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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	<u>REPORTABLE: YES</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: YES</u>
.....	
DATE	SIGNATURE

CASE NO: 40769/14

In the matter between:

FRANJERON (PTY) LTD

Applicant

And

INCREDIBLE HAPPENINGS

First Respondent

**THE OTHER OCCUPIERS OF ERVEN 7...., 7..., 7....,
Respondent
7..., 7..., 7... AND 7.... JUNCTION HILL EXTENSION
7 TOWNSHIP, REGISTRATION DIVISION I.R HELD
UNDER DEED OF TRANSFER NO. T6.....;
DESCRIBED AS: GINSTRIN PLACE, JUNCTION HILL,
GERMISTON**

Second

Summary:

Application for eviction – Commercial premises – Respondent alleging it is owner of shares in Applicant by virtue of sale of shares agreement – Sale of shares agreement providing that “closing date” would be third business day after final date for

repayment – Full purchase price not yet paid – Respondent not relying on lease/sub-lease for possession – Applicant alleging that closing date depended upon full payment – Interpretation of agreement – Respondent alleging Applicant failed to prove ownership – Respondent conceding in related proceedings that Applicant is owner

J U D G M E N T

WEINER J:

[1] The applicant applies for an order against the first and second respondents evicting them from erven 7....., 7....., 7...., 7....., 7....., 7..... and 7..... J..... H....., Extension 7 Township held under Deed of Transfer No T6..... described as D..... P....., Junction Hill, Germiston (the premises) within 21 days alternatively within such other period as stipulated by the court.

[2] The applicant also seeks that if the respondents fail to vacate the premises that the Sheriff be authorised to enter upon the premises to evict the respondents and all those who occupy the premises under and by virtue of their occupancy.

Background

[3] Various religious ministries conduct their business from the premises. They are all associated with the first respondent and conduct their business from the premises through the first respondent.

[4] The applicant contends that the first and second respondents are in unlawful occupation of the premises. The premises are not utilised for residential purposes and accordingly, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 as amended (the PIE Act) are not applicable.

[5] The premises were originally leased to the applicant by Metcash Trading Ltd (Metcash) on 16 October 1993. The lease terminated on 30 November 2013.

[6] During or about 2012, the first respondent concluded a sale of shares agreement with the shareholders of the applicant. The first respondent was at all material times represented by one Motsoeneng (Motsoeneng).

[7] In terms of the sale of shares agreement:-

7.1 The shareholders identified as Eric Grusd, Francis Grusd, Rhona Steinfeld and the Franjeron Trust agreed to sell and cede to the first respondent their respective shares and loan accounts in the applicant;

7.2 There were certain suspensive conditions one of which was that the first respondent conclude a sublease in terms of the premises with Metcash;

7.3 The purchase price payable by the first respondent for the shares and loan accounts was R14 million which was payable in amounts as stipulated in clauses 6 and 7 of the sale of shares agreement;

7.4 the balance of the purchase price due from time to time would bear interest at 16% per annum.

[8] The closing date was defined in the sale of shares agreement as meaning:-

“The third business day after the earlier of:

1.2.4.1 the last day set for payment in the repayment schedule attached as annexure 2 or

1.2.4.2 the date on which the outstanding balance of the purchase price is paid in full (including any interest that would have accrued on it) in terms of clause 7.5.”

[9] On the closing date, the sellers were obliged to hand to the first respondent the duly completed signed share transfer forms made out in favour of the first respondent and a written and signed cession of the loan accounts.

The Metcash Litigation

[10] The first respondent apparently concluded two sublease agreements with Metcash the first being replaced by the second in and during September

2012. There are legal proceedings between Metcash and the first respondent. Metcash launched an application in September 2013 for the eviction of the first respondent on the grounds that it had breached the terms of the second sublease agreement. The matter has been referred to trial.

Application of PIE

[11] The respondents raise certain points *in limine* one of which is that the PIE Act should have been applied. However, the Act does not apply to the eviction of juristic persons. The respondents attempt to show that the property was no longer used for commercial purposes. There was a bed and stove present on the premises and people who might have been staying there as security guards. However, this does not render the property the primary residence of anyone more particularly not the primary residence of the first respondent which is a juristic entity to which the PIE Act does not apply. In the Metcash application the respondents did not dispute Metcash's allegation that the respondents used the property for purposes of a church and that it was never used as living quarters for anyone.

Non Joinder

[12] The respondents contend in their second point *in limine* that the shareholders of the applicant should have been joined to the proceedings because the first respondent has a counterclaim against the shareholders. The test to determine whether it is necessary to join parties to proceedings is

whether they have a direct and substantial interest in the subject-matter of the action, that is a legal interest which may be affected prejudicially by the judgment of the court. See *BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at 241H-I.

[13] The applicant is the owner of the premises. The shareholders do not have any direct and substantial interest in the subject-matter of this action. In any event the shareholders were provided with a copy of the application and declared that they had no direct and substantial interest in the application and waived their right to be joined as parties. They recorded that they would abide by the decision of the court.

[14] Accordingly both points *in limine* must fail.

Defences

Ownership

[15] In the proceedings before me, the basis of the defence of the respondents is that the applicant has not specifically alleged that it is the owner of the premises and is thus not entitled to an eviction order. Nowhere in the answering affidavit in these proceedings do the respondents challenge that the applicant is the owner of the premises. In his answering affidavit in the Metcah litigation, Motsoeneng referred to the applicant herein as the owner of the premises. The applicant points to this admission and contends that it therefore did not deal with the issue of ownership in any detail, as, in its view, it was common cause and not an issue in dispute. In fact, the main

defence relied upon by the respondents is that the first respondent acquired all the shares in the applicant and is thus the owner of the premises.

Sublease

[16] The first respondent denies that it concluded a sublease with Metcash despite the admission that it did so when faced with the allegation in the founding affidavit. It relies on this denial while stating, in its answering affidavit, that the rental payments it made would be partly allocated to its obligations under the sublease and in reduction of the purchase price paid for the property under the sale of shares agreement. It further states that it was during the existence of the sublease that payments were to be made as agreed between the parties.

[17] The sublease with Metcash is not material in the present proceedings as the respondents do not rely for their right to occupation of the premises on any right that flowed from the sublease agreement. In any event such sublease agreement had terminated through the effluxion of time.

Sale of shares Agreement

[18] The nub of the respondents' defence is that the first respondent on 3 March 2013 became the owner of the shares in the applicant, the company that owned the property. The applicant sought to cancel the sale of shares agreement when the first respondent breached same by failing to make the requisite payments. The first respondent contends that the sale of shares agreement could not be cancelled as "*closing had by then already taken place*".

[19] It thus appears that the sole basis upon which the respondents contend that they are entitled to remain in occupation of the premises is that the sale of shares agreement closed and the first respondent accordingly owns the shares in the applicant and in so doing owns the premises. The respondents base their submission that closing took place on the provisions in the agreement that closing would take place after the earlier of the two events described above. The first respondent contends that closing took place in terms of the first event because the last date set for payment in the repayment schedule was 28 February 2013. The applicant contends that the reading of this clause cannot be as submitted by the first respondent. It is common cause that the first respondent did not make payment in accordance with the repayment schedule. It is common cause that the first respondent had not paid the full purchase price by the 28 February 2013.

[20] The applicant contends that the closing date of the sale of shares agreement implied that the first respondent had, by that date, complied with its obligations under the sale of shares agreement and had made payment of the purchase price in full.

[21] The ambiguity according to the applicant is that the second of the dates referred to in clause 1.2.4 of the agreement refers to the balance of the purchase price becoming payable in full as a result of a breach. Accordingly the applicant contends that, in order to have business efficacy, the first date referred to (being the last date for payment in terms of the repayment

schedule) must imply that the repayment schedule was adhered to. Therefore the date referred to in the repayment schedule could only be the closing date if the purchase price had been paid in accordance with such schedule. In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) Wallis JA dealt with the approach in interpreting written agreements. He stated at para [8]:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...”

[22] At para [26] Wallis JA held further:

“In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”

[23] The applicant contends that the sale of shares agreement must be viewed purposively in the manner proposed by Wallis JA. Accordingly the terms of the agreement do not contemplate the closing date arising prior to the payment of the purchase price. This seems to be the correct approach. It is an approach which makes business sense. If one takes the literal meaning of the words “the last date set for payment in the repayment schedule” it would lead to *“insensible or unbusinesslike results”* if that were to be the closing date. One only has to imagine that the respondents made no payments and then claimed that the closing date was on 28 February 2013 because it was the date set out in the repayment schedule. The respondents’ argument that the agreement provides in clear language for two possibilities for the date of closing cannot be accepted. The interpretation that the respondent relies upon would be unbusinesslike and would not make commercial sense.

[24] In the unlikely event that the respondents’ interpretation should be acceptable and that it is now the owner of the shares, this does not provide a defence for the respondents to remain in occupation of the premises. Simply being owner of the shares does not entitle the first respondent to occupation and the first respondent has denied that it is there in terms of any lease or sublease. It therefore raises no legitimate defence to the claim for eviction.

[25] In light of the decision to which I have come in regard to the closing date, it is my view that the shares have not been transferred to the first respondent and accordingly the applicant, as owner of the property, is entitled

to seek the eviction of the respondents. Accordingly an order will be made in the following terms:

25.1. First and Second Respondents and all those who occupy the Premises under and by virtue of the First and Second Respondents (" the respondents") are ordered to vacate Erven 7.....,7.....,7.....,7.....,7.....,7.... and 7..... J..... H..... Extension 7 Township, Registration Division I.R held under deed of transfer no. T6....., described as: G..... P....., J..... H....., G..... ("the Premises") by 30 August 2015.

25.2. In the event that the Respondents fail or refuse to vacate the premises by 30 August, 2015, the Sheriff for the district of Germiston is ordered to enter the premises and evict the Respondents.

25.3. The costs of this application are to be paid by the Respondents jointly and severally, the one paying the other to be absolved.

WEINER J

Appearances

For the Applicant:	P Cirone
Instructed by:	Werksmans Attorneys
For the Respondents:	J Broodryk of BMH Incorporated Attorneys
Date of Hearing:	18 June 2015
Date of Judgment:	13 August 2015