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

Case Number: 006480/2023

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: YES/NO

DATE: 18 MARCH 2024

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

INTRAX INVESTMENTS 28 (PTY) LTD

First Respondent

ASTRON ENERGY(PTY) LTD

Second Respondent

JUDGMENT

MAKUME, J

- [1] In this matter the applicant seeks an order evicting the first respondent from occupation of a certain property described as “Portion [...] of Erf Number [...] E[...] in Extent [...] Square Meter (“the property”).

- [2] The applicant is the owner of the property. Despite demand the first respondent refuses to vacate the property and continues to trade thereon in the retail of fuel and filling station.
- [3] In its answering affidavit the first respondent says that it has been in undisturbed occupation of the property since 1991 and has thus, by the concept of acquisitive prescription, become entitled to ownership of the property.
- [4] In the further alternative, the first respondent argues that it has launched a review application in which it seeks an order reviewing the decision of the applicant not to proceed with its promise to sell the property to the first respondent.
- [5] In the view of the first respondent this eviction application should be stayed pending the finalisation of the review application.

Background Facts

- [6] It is necessary to set out a brief narrative of certain facts and circumstances that gave rise to this litigation which have a bearing on the question to be decided.
- [7] During or about 8 October 1991 the applicant's predecessor in title, the Daveyton City Council, entered into a Notarial Deed of Lease with the second respondent's predecessor in title, namely Caltex Oil of South Africa (Pty) Limited, in terms of which Caltex leased the property from the Daveyton City Council for purposes of establishing and operating a filling station.
- [8] The notarial lease was for a period of 20 (twenty) years and expired on 27 February 2012 from which expiry date Caltex occupied the property on a month to month basis.

- [9] On 23 March 2016 a letter was addressed by the applicant to Caltex Oil reminding them of the expiry of the lease and informing Caltex that the applicant was in the process of obtaining the necessary approval to invite tenders for a new lease. The rest of the letter reads as follows:

“We accept that you will also submit a tender to lease the property subject to the Council’s new conditions as prescribed in the tender documents. Should you not be the successful bidder you will be given proper notice to vacate the premises and to remove the equipment as stated in the expired lease agreement entered into with erstwhile City Council of Daveyton within two months (Sixty days) from the date of such notice provided that should you fail to remove the equipment in the period as stated above, the Council will remove the equipment at your costs. Should you, however, still be the fuel provider to the successful bidder the removal/non-removal of your equipment will be subject to the agreement between yourself and the successful bidder.”

- [10] On or about 20 September 2001, Caltex concluded a Franchise Agreement with the first respondent who traded as Etwatwa Service Station. In terms of the franchise agreement Intrax became a subtenant of Caltex on condition it conducted the business of retailing Caltex Oil products. That franchise agreement would last until the termination of the notarial lease between the applicant and Caltex.

- [11] During or about the year 2010, and at the time that the first respondent as subtenant and in franchise with Chevron made an unsolicited bid to the applicant to purchase the property. On 13 December 2010 the applicant’s corporate and legal services manager addressed a letter to Attorneys MB Mokoena who were at that stage the attorneys of record for Mr Mthimkulu and informed him that the property was not for sale. It needs be recorded that Mr Vusumuzi Mthimkulu is a director of Intrax as well as Etwatwa Service Station.

- [12] The notarial lease with Caltex having expired by effluxion of time, the applicant then set about inviting tenders from prospective tenants on 22 January 2018.

During that time the first respondent was still in occupation of the property on a month-to-month basis as sub-tenant of Caltex/Chevron/Astron Energy.

[13] The tender for a new lease which was awarded to Chevron/Caltex/Astron Energy was later withdrawn due to Caltex failing to conclude a new lease agreement. The applicant subsequently appointed Barvellen CC and addressed a letter to Chevron requesting them to vacate.

[14] On receipt of that letter, Messrs Wright Rose Innes Inc who represented Chevron addressed a letter to the applicant informing them that the first respondent was in occupation of the property despite there being no existing franchise agreement between their client and Intrax. The letter is marked "COE7" and is an annexure to the Founding Affidavit. Paragraphs 5 and 7 of the letter reads as follows:

"Our client has been in dispute with the current occupier Intratax Investments 28 (Pty) Limited who have been unlawfully occupying this site without any contractual arrangement with our client for a number of years. Our client understands that at present there is a lease agreement signed between an entity Barvellen Convenience Centre CC (Barvellen) and your client in respect of the site. Our client has informed us that it is presently conducting negotiations with Barvellen in order to secure occupation of the site as a sub-tenant conditional however upon Barvellen evicting the occupiers Intrax Investment (Pty) Limited who currently occupy the site unlawfully."

[15] The Company Barvallen had concluded a notarial lease with the applicant and brought an application to evict the first respondent which application was opposed by the first respondent who mounted as a defence that the applicant's decision to award the tender to Barvallen should be reviewed. The application served before Dippenaar J and a ruling was made postponing the eviction application *sine die* pending the outcome of the review application.

[16] The review application served before Matsemela AJ who on 24 June 2022 made the following order:

“16.1 The Municipality is compelled to make a decision on the applicant’s unsolicited bid and offer to purchase.

16.2 The decision by the Municipality to award the tender to the second respondent and to reject the bid of the applicant is hereby set aside.

16.3 The Municipality is ordered to begin the whole tender process de novo.

16.4 The first and second respondents are jointly and severally ordered to pay the costs of this application the one paying the other to be absolved.

[17] The ruling by Matsemela AJ resulted in Barvallen withdrawing their eviction application against the first respondent as they had by that time lost *locus standi*.

[18] On 31 August 2022 and in compliance with the above order, the applicant addressed a letter to the first respondent’s attorneys and attached a letter dated 13 December 2010 which was addressed to MB Mokoena Attorneys who acted for the first respondent at that time.

[19] The letter reiterated the contents of the decision already taken in 2010 to reject the first respondent’s unsolicited bid. What then remained from the order by Matsemela AJ was to re-open the tender bid to lease the property.

[20] The applicant maintains that at this stage it will be wise or equitable to first achieve the eviction of the first respondent before opening bids to tender for the lease of the property. It was on that basis that the applicant launched this application during January 2023.

[21] In its answering affidavit the first respondent maintains that there was an agreement or promise to sell or lease the property to it by the applicant as far

back as the year 2010. Secondly because the first respondent has been in occupation of the property since 1991 it has by law acquired that property as its own. It is on that basis that the first respondent argues that this application is premature and should await the outcome of the review application.

[22] It is common cause that shortly after the applicant had informed the first respondent that it now intends to proceed with the re-advertising of the tender in August 2022, the first respondent then brought the issue of the unsolicited bid to purchase the property. The applicant then informed the first respondent that a decision had long been taken in 2010 and the first respondent informed the applicant that it was not aware of such a decision.

[23] In November 2022, the first respondent launched the review application to set aside that 2010 decision and to ask the Court to declare that the first respondent had acquired ownership of the property through its long and uninterrupted occupation. The first respondent says that this eviction application should be stayed pending the outcome of that review application.

[24] It is perhaps proper at this stage to deal with the issue of the review application that is being mounted with the intention to stay this eviction application including interdicting the applicant from proceeding to invite tenders to lease the property.

[25] Firstly, the first respondent, in paragraph 10 to 12 of its answering affidavit, maintain that there was an agreement between it and the applicant that the property would be sold to the first respondent or a 99 year lease would have been granted to it. This allegation is not supported by any written document and in any event the first respondent fails to set out details of such an agreement namely when was it concluded and who on behalf of the applicant concluded such an agreement.

[26] In the present application for review and in the answering affidavit, the first respondent denies any knowledge that the applicant declined its unsolicited bid as far back as March 2010. This despite the fact that the letter of rejection was

sent to the first respondent's attorneys, Messrs MB Mokoena. The first respondent has not attached any affidavit from MB Mokoena to explain what happened or what they did when they received the letter rejecting the unsolicited bid.

[27] The letter from the applicant rejecting the unsolicited bid was dated 13 December 2010. On receipt of that letter MB Mokoena Attorneys responded as follows:

"3 March 2011

RE: APPLICATION TO PURCHASE PORTION [...] OF ERF [...] E[...] TOWNSHIP B[...] E[...]

We are in receipt of your letter dated 13 December 2010 the contents are noted."

[28] On receipt of the letter referred to above which clearly has reference to the issue of the unsolicited bid, the applicant responded on 28 March 2011. Then MB Mokoena replied on 14 April 2011 and said the following:

"Our client is a sub-tenant, and the property is leased to Caltex."

[29] In my view MB Mokoena Attorneys could not have been exchanging correspondence with the applicant on the issue of the purchase without having taken instructions from their client the first respondent. This Court is satisfied that despite its denial, the first respondent knew as far back as December 2010 or March 2011 that its unsolicited bid had been rejected. It is therefore in my view futile at this late stage, 12 years later, to ask this Court to review a decision taken in 2010.

[30] It is trite law that there is generally no prescribed time limit within which review proceedings must be brought save to say that same must be instituted within a reasonable time. Goldstein J in the matter of *Minisi v Chauke and Others*;

*Chauke v Provincial Secretary, Transvaal, and Others*¹ concluded on the issue of reasonable time in the following words:

“The counter application was brought on 18 August 1993. Counsel for the Provincial Secretary submits that the counter-application, which is essentially one of review, ought to be dismissed by reason of the delay of the Chaukes in bringing it. In support of this submission he cites *Wolgroeiërs Afslaers (EDMS) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41 D-E, where Miller JA said that it was desirable and of importance that finality in regard to judicial and administrative decisions or actions be reached within a reasonable time and that it could be adverse to the administration of justice and the public interest to allow such decision and actions to be set aside after expiry of an unreasonably long time.”

[31] In my view the prospects of success of the review application are non-existent. The review application is being used to delay the publication of a tender inviting prospective tenants to apply and comply with the order by Matsemela AJ. The mere fact that they waited until some 12 years later indicates that they accepted the decision taken by the applicant in December 2010 in rejecting the unsolicited bid. It is inconceivable that attorney MB Mokoena would not have informed their client about that decision.

[32] The application to stay the eviction proceedings also suffers the same fate. Whilst it is correct that the High Court has inherent jurisdiction to prevent abuse of process by staying proceedings in certain circumstances, such power will and should be exercised sparingly and only in exceptional cases. Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* (“*Fisheries Development Corp*”)² said that the grant of a stay of

¹ 1994 (4) SA 715 (T) at page 719 G-H.

² 1979 (3) SA 1331 (W) at page 1338 H.

proceedings is a matter of discretion and that is not something which can be decided as “a matter of law.”

[33] The Court in Fisheries Development Corp (Supra) held at page 1338 that:

“The proper course, when a stay is sought against litigation alleged to be vexatious, is to make a substantive application, supported by affidavits, giving the grounds upon which relief is sought. The affidavits can be answered by the affidavits from the other side, and the facts in that way fully placed on record. To claim this relief by way of a plea in bar is wholly irregular.”

[34] In this matter there is no separate application for a stay, it is set out in the first respondent’s answering affidavit. This, in my view, is irregular. If the first respondent had brought a stay application it would have had to be decided on first prior to dealing with the merits and if a case for a stay was made, it would not have been necessary to go into the merits of the eviction application.

[35] The order by Matsemela AJ did not direct that the eviction be stayed, all it did was to direct that the applicant proceed to advertise the tender and call for tenants to apply and this is exactly what the applicant wants to achieve by first evicting the first respondent who has no right of occupation. Reliance on acquisitive prescription is also misplaced and the prospects of success in the purported review are in my view non-existent.

[36] There is one other aspect in this matter, it is the filing of a supplementary answering affidavit which the first respondent filed without leave of the Court after having read the applicant’s replying affidavit. In my view, that supplementary affidavit takes the issues no further. It is noted that the applicant has responded to its contents in their supplementary heads. In my view, nothing turns on that affidavit.

[37] This is a commercial eviction based on ownership. For the first respondent to mount a successful defence against the application, it is incumbent on the first

respondent to establish a stronger independent right. This the first respondent has failed to do. The defences raised are spurious.

[38] The first such defence is the so-called agreement to purchase which was never supported by credible evidence. Besides there is no mention in the correspondence by the first respondent's attorneys of that agreement. It is something that suddenly springs up when the eviction application is launched.

[39] Secondly, it is the acquisitive prescription of ownership. Once more this has no basis in law. The first Respondent has always occupied the property as a sub-tenant in terms of a Franchise Agreement with the second respondent. That Franchise Agreement terminated in the year 2018 and the first respondent was informed and asked to vacate. It is accordingly not correct to say that the first respondent has occupied the property as if it was the owner thereof.

[40] In the absence of any credible proof that the applicant undertook to sell or lease on 99 years the property to the first respondent there can be no issue of estoppel. That defence also fails. The first respondent has failed to raise or mount a stronger right to remain on the property and should vacate same.

[41] What remains is when should the first respondent vacate the property. Two issues have relevance, the first is that the first respondent is conducting a business and needs time to make alternative arrangements. Secondly, Astron Energy, the second respondent, has also indicated that it needs to remove its tanks which are on the property. This will require that the tanks be emptied and then dug out of the premises unless a tenant is found. It must also be remembered that the first respondent also has a right to take part in the re-opened tender.

[42] In the result, judgement is hereby granted in favour of the applicant on the following terms:

Order

1. The first Respondent is hereby directed to vacate the property being Portion [...] of Erf Number [...] E[...] in Extent [...] square meter subject to what appears hereunder.
2. The applicant is called upon to, within 30 days from date hereof, advertise and call for prospective tenants in respect of the property described in (1) above.
3. The applicant must, within 30 days after such advertisement, adjudicate on such bid and announce the results publicly and individually to all tenderers.
4. Once a successful bidder is announced as ordered in (3) above, the first respondent shall then be granted 30 days to vacate if it is not the successful bidder.
5. The first respondent is ordered to pay the taxed party and party costs of this application.

Dated at Johannesburg on this 18 day of March 2024

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

Date of Hearing: 29 February 2024

Date of Judgment: 18 March 2024

For Applicant: Adv C Shongwe

Instructed By: Messrs Sikunyana Inc.

For Respondent: Adv Mhambi

Instructed By:

Messrs Makhuni Inc.