contains a “note to attorney” which states that “Guarantee to be limited to R2500000.00.” (Emphasis added.) Both these features indicate that nothing was, as yet, guaranteed. Indeed, Ms Chimuchere's answering affidavit refers to these communications as a “bond offer”. An offer is not a guarantee.
19. In the second place, the bond offer did not cover the outstanding amount and fell short by more than R1 million. Ms Chimuchere contended that there was an agreement that the shortfall could be covered by cash. Her answering affidavit did not explain when such an agreement was reached, by whom or how. It did suggest, however, that there were

communications after 25 August 2021 about a potential cash payment to Mr Anderson, which would not avail – since the sale had been cancelled by that time. Even if there were an oral agreement before that date, it would not be enforceable, by virtue of section 2(1) of the Alienation of Land Act.[1]

20. In argument, Ms Chimuchere’s legal representatives contended that there was a tacit or implied agreement that, insofar as there was a shortfall in the bond offer, that could be made up in cash. But such a tacit or implied term directly contradicts the express terms of the second agreement, which requires guarantees – not cash.[2]
21. It is notable that Ms Chimuchere at no stage put up any evidence showing that she had cash available to make up the shortfall – either in answer to the letter of 17 August 2021, or before this court. Further, in later correspondence the Chimucheres had threatened to institute proceedings for specific performance of the agreements against Mr Anderson, on the basis that the cancellation was invalid and that he had repudiated the sale. There is nothing before this court indicating that this was done either. The facts are suggestive, rather, of purchasers with some means, but insufficient to meet the full purchase price.
22. At the hearing of this matter, the attorney appearing for the Chimucheres raised the further contention that the sale was in any event not validly cancelled, because the cancellation did not comply with section 19 of the Alienation of Land Act, 68 of 1981.[3] It was contended that, on the face of the letters dated 17 August 2021 and 25 August 2021, they were not sent to the Chimucheres by registered post; and that that the demand to rectify the breach within 7 days was inconsistent with the requirement in section 19(2)(b) that no less than 30 days should be allowed to rectify the breach.
23. Given that this contention was neither raised on the papers, nor in the parties’ heads of argument, the court requested the parties to file further submissions. The court is grateful for the further submissions it received from both parties.
24. The requirements for notice and demand in section 19 of the Alienation of Land Act relates only to a “contract” as defined in that Act. The definition states:

“*contract* –

(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;

(b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take;”
25. The first agreement was, unambiguously, not a deed of alienation under which land was sold against payment in more than two instalments over a period exceeding one year.[4] It contemplated full payment of the purchase price by 31 January 2021, less than a year from conclusion of the sale.

26. Could it be said that the second agreement, concluded on 31 July 2021 – which has to be read together with the first in order to make sense of the sale to Ms Chimuchere – created a “contract” (as defined the Alienation of Land Act)? In my view, it did not.
27. According to The Chambers Dictionary (12th Edition), an “instalment” is “one of a series of partial payments”. In a similar context, the High Court has found that “[a]n instalment is a portion of a debt, a sum of money divided into portions that are made payable at different times”. Accordingly, a further instalment is one where a further amount formed part of a series of payments agreed upon in the deed of

alienation.[5]

28. The second agreement did not add a further “instalment” which had to be paid outside of the one-year period. Instead, it provided that all mounts paid under the first agreement would be retained by the seller and appropriated towards the amount owing by Ms Chimuchere. The second agreement simply added a date by which payment of the arrears had to be guaranteed, without mentioning a further partial payment in a series of partial payments

to be made. The furnishing of such a guarantee is not, in my view, an “instalment” for purposes of the Alienation of Land Act.

- [1] “No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.” See Kovacs Investments 724 (Pty) Ltd v Marais 2009

- (6) SA 560 (SCA) para 22.

- [2] Transnet Ltd v Rubenstein 2006

- (1) SA 591 (SCA) para 19.

- [3] Section 19 reads, in relevant part, as follows:

“19 Limitation of right of seller to take action

- (1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled-
- (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other

penalty stipulation in the contract;

- (b) to terminate the contract; or

- (c) to institute an action for damages,

unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.

- (2) A notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain-
- (a) a description of the purchaser's alleged breach of contract;
 - (b) a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3),

shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered

post, as the case may be; and

- (c) an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.”

[4] Compare *Bubu v Kay* [2022] ZAGPJHC 779 (10 October 2022); 2022 JDR 2902 (GJ) para 19.

[5] *Warr and Another NNO v Clarke* 2003

(3) SA 551 (C) para 25.

[6] The PIE Act defines “unlawful occupier” as “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996”.

[7] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012

(6) SA 294 (SCA) paras 28-34.

[8] *Changing Tides supra* para 30.

[9] As to the relevance of the respondents' legal representation, see *Occupiers, Berea v De Wet* NO 2017

(5) SA 346 (CC) para 47.

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Prepared on 11 October 2026 · Esheria