

SOUTH AFRICA / JUDGMENT

Mohamed v Moosa and Others (44567/2021) [2025] ZAGPPHC 681 (2 July 2025) [2025] ZAGPPHC 681

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlamohlaka

CASE / FILE NUMBER

44567/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 44567/2021

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED: YES

02/07/2025

In the matter between: MOHAMED JAVED
 GANI
 APPLICANT
 and
 GH
 MOOSA
 FIRST RESPONDENT
 Z
 MOOSA
 SECOND RESPONDENT
 ALL OTHER
 OCCUPIERS
 THIRD RESPONDENT
 THE CITY OF TSHWANE
 METROPOLITAN
 FOURTH RESPONDENT
 MUNICIPALITY

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JUDGMENT

Phahlamohlaka AJ

Introduction

- [1] This is an application for the eviction of first and respondents and all other occupiers who are in occupation of Erf 2[...], Eldoraigue Extension 35, City of Tshwane, Registration Division JR, held under title deed T[...], situated at number 1[...] J[...] N[...], E[...] G[...], E[...], Gauteng Province.
- [2] The application is opposed by the first and second respondents (“the respondents”), who filed a counter application. In the counter application the respondents are seeking an order the following terms:

2.1 Interdicting the applicant from disposing of, selling, ceding or encumbering the property situated at Erf 3[...], E[...] Extension 35, City of Tshwane Metropolitan Municipality, Registration Division J.R., held under Title Deed number T[...], situated at number 1[...] J[...] N[...], E[...] G[...], E[...], Gauteng Province, pending the finalization

of the action that will be instituted by the respondents for specific performance;

2.2 Alternatively, acknowledgement and fair accounting of the payments made to date are provided, a fair and reasonable price is set, and that the respondents are afforded a right to 1st refusal to purchase the property;

2.3 Costs.

2.4 Further and/or alternative relief.

Factual background

[3] During November 2012, the applicant and the respondents proposed an installment sale agreement in terms whereof the respondents would purchase the applicant's property.

[4] The following factors are important to take note:

4.1 A written agreement was proposed, drafted, and provided to the respondents, who signed it;

4.2 The applicant never signed the agreement;

4.3 The agreement was never recorded by the Registrar of Deeds in terms of the provisions of the Alienation of Land Act, 68 of 1981 ("the Act"); and

4.4 The purchase price was not paid in the required 60-month period in terms of the Act.

[5] The applicant, therefore, contends that in terms of the Act, the agreement is void ab initio.

The Applicant's case

[6] The applicant contends that, in August 2021, the applicant's attorney of record addressed a letter to the respondents in which they were informed that the agreement is void, cancelled, and that the tenancy is unlawful. Furthermore, the respondents were informed that all the proceeds that have been paid by them to the applicant will be held in trust pending the finalization of the action proceedings.

[7] As a consequence, the applicant contends that the respondents have been in unlawful occupation of the immovable property since September 2021. This is so, according to the applicant, because the respondents were indebted to the applicant in the amount of approximately R475 500.00 in November 2017 and have made little to no payments since then whilst remaining in unlawful occupation of the property.

The respondents' case

[8] The respondents contend that the parties were introduced to each other in 2012. A written agreement of the sale of the property was drafted on the applicant's instance, which the respondents signed. The respondents took occupation in December 2012. On the applicant's own version, as expressed to the respondents, the agreement was signed by him. The applicant collected payments of R 750,000.00 and R 150,000.00, and thereafter several installments by the respondents under the agreement.

- [9] The respondents have instituted an application to have that agreement of sale declared valid under case number 2023- 107954, in the same court. The application is still pending. The respondents have also brought a counter application for interdictory relief, pending the decision as to whether the agreement should be enforced.
- [10] The respondents, therefore, contend that they have highlighted a dispute of fact, yet the applicant has chosen to proceed on motion. The respondents further submitted that the application should be dealt with in terms of the trite principles laid down in the matter of *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*[1] (“the Plascon-Evans rule”), by considering whether the applicant would be entitled to the relief claimed on the facts stated by the respondents, read with the admitted facts in the applicant's affidavit.

Issues for determination.

- [11] The issues to be determined are whether the respondents are, in fact, unlawfully occupying the applicant's property and whether the respondents have raised a dispute of fact. Further, the court has to determine whether the respondents have made a case for the interdictory relief.

The legal position

- [12] Section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (“PIE Act”) provides that notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or a person in charge of land for the eviction of an unlawful occupier.
- [13] Subsection 1(xi) of the PIE Act defines an 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 (Act No. 31 of 1996).
- [14] In the case of the *Plascon-Evans* case (*supra*), Corbett JA said it is correct that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts are averred in the applicant's

affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of the fact alleged by the applicant may not be such as to raise a real, genuine, or bona fide dispute of fact.

Discussion

[15] It is common cause that the applicant is the owner of the property in question. It is further common cause that the applicant and the respondents proposed an agreement of sale in November 2012, and pursuant thereto, the respondents took occupation of the property. It is further common cause that as a result of the agreement, the respondents paid a large sum of money to the applicant

in honour of the agreement to purchase the property in question. The respondents, however, could not keep up with payments, and the agreed purchase price was not paid in full as per the agreement between the applicant and the respondents.

[16] The applicant does not dispute being paid money, although the amount is in dispute. In the replying affidavit, the applicant makes the following concessions:

16.1 That an agreement was used for the applicant to sell the property to Moosa and the second respondent;

16.2 That the agreement was drafted by the applicant's attorneys of record and provided to the first and the second respondent (my emphasis);

16.3 The agreement was returned to the applicant's attorneys of record after the respondents signed the agreement. The agreement was not signed by the applicant;

16.4 The agreement makes provision for, amongst others, payment of installments which exceeded the allowable period stipulated in the Alienation of Land Act, 68 of 1981 ("the Act"), and for a period within which the property had to be registered in the name of the respondents;

16.5 The agreement was not recorded in accordance with the provisions of the act; and

16.6 The respondents have made several installments towards the applicant.

[17] Although the applicant concedes that several payments were made towards him, the applicant contends that through a letter from his attorneys of record, the right afforded to the respondents to occupy the property was cancelled. The applicant does not make it clear what the payments made to him by the respondents were meant for, but argued that the agreement never came into being, and therefore, it is void ab initio.

[18] This court cannot ignore the fact that the respondents have approached the court to seek an order declaring the agreement valid. The applicant has not disputed this, although the application was instituted after the current application. However, the respondents filed a counter application in which they indicated that they would apply for the agreement to be declared valid.

[19] The Constitutional Court in *Botha and Another v Rich N.O and Others*[2] had to determine whether the respondents were obliged, in terms of section 27 (1) of the Alienation of Land Act, to register the transfer of the property in the name of the first applicant after more than half of the purchase price of the immovable property had been paid. The Constitutional Court in *Botha's* case held[3]:

“...granting cancellation- and therefore, in this case, forfeiture- in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach. In their application for cancellation the Trustees did not properly address the disproportionate burden their claim for relief would have on Mis. Botha. They took the view that the question of forfeiture and restitution was independent of, and logically anterior to, the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The Trustees’ stance therefore meant that they could not justify this Court’s awarding the relief they sought. In view of the above the cancellation application must fail.”

[20] The relevance of Botha’s judgment to the current proceedings is that the respondents in this case have paid more than half of the purchase price. After having done so, the applicant seeks to cancel the agreement, which the applicant avers is void ab initio.

By seeking to cancel the agreement, in my view, the applicant concedes that at least the agreement existed, hence the need for it to be cancelled.

Dispute of fact

[21] In the replaying affidavit[4] the applicant denies that an initial amount of R750,000.00 was paid by the respondents around 2012, contending that he does not have the records of the amount. The applicant further contends that the respondents provide no documentary proof that the said amount was, in fact, paid. In the same breath, the applicant concedes that the respondents were indeed given occupation of the property during December 2012.

[22] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[5], Heher JA said the following:

‘A real, genuine and bona fide the dispute of fact exists only where the court is satisfied that the party who purports to raise the dispute has in his affidavit

seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. If the facts alleged are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will genuinely have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial against a real attempt to grapple with all relevant factual allegations made by the other party.”

- [23] The applicant does not offer the circumstances under which occupation was given to the respondents. The applicant does not even attempt to give clarity in respect of why the respondents have been in occupation of the property since 2012 to date. In my view, the applicant has not succeeded in making out a case that the respondents are in unlawful occupation of the property or that they are illegal occupants of the property.
- [24] Considering the applicant's founding affidavit, as well as the facts not disputed in the respondents' answering affidavit, a dispute of fact has been raised. This matter cannot, therefore, be finalized on paper, without evidence being led.

Were the respondents in unlawful occupation of the property?

- [25] It is a well-established principle of our law that the applicant in motion proceedings must make out his case in the papers. There is a serious dispute regarding the respondents' occupation of the property. The applicant is not candid in the founding affidavit in respect of how the respondents came to be in occupation of the property. The facts regarding the circumstances under which the respondents came to be in occupation of the property are revealed by the respondents in their answering affidavit.
- [26] Those facts on how the respondents occupied the property were either admitted or not disputed by the applicant. It is my considered view, therefore, that the issue of whether the respondents are illegal occupants of the property is in dispute, and thus a dispute of fact arises in this regard.

Counterclaim

- [27] As alluded to earlier, the respondents seek an interdict, pending the determination of their entitlement to transfer, preserving their occupation of the property until the issue of their entitlement to transfer of the property has been determined.
- [28] The counter claim is premised on the impugned agreement between the applicant and the respondents. The applicant submitted that fair accounting would require substantial evidence, which cannot be decided upon application. I agree with the applicant on this aspect that substantial evidence is needed in this regard.
- [29] I have already found that the respondents have demonstrated the existence of a dispute of fact. I do not think it would be proper for this court to preclude the applicant from exercising his rights to approach the courts for any relief relating to this dispute. Should the applicant try to evict the respondents through unlawful means, the respondent will not be without a remedy. I am, therefore, not satisfied that the respondents have made a case for interdictory relief.

Conclusion

[30] Having found that a dispute of facts has been established, it is a well-established principle of our law that the court has the discretion to decide whether to allow a referral for oral evidence. The Court will therefore dismiss the application if the applicant should have realized when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.

[31] In these proceedings, the respondents raised genuine disputes in their answering papers, which were confirmed by the applicant, but the applicant insisted on proceeding with the application.

[32] In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[6], the Court held that where a dispute of fact is shown to exist, however, the Court has discretion as to the future course of the

proceedings. If the dispute of fact cannot properly be determined by viva voce evidence under rule 9, the parties may be sent to trial in the ordinary way (either on the affidavits as constituting the pleadings, or else with a discretion that pleadings be filed); otherwise, the application may be dismissed with costs, particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop.

[33] The applicant, among others, contradicted itself regarding the payments he received from the respondents. Further, the applicant contends that the agreement that the respondents rely on is void ab initio. Whether the agreement was validly entered into or not cannot be determined from the papers.

[34] Having found that a dispute of fact exists, it is now incumbent upon the Court to decide on the future course of the proceedings. The applicant has persisted with the order for eviction whilst the respondents have submitted that the application be dismissed, alternatively that the matter be postponed sine die for the determination of the application for the enforceability of the agreement.

[35] Rule 6(5)(g) of the Uniform Rules of Court provides as follows:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to a trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[36] It is my considered view that the applicant in these proceedings ought to have realized that a serious dispute of facts was bound to develop, especially considering the fact that the respondent took occupation of the property pursuant to the impugned agreement with the applicant.

Costs

[37] I cannot find any reason why costs should not follow the result.

Order

[38] In the result, I make the following order:

- (a) The application is dismissed with costs, to be taxed on Scale B
- (b) The counter application is dismissed with costs, to be taxed on Scale B

KF PHAHLAMOHLAKA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

[1] (53/84)

[1984] ZASCA 51; [1984] 2 ALL SA 366(A)

[2] CCT 89/13) [2014] ZASCA 11; 2014(4) SA 124(CC); 2014 (7) BCLR (CC) (17 April 2014)

[3] On para 51

[4] Caseline 008-8

[5] (2008)

(3) SA 371

[6] 1949(3) SA 1155(T)

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