IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1855/2015

In the matter between:

DINGANE SIMON MSUTHU N.O. 1st Applicant

DINGANE SIMON MSUTHU 2nd Applicant

and

MOTLOUWA ELIAS VICTOR MATSHIDISO LEBEKO 1st Respondent

ANY OTHER OCCUPIER OF ERF […], T.,

DISTRICT WELKOM, FREE STATE PROVINCE 2nd Respondent

MATJHABENG LOCAL MUNICIPALITY 3rd Respondent

HEARD ON: 03 AUGUST 2017

JUDGEMENT BY: MATHEBULA, J

DELIVERED ON: 27 OCTOBER 2017

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[1] This is an application in which the applicants asks for an order that the contract entered into by the parties is void *ab initio* alternatively be declared validly and legally cancelled by the first applicant (the "deceased"). In the event that I make the determination in favour of the applicants on any or both of the relief sought, the first and second respondent(s) be declared illegal occupiers of Erf [...] M. S., Thabong, Welkom and liable to be evicted from the said premises.

[2] The factual background to this application is largely common cause between the parties. Sometime in 2006 Mahlapane Catherine Msuthu (deceased) acquired the aforementioned property which was subsequently registered in her name and held by Deed of Transfer TL 20139/2006. On 20 January 2010, the deceased and the second applicant married each other in community of property. It appears that on 13 December 2011, the deceased and the first respondent concluded a written contract for the sale of Erf [...] M. S., Thabong, Welkom.

[3] The salient terms of the Memorandum of Agreement made and entered into by and between them are the following:-

"2. <u>PURCHASE PRICE</u>

The purchase price is the sum of

3. <u>PAYMENT OF THE PURCHASE PRICE</u>

The purchase price shall be paid in the following:

3.1 The amount of R10 000,00 as deposit.

3.2 The outstanding amount of R190 000,00 shall be immediately paid to the Seller after the final settlement of Sunmultiserve.

3.3 If the multiserve delays agreement will be reviewed by both parties.

6. **BREACH OF CONTRACT**

In the event of the Purchaser failing to comply with any of the terms of this Agreement, the Seller shall be entitled to give the Purchaser written notice to comply with the agreement within fourteen (14) days failing which the Seller shall be entitle to either:·

6.1 **enforce the agreement by claiming payment of the full balance of the purchase price which may be owing together with interest at 15,5% per annum on such amount as may be in arrears to date of payment;**

6.2 **to cancel the agreement by means of written notice to the Purchaser and to return all monies paid thus in respect of the Purchase as agreed damages.**

7. **WHOLE AGREEMENT**

It is hereby recorded by the parties that this contract contains the whole agreement between them and no addition thereto shall be of any force and effect unless it be done in writing and both parties.

10. PURCHASER OBLIGATIONS

10.1 Until transfer of the property hereby sold has been registered in the name of the Purchaser shall

registration of transfer pay rates and taxes, water, electricity and sanitation charges and other local authority charges levied on the property strictly on due dates".

[4] The first respondent reneged on the agreement pertaining to payment of the agreed purchase price. The parties agreed that the first respondent must pay the sum of R500,00 per month with effect from January 2012. The parties entered into another review reduced to writing as Memorandum of Agreement on 9 September 2013. According to the aforesaid document, the parties agreed to increase the monthly payment to R1000,00 per month from the stated date. The first respondent once more failed to perform by not making the necessary payments. This prompted the applicant to cause her attorney to remit a letter to the first respondent cancelling the agreement and instructing him to vacate the property on/or before the 20th March 2014. The first respondent also instructed his attorney to write a letter to the attorney of the deceased resisting this move.

[5] I am called upon to resolve the deadlock which culminated in this application. The pertinent issues to be determined are twofold ie:- whether the contract entered into is *void ab initio,* and if not, whether the deceased has cancelled the same. In the event of finding in favour of the applicants, the first and second respondent(s) be declared illegal occupiers and that they be evicted from the property.

[6] The contention of Mr Greyling, for the applicants, is that the contract is insufficient and vague to comply with the relevant Act.

In essence the contract is open ended in that the essential term regarding method of payment still had to be negotiated in the future as recorded in paragraph 3.3 of the purported contract. It can therefore not be relied upon with certainty. I am inclined to agree with him. Me Pedzisai submitted that the contract was not void *ab initio* and argued that there were minor issues which could be cured. I pause to mention that there is no application for rectification of the contract that served before me. I was not referred to any underlying principles as authority fortifying this argument and I find it to be unsound.

[7] Matters of this nature are governed by the Alienation of Land Act 68 of 1981 (the "Act"). Section 2 (1) of the Act provides:-

> **"2 Formalities in respect of alienation of land**
> **(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.**

Section 6 reads as follows:-

> **"6 Contents of contract**
> **(1) A contract shall contain-**
> ***(a)*** ...
> ***(b)***
> ***(c)***
> ***(d)*** **...**
> ***(e)*** **the amount of the purchase price;**
> ***(f)*** **...**
> ***(g)*** **the amount of each instalment payable under the contract in reduction or settlement of the purchase price and interest (if any);**
> ***(h)*** **the due date or the method of determining the due date of each instalment;**
> ***(i)*** **...**
> ***(j)*** **...**
> ***(k)*** **...**
> ***(l)*** **the place where the payments shall be made**

[8] Section 5 further gives the purchaser the power to elect the language in which the contract shall be drawn up. Section 6 stipulates that the contract shall contain the amount of the purchase price as well as the due date or the method of determining the due date of each instalment. All the essential elements of the contract must be in writing. It is trite that the amount, due date and method of payment comprises essential elements of the contract. It stands to reason that if the material term is left over for further negotiations, there can be no talk of a valid contract.

[9] The formal requirements dealing with a contract of this nature where succinctly discussed and conclusively accepted in **Dijkstra v Janowsky 1985 (3) 560 (C)** at **564 G-H** and **565 A** as follows:-

> **"In regard to these requisites certain legal principles have been settled by our Courts:**
>
> **(i) The whole contract - or at least all the material terms - must be reduced to writing *(Johnston v Leal* 1980 (3) SA 927 (A) at 937C - G).**
>
> **(ii) The Court must be able to ascertain with reasonable certainty the terms of the contract. As COLMAN J stated in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) in a passage cited with approval in *Clements v Simpson* 1971 (3) SA 1 (A) at 7E: "inelegance, clumsy draftsman ship or loose use of language in a commercial document purporting to be a contract will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract".**
>
> **(iii) There is no valid contract where a material term has not been finally agreed upon, but is left open for further negotiations *(Jammine v Lowrie* 1958 (2) SA 430 (T) and authorities there cited).**
>
> **(iv) The material terms are not confined to the *essentialia of the contract of sale (Johnston's* case *supra* at 937H).**
>
> **(v) The manner of payment is ordinarily a material term *(Patel v Adam* 1977 (2) SA 653 (A) at 666A- C)".**

This was cited with approval in **Chretien v Bell 2011 (1) SA 54 (SCA) at 56 H-J** and **57 A-C.**

[10] The document purporting to be the embodiment of the contract between the parties is poorly drafted. It is couched in an ambiguous manner and a language suggesting in particular a suspensive condition. It is important to note that the main purpose of the Act (drawing from its predecessors) had amongst its objects the possible prevention of disputes, uncertainty and malpractices. This is the main reason why the entire contract must be contained in the written contract. The omission to record the price renders the contract invalid and of no force and effect. The same goes for the omission regarding the mode of payment which will simply mean that there is no valid sale.

[11] In **Hartland Implemente (edms) Bpk v Enal Eiendomme Bk en andere 2002 (3) SA 653 (NC) at 667 H-1** the court emphasised these requirements and held as follows:-

> **"Toegepas op die onderhawige saak sal dit meebring dat die koopprys sowel as die wyse van betaling daarvan, in die skriftelike dokument waarin die vervreemdingsakte vervat is, bepaal en behoorlik omskryf moet wees, of dat 'n formule daaruit blyk waarkragtens dit met redelike sekerheid objektief bepaal kan word sonder 'n verwysing na getuienis van die mondelinge *consensus* tussen die partye. By gebreke daaraan sal die kontrak ongeldig en onafdwingbaar wees vanwee nie-nakoming van die bepalings van opskrifstelling soos vereis deur die gemelde Artikef 2 van die Wet op Vervreemding van Grond".**

[12] The written contract under consideration does not measure up to the standard set by the Act. Actually, it flies against a string of decisions handed down by the court regarding the requirements to be met for a contract to be valid. The purchase price of the property is unknown and to make matters worse the mode of payment still has to negotiated at same stage in the future. The reliance on some payment to be received from the Liquidators of Sun Mutiserve is nothing but a hoax. Despite the lapse of a substantial period of time, nothing has come of it. The absurdity of this humiliating failure is that it is due to occur in some undetermined date. This leaves the written contract without a due date. On the basis of the aforegoing reasons, I am convinced that the contract is void *ab initio.*

[13] I deem it unnecessary to express an opinion on the issue which has been raised relating to suspensive condition provision of the contract. The contentious issue dealing with the cancellation of the contract also falls off. There cannot be talk of cancellation of a non-existence contract. Cancellation is dependent on the existence of a valid contract with force and effect. This is not the case in this matter.

[14] As alluded to in paragraph one (1) above, the applicants are also seeking an eviction order against the first and second respondent(s). The factual circumstances of this case are that the first respondent took occupation and possession of the property in December 2011. The papers are silent whether he is married or not and staying with any dependants in the form of his children and/or elderly persons who might be detrimentally

affected in the event the eviction order is granted. The parties have been at loggerheads with each other that the first respondent vacate the property since February 2014. The proceedings before the court have been pending since May 2015.

[15] In *casu,* the applicants are the lawful owners of the property even though it is registered in the name of the deceased alone. They are joint owners because they are married in community of property. The first respondent and any other person occupying the property through him are unlawful occupiers. They do not have the permission of the applicants to be there. However in order for the applicants to succeed, the court is required to go beyond the consideration of the lawfulness of the occupation.

[16] **Section 4(7) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998** (the "PIE Act") provides that:

> **"(7) 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, except where the land is sold in a sale of execution pursuant to a mortgage, 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";** and

Section 26(3) of Constitution of the Republic of South Africa, Act 108 of 1996 provides that:

> **"(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".**

[17] The thrust of the two (2) provisions is that the key considerations of the court must be based on justice and equity in the circumstances to grant an order for eviction. In plain language, the court must strike a balance between the proprietary rights of the owner and the socio economic rights of the occupier. This interpretation has been analysed and summed up in a number of decided cases.

[18] In order to discharge such a duty, it is required that all relevant facts must be placed before the court. In the matter of **The City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (2) BCLR 1206 (SCA)** at **paragraph 25** the court stated the enquiry as follows:-

> **"First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 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 section 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 that order. Before doing so, however, it must consider what justice and equity demands 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 have 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".**

[19] This was affirmed *inter alia* in **Occupiers of erven 87** & **88 Berea v Christiaan Frederick De Wet N.O. (2017) ZACC 18** that the court in discharging its duty is “required and expected to take an active role”. It is incumbent on the parties that all information is put before the court in order to decide whether the eviction is just and equitable. This requirement was deemed in Occupiers of erven 87 & 88 case to be “inextricably, interlinked and essential". The failure to adhere to such consideration of justice and equity as required will be arbitrary. However, it must be emphasized that the court must not assume a passive but play an active role in adjudication of matters of this nature.

[20] According to the papers the first respondent is a paralegal practitioner/legal advisor. He is not only gainfully employed but possesses healthy financial assets at his disposal. As stated by him, at one stage he tendered payment of R150 000,00 and revealed that he had secured finance in the form of a loan amounting to R70 000,00. This is a further confirmation that he is

not a man of straw. I was not appraised of any reasons that he can be described as poor. He is in a position to acquire alternative accommodation with ease given his financial muscle and privileged status in society. The first respondent is withholding his marital status from this court and any dependants living on the property. I assume there is none. There is no justifiable reason why the first and second respondent(s) (if any) should hold on to the property of the applicants without a good cause. In exercising my discretion, I am convinced that granting the eviction order against the first and second respondent(s) (if any) will be just and equitable. The first and second respondent(s) must be availed sufficient time to make proper arrangements for alternative accommodation. I am of the view that three (3) months will be in order for arranging the necessaries.

[21] The costs normally follow the result. Consequently, there is no reason in law to deviate from this principle that the costs should be paid by the unsuccessful party.

[22] Accordingly I make the following order:-

22.1. The contract entered into by the first applicant and the first respondent regarding Erf [...] M. S., Thabong, Welkom on 13 December 2011 is declared void *ab initio.*

22.2. The first and second respondent(s) are declared unlawful occupiers of the property mentioned in paragraph 22.1.

22.3. The first and second respondent(s) occupying the property through him are ordered to vacate the property not later than 1 February 2018 at 12H00.

22.4. In the event the first and second respondent(s) fail to comply with this order, the Sheriff for the District of Welkom is authorized and directed to evict them and remove any movable property belonging to them forthwith.

22.5. The first respondent is ordered to pay the costs of the application.

MATHEBULA, J

On behalf of applicants:	Adv. P Grayling
Instructed by:	Kemi Akinbohun Attorneys
	c/o Motaung Attorneys

On behalf of respondent:	Me. J Pedzisai
Instructed by:	Pedzisai-Pion Attorneys

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