

SOUTH AFRICA / JUDGMENT

Knoop N.O. and Others v Khumalo and Others (6174/2021P) [2023]

ZAKZPHC 12 (3 February 2023)

[2023] ZAKZPHC 12

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

P C Bezuidenhout

CASE / FILE NUMBER

6174/2021P

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****CASE NUMBER:** 6174/2021P

In the matter between: KURT ROBERT KNOOP
N.O.
FIRST APPLICANT
AMERASAN PILLAY
N.O.
SECOND APPLICANT
EBRAHIM AMEER
N.O.
THIRD APPLICANT
and
MUZI CYPRIAN
KHUMALO
FIRST RESPONDENT
THOBEKA NTOMBIFUTHI
KHUMALO

SECOND RESPONDENT
MHOLI MERVIYN
KHUMALO
THIRD RESPONDENT
eTHEKWINI
MUNICIPALITY
FOURTH RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

- [1] Applicants are the trustees of the insolvent estate of First and Second Respondents who had been married in community of property. First and Second Respondents estates were finally sequestrated on 4 July 2011. The primary asset in the estate was the property situated at [...] H [...] Road, Kloof, KwaZulu-Natal.
- [2] After the sequestration of their estates First and Second Respondent resigned as trustees of the Khumalo Family Trust. The Khumalo Family Trust of which Third Respondent is a trustee then entered into an agreement with Applicants during May 2012. In terms of the said agreement the property was purchased by the Trust for the sum of R 2 900 000.00 million which had to be paid by a non-refundable deposit of R 290 000.00 payable within 7 days of signature and the balance of the purchase price of R 2 610 000.00 was payable against registration of transfer. A bank guarantee for the amount had to be furnished to the transferring attorneys on or before 30 June 2012. The Trust had to pay occupational rent calculated at 1 per cent of the purchase price which amounted to R 29 000.00 per month. The various other terms of the agreement are not relevant to the issue which has to be decided. The agreement was effective from 19 June 2012. The deposit had to be paid therefore by 26 June 2012 which was not done. The bank guarantee for the balance of the purchase price was also not furnished by 30 June 2012.
- [3] Sporadic payments were made by The Khumalo Trust but was not in accordance with the agreement. According to Applicants payments were made of R 30 000.00, R 50 000.00 and R 20 000.00 during 2012 and was the total of the payments made. During 2013 payments were made by The Trust in the sum of R 379 000.00 which covered the occupational rental for 2013. A letter of breach was sent to The Trust. It was not cured the agreement was cancelled by notice dated 28 March 2014.
- [4] It is common cause that First and Second Respondent continued living in the said premises and are presently still residing therein. Applicants are seeking an order that First and Second Respondent be evicted from the said premises. This is based on the fact that the occupation by them is unlawful as The Trust which had purchased the property had not complied with the agreement which was then cancelled as set out above. Accordingly they have no further right to remain on the said property. It is further common cause that the

necessary notices in terms of PIE were served on Respondents.

- [5] It is contended by First Respondent that an amount of R 2 690 000.00 was paid between 2012 and July 2014. It is admitted that at the beginning of 2013 the R 290 00.00 had not been paid but only R 235 000.00. It is further contended that after 28 March 2014 when the notice of cancellation was received further payments totalling R 925 000.00 were paid.
- [6] Third Respondent contends that The Trust had to be joined as a Respondent. He also contends that payment in the sum of R 2 690 000.00 was paid between 19 June 2012 and July 2014. He further contends that The Trust has made improvements to the property in the sum of R 1 800 000.00 and accordingly has an improvement lien in respect thereof. He sets out various changes which have been made to the said property and it also attaches certain photographs. It is common cause that Third Respondent, although a trustee of The Khumalo Family Trust, does not reside on the said property.
- [7] It is also common cause or undisputed by Respondent that the deposit was not paid on time; that the guarantee was not provided for the balance of the purchase price and also that there is no allegation by Third Respondent that occupational rent was paid beyond the year 2014. The occupation is accordingly unlawful as the agreement of purchase and sale had been cancelled for the reasons set out above. The only issue which still has to be considered is the contention by

The Trust that they made improvements to the property to the value of R 1 800 000.00. It is however noteworthy that Third Respondent sets out various alterations, additions etc. that were made to the property but no further detail is provided as to when each of these were done, by whom they were done and the costing of each one and that no invoices etc. were attached to his affidavit. The contention that it is The Trust that occupies the property is not correct in that The Trust as a semi legal entity cannot occupy it but it is individuals which occupy the property. As the agreement with The Trust had been cancelled The Trust no longer has any lawful right to occupation of the said property but it is occupied by First and Second Respondent and their family and accordingly it is them that have to be evicted from the said property.

- [8] It was submitted on behalf of Respondents that even if the property was held mala fide it still had a right of retention. It was further submitted that there are disputes of facts and that it has to be referred for the hearing of oral evidence. It was the submission on behalf of Applicants that there are no material disputes of fact in that the agreement was cancelled due to non-compliance and that there is accordingly no need for the matter to be referred for oral evidence and that it can be decided on the papers.
- [9] To rely on a lien a party must prove:
- (a) a lawful possession of the object,
 - (b) that the expenses were necessary for the salvation of the thing or useful for its improvements,

- (c) the actual expenses and the extent of enrichments of the plaintiff and
- (d) that there was no contractual arrangement between the two parties in respect of the expenses.

[10] As set out above besides mere allegations that certain improvements and changes had been made and that it cost a certain amount no proof of any expenditure thereon such as invoices etc. has been provided and accordingly it is merely unsubstantiated allegations that are made in respect of the improvements made. It is accordingly difficult due to the bold allegations of improvements without any detail as to who did the work, who the contractor was etc. to evaluate the evidence. There is also no building plans etc. provided for any of the improvements which include the construction of carports etc.

[11] Accordingly as set out above the purchase and sale agreement was validly cancelled due to non-compliance by Respondents and which is not disputed that no guarantee was ever obtained for the balance of the purchase price. Attempts were made for payments to be made in various other ways but was not accepted by Applicants and accordingly no such agreements came into existence. The only agreement was therefore the agreement which was entered into for the purchase of the property and which was not complied with and validly cancelled.

[12] Applicants have are therefore entitled to an order evicting First and Second Respondent from the said premises.

Order:

I accordingly grant an order as set out in the Draft Order attached hereto which is initialled and dated.

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DRAFT ORDER

It is hereby ordered that:

1. The first and second respondents and any or all persons occupying by, through or under them are hereby ordered to vacate the immovable property bearing the physical address [...] H [...] Road, Kloof, KwaZulu Natal ("the property"), within 30 days of the granting of this order.
2. The first and second respondents are directed to deliver to the applicants' nominated representative or agent all keys and access remotes to the property upon vacating the property.

3. In the event of the first and second respondents and any persons occupying by, through or under them failing to comply with the orders set out in paragraphs 1 and 2 above, the Sheriff of the Court be and is hereby authorised and directed forthwith to eject the first and second respondents and any persons occupying by, through or under them from the property and to hand vacant possession thereof to the applicants, and to deliver all keys and access remotes in respect of the property to the applicants' or their nominated representative or agent.
4. The first and second respondents are directed to pay the costs of the application.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON:

31 JANUARY 2023

JUDGMENT HANDED DOWN ON:

3 FEBRUARY 2023

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COUNSELF FOR THE 1ST, 2ND & 3RD

RESPONDENTS:

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