IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D4121/2020

In the matter between:

AVISHA SINGH **APPLICANT**

and

VISHAL SURRENDRA MAHARAJ **FIRST RESPONDENT**

ETHEKWINI MUNICIPALITY **SECOND RESPONDENT**

ORDER

(a) The first respondent and all persons occupying under his authority, be and are hereby ordered to vacate the property situated at Unit […], […], […], […], Umhlanga, Durban by not later than 31 October 2021, and to deliver the keys to the premises to the applicant or her appointed agent;

(b) That in the event of the first respondent and all persons occupying under his authority failing to comply with the order in paragraph (a) above, the Sheriff is hereby authorised and directed to eject the first respondent and all those occupying under his authority from the property and to take all steps as may be necessary to give effect to the order in paragraph (a); and

(c) The first respondent is directed to pay the costs of this application.

JUDGMENT

CHETTY J

[1] This is an application for the eviction of the first respondent and his family from their primary residence, being a property of which the applicant is the registered owner. The second respondent takes no part in these proceedings and is cited as a formality in terms of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Where reference is made to the 'respondent' in this judgment, such reference for convenience is intended to refer solely to the first respondent.

[2] It is not in dispute that the applicant concluded a purchase and sale agreement on 2 July 2018 with the respondent in terms of which the applicant agreed to pay the sum of R2,5 million as a purchase price for the property, the amount being payable on registration of transfer. The agreement further provided that vacant possession and occupation would be given by the respondent to the applicant on the occupation date, which, on the most generous interpretation of the agreement would be on the date of registration of transfer. The registration of transfer was concluded on 21 January 2019. It bears noting that on the same date a print out of the respondent's home loan account with Standard Bank reflects an electronic funds transfer (EFT) into the account in an amount in excess of R2,3 million. This would be consistent with the terms of the written agreement of sale of the immovable property concluded by the parties.

[3] Notwithstanding the transfer of the property having taken place on 21 January 2019, the respondent continues to remain in occupation of the premises, without any authority or agreement with the applicant and without paying anything towards the occupation of the premises or any of the utilities relating to the property.

[4] On 29 July 2019, the applicant engaged the services of an attorney who addressed a letter to the respondent demanding that the latter vacant the immovable property by 31 August 2019. It is evident from the notice that subsequent to transfer taking place, the respondent attempted to repurchase the property from the applicant.

Those negotiations broke down as the parties appear to have been unable to reach an agreement on the price. The applicant recorded that she no longer wished to sell the property to the respondent.

[5] The applicant contends that she meets all of the requirements in terms of PIE to seek the eviction of the respondent as she is the registered and lawful owner of the property. The respondent, it is contended, occupies the property unlawfully without any agreement or the consent of the applicant. Despite demand, he refuses to vacate. As a result, the applicant was obliged to institute proceedings for his eviction and all those who occupy by or through him.

[6] Mr *Khan* SC, who appeared on behalf of the respondent, conceded at the outset that it was not in dispute that the applicant is the registered owner of the property. The respondent's contention is that the agreement of sale through which the applicant acquired ownership, was a fictitious agreement. It is contended that in reality the conveyancing attorney acting on behalf of the applicant, Mr Sahadaw, together with the applicant's husband, Mr Singh, loaned an amount of approximately R5 million to the respondent. In exchange, the respondent was compelled to put up his immovable property as security for the loan. The respondent agreed to the sale and transfer of the property into the name of the applicant, whom it is alleged was merely a nominee for her husband and Sahadaw.

[7] According to the respondent, an agreement was concluded with the applicant, her husband and her attorney that the property would be repurchased by the respondent when his financial predicament improved. As there was no breach of the loan agreement between the parties, the respondent contends that any application for his ejectment is premature. I should point out that there is nothing on record to indicate the further terms of the loan, the date or the manner in which it was advanced to the respondent and any proof of the amount of R5 million being paid to him. As stated earlier, the only reference to a transaction commensurate with the written agreement between the parties is that for the amount of approximately R2,3 million paid on registration of transfer.

[8] The second leg of opposition is that there exists a dispute of fact on the papers, necessitating that the mater be referred to oral evidence. Lastly, and closely aligned to the first ground of opposition, it is contended that the contract for the purposed sale of the property constitutes an illegal contract as it was essentially a fiction, masquerading the true nature of the loan agreement between the parties. Relying on the principle *ex turpi causa non oritur actio* it is contended that the contract is unenforceable and consequently the relief of eviction which the applicant is seeking, is tainted by the illegality of the sale agreement.

[9] In his answering affidavit, the respondent asserts that the applicant is not 'the true owner of the property' and proceeded to explain in some detail how the property came to be registered in her name. The respondent is a clinical technologist having, on his version, achieved significant success in the field of his expertise, until falling ill and suffering from depression. This had a significant impact on his business operations and his finances, as a result of which he fell into difficulties resulting in his bond account falling into arrears. In order to prevent the foreclosure on his bond, through his sister who is an attorney, he approached the applicant's attorney, Mr Sahadaw, to loan him an amount of approximately R5 million. At the time of the sale of the property, the respondent owed Standard Bank, the mortgagor, approximately R3,4 million. Pursuant to negotiations conducted by Mr Sahadaw, the bank agreed to accept a reduced offer of settlement on the outstanding amount of approximately R2,3 million. As referred to earlier, this approximates to the amount paid into the bond account of the respondent by the applicant on registration of transfer.

[10] The version of events set out by the respondent in his opposing affidavit is largely consistent with the version of the applicant, save for the allegations of a sham purchase and sale agreement having been concluded. It is not disputed that the respondent's sister was party to the negotiations leading to the sale and transfer of property. It seems to me highly unusual that the respondent would have entered into a sham sale agreement without any demur from his sister.

[11] The respondent further contends that after the registration of transfer into the name of the applicant, it was his intention to repurchase his property from the applicant.

This was largely dependent on the respondent being successful in the outcome of his litigation against Discovery Life following the rejection of his claim for loss of earnings subsequent to the onset of an illness. At best, the respondent believed that with the money he hoped to secure from the successful litigation, he would be able to repurchase his property, which he contends was valued at far more than the amount for which the applicant purchased it. There is nothing unusual or sinister in the applicant purchasing the property for less than its value as many prospective purchasers would be keen to snatch a bargain where an owner falls on hard times. In the context of the version set out by the respondent, while there is a written purchase and sale agreement of the property between he respondent to the applicant, there is no written agreement for the repurchase of the property by the respondent. His averments in this regard stands without any proof. In addition, the respondent does not deny payment into his bond account of approximately R2,3 million.

[12] The allegations of a sham agreement, involving the applicant, her husband and her attorney, is vehemently denied by the applicant. To the extent that the respondent relies on a fraud having been perpetrated, it is well established that where a party seeks to rely on fraud as its cause of action it must be properly pleaded and proved. In *Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 (W) at 220B, although the court considered the matter in the context of a summary judgement application, the court noted the following :

‘At the outset one has to observe that it is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up speculative propositions or to raise submissions or to advance arguments on probabilities which might indicate a fraud. What is essential is that there should be hard facts, as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment.’

[13] Where allegations of fraud are contained in affidavit form, these allegations are incapable of being properly assessed through the tool of cross-examination. As Harms DP noted in *National Director of Public Prosecutions v Zuma and others* 2009 (2) SA 277 (SCA) para 26:

'Motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

In addition, as the SCA pointed out in *Raubex Construction (Pty) Ltd v Bryte Insurance Company Limited* [2019] 2 All SA 322 (SCA) para 24:

'(F)raud will not be readily inferred; particularly where it is sought to be established in motion proceedings. A mere error, misunderstanding or oversight, however unreasonable, does not amount to fraud and it is insufficient merely to show that contentions are incorrect. A party has to go through and show that the representor advanced the contentions in bad faith, knowing them to be incorrect.'

[14] To the extent that that the respondent contends that there is a dispute of fact on the papers and that the matter should be referred to oral evidence, Mr *Naidu*, who appeared for the applicant, submitted that this was nothing more than a delaying tactic intended to further deprive the applicant of her right to the use and enjoyment of her property, of which she become the lawful owner in January 2019. Since then, the respondent has frustrated her attempts to obtain possession while living rent free in upmarket surroundings in a home valued at R5 million. In furtherance of his opposition, it was submitted by counsel that the respondent has resorted to making vexatious and defamatory allegations against the applicant's attorney. The approach to be adopted when factual disputes arise on the papers has been set out in *Wightman t/a JW Constructions v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) paras 12-13, where Heher JA remarked as follows.

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at634E – 635C…

[13] A real, genuine and bona fide dispute of fact can exist 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.'

[15] I am in agreement with the submissions by counsel for the applicant that the contentions raised by the respondent are nothing but an attempt to delay the finalization of this matter to the continuing prejudice of the applicant. As stated earlier, the respondent provides no 'hard facts' of the loan of R5 million supposedly advanced through a scheme conjured between Sahadaw and the applicant's husband. There is nothing before me of a binding, written agreement to repurchase the property or of any entitlement for him to remain on the property after transfer had taken place.

[16] Counsel for the respondent conceded that despite the respondent's contention that the sale agreement was factitious and a sham, a period of three years has elapsed since he signed the sale agreement and almost two and half years since the registration of the transfer of the property was passed. In all that time, the respondent has taken no steps towards setting aside either the sale agreement or the registration of transfer. It is also evident that while he alleges a factitious sale, he has made no attempt to tender return of the amount paid into his bond account together with an action to set aside the sale. Applying the principals from *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), the registration of transfer of the property into the name of the applicant accords her the status of lawful owner. That position remains legally effective and intact until properly set aside by a court. On that basis alone, the registration of the property into the name of the applicant remains unimpeached. The applicant, as the lawful owner, has the necessary locus to assert her right of possession in respect of the property and to demand the eviction of the respondent and anyone holding through him.

[17] Added to the above, the respondent has failed to take any steps to report the conduct of the applicant's attorney to the professional regulatory body over the latter's alleged unprofessional conduct in coercing the respondent to enter into a sham sale agreement. Mr *Khan* attributed the lack of action against the applicant's attorney to the close friendship that existed between the parties. I am not persuaded by this explanation, particularly as the applicant had set herself on course to evict the respondent as early as July 2019. Despite the passing of two years, the respondent has not taken any action against Mr Sahadaw. I am in agreement that these allegations

are nothing more than an attempt to muddy the waters and a distraction from the failure of the respondent to vacate the property.

[18] For all of the above reasons, I am satisfied that there is no genuine dispute of fact on the papers and that the purported defences put up by the respondent are nothing but an attempt at delaying the inevitable. In *Wormald NO and others v Kambule* 2006 (3) SA 562 (SCA) para 11, Maya AJA held that '[a]n owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract, or any legal basis'.

[19] I am accordingly satisfied that there is no merit in any of the defences raised by the respondent to the application for eviction and that the applicant has satisfied the onus of establishing that the respondent is an 'unlawful occupier' as defined in PIE. He occupies the property without the necessary express or tacit consent of the applicant.

[20] As the applicant's property is residential in nature with the respondent residing on it for a number of years, the provisions s 4(7) of PIE govern any eviction proceedings against the respondent. This sections provides that:

'If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including . . . whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'

[21] The Act therefore limits the right of an owner to vindicate her property in these circumstances. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA) para 25, Wallis JA held that the provisions of this section trigger a two-stage enquiry:

'A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant the order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries had been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.'

[22] In *Ndlovu v Ngcobo; Bekker and another v Jika* 2003 (1) SA 113 (SCA) para 19, the SCA in considering what constituted relevant circumstances, said the following:

'Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.'

[23] Mr *Naidu* submitted that the respondent is or was a successful businessman. There is nothing on the papers to suggest that he would be left homeless if he were to be evicted. His sister is an attorney, someone whom the respondent could turn to, to assist him in finding alternative accommodation. Although his medical practice has been liquidated and he has fallen on hard times, he is still pursuing a claim of approximately R100 million against Discovery Limited arising from the insurer's failure to pay out on a policy arising from the respondent's illness. Should he eventually succeed in his claim, he would have no difficulty in securing suitable accommodation. In any event, he has long een aware of the applicant's intention to seek his eviction and has had ample opportunity to find alternative accommodation.

[24] In accordance with the enquiry to be undertaken by the court in terms of ss 4(8) and (9) of PIE, Mr *Naidu* suggested that a date of 31 October 2021 would be sufficiently adequate to enable the applicant to find suitable, alternative accommodation. There was no suggestion from Mr *Khan* that this date was too soon or for some other reason it would not be considered to be just and equitable.

[25] Lastly, counsel for the respondent contended that there had been non-compliance with s 4(2) of PIE as the notice in terms of that section had been served less than 14 days before the hearing of the application. It is correct that the notice was served on the respondent’s attorneys one day less than the period prescribed in the Act. There is no prejudice to the respondent as he had already filed his opposing papers in the matter as far back as August 2020. I am satisfied that no prejudice or hardship has been occasioned to the respondent and such non-compliance is condoned.

[26] In the result I grant the following order:

(a) The first respondent and all persons occupying under his authority, be and are hereby ordered to vacate the property situated at Unit […], […], […], […], Umhlanga, Durban by not later than 31 October 2021, and to deliver the keys to the premises to the applicant or her appointed agent;

(b) That in the event of the first respondent and all persons occupying under his authority failing to comply with the order in paragraph (a) above, the Sheriff is d hereby authorise and directed to eject the first respondent and all those occupying under his authority from the property and to take all steps as may be necessary to give effect to the order in paragraph (a); and

(c) The first respondent is directed to pay the costs of this application.

M R Chetty

Appearances

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Date of delivery:	18 August 2021