IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 2053/2011

In the matter between:

EASTERN CAPE DEVELOPMENT CORPORATION **Applicant**

and

BONGINKOSI GODFREY SANDLANA **Respondent**

JUDGMENT

BROOKS AJ:

[1] The applicant is the registered owner of certain immovable property described as ERF [.......] Umtata, Township Extension No. [...], King Sabata Dalindyebo Municipality, District of Umtata, Province of the Eastern Cape, and situate at [.....], Southridge Park, Mthatha (the immovable property).

[2] It is common cause between the parties that on 2 April 2003 they entered into a written agreement of sale in respect of the immovable property which reflected the respondent as the purchaser. A copy of the signed and dated agreement of sale was annexed by the respondent to his answering affidavit (the agreement of sale).

[3] On 22 August 2011 the applicant launched the present application. In argument, Mr BEYLEVELD, who appeared on behalf of the applicant, indicated that the applicant sought an order in the following terms;

> "1. *That the Respondent be and is hereby directed to vacate the premises situated upon the property described as [.....] Southridge Park, Mthatha ("the premises") together with any other occupiers within 15 calendar days.*
>
> *2. That the sheriff of the High Court Mthatha, be and is hereby ordered to evict the Respondent together with any other of the premises assisted, if need be, by any member/s of the South African Police Services should the premises not have been vacated by the date prescribed in paragraph 1 above.*
>
> *3. That the Respondent be and is hereby ordered to pay costs of this application*." (*sic*)

[4] The application is opposed by the respondent, who also introduced a counter application in which he seeks the following relief:

> "1. *That the applicant, against payment by the respondent of the purchase price R 180 000, 00 (One Hundred and Eighty Thousand Rand) be ordered or directed to take steps to have the immovable property*

known as ERF No. [.......], MTHATHA HOUSE No. [.....] STREET SOUTHRIDGE PARK, MTHATHA transferred to the respondent.

2. *That the applicant pays costs of this application*." (*sic*)

[5] The applicant has opposed the counter application.

[6] There is no dispute between the parties about the correctness of the recordal of the following terms which were included in the agreement of sale:

- the purchase price payable in respect of the immovable property was the sum of R180 000,00;

- the date of possession means the date of registration of the immovable property into the name of the purchaser;

- occupational rental referred to the current rental;

- transfer of the immovable property would be effected within a reasonable time after the purchaser had either paid the purchase price or made provision for the payment of the purchase price by the timeous provision of bank or building society guarantees, and had made payment of all the costs of transfer;

- the purchaser was obliged to pay the full purchase price alternatively to make provision for payment of the full purchase price by the furnishing of bank or building society guarantees, within ninety days of the date of signature of the agreement of sale;

- in the event of the purchase price not being paid timeously, or the bank or building society guarantees not being furnished timeously, the agreement of sale would cease to be of any force or effect, unless the seller elected to enforce performance of the terms of the sale agreement including payment of the full balance of the purchase price and other amounts due by the purchaser;

- the purchaser was to pay occupational rent to the seller up to the date of registration of transfer;

- the purchaser was obliged to vacate the immovable property upon cancellation of the agreement of sale;

- any agreement between the parties to amend or alter the terms of the agreement of sale would not be binding unless reduced to writing and signed by the parties;

- the agreement of sale constituted the entire contract between the parties to the exclusion of any other conditions, stipulations, warranties or representations not specifically included therein.

[7] It was common cause between the parties that as at the date upon which the application was launched, and indeed as at the date upon which it was argued together with the counter application;

- the respondent was in occupation of the immovable property;
- the purchase price was not paid before the expiry of ninety days after signature of the agreement of sale;

- the respondent had not furnished bank or building society guarantees before the expiry of ninety days after signature of the agreement of sale;

- The applicant had not elected to enforce performance by the respondent of the terms of the agreement of sale pertaining to the payment of the purchase price or the provision of guarantees.

[8] It is plain that the respondent's opposition to the application and reliance upon the counter application are both predicated upon the view that the agreement of sale remains in existence and is enforceable between the parties. In support of this view, the respondent purports to rely upon various implied or tacit terms and has raised arguments relating to the precedence to be attributed to the various mutual obligations recorded in the agreement of sale. For the reasons which follow, I do not consider and evaluate each of the arguments raised on behalf of the respondent in support of his counter claim.

[9] There is no dispute *inter partes* about the correctness of the recordal of the written terms in the agreement of sale. Amongst these is clause 13, which records that no alteration or amendment (variation) of the agreement between the parties shall be binding unless reduced to writing and signed by the parties, and clause 19, which records that the agreement of sale constitutes the entire contract between the parties to the exclusion of any other conditions, stipulations, warranties or representations not recorded therein. The meaning of these clauses is plain and operates to exclude any reliance the respondent may claim upon any purported tacit terms pertaining to the agreement of sale.

[10] To the extent that the respondent may have wished to rely upon any implied terms pertaining to the agreement of sale, the implied terms set out in the answering affidavit are at variance with the terms embodied in the agreement of sale. It has been held that an implied term cannot be in conflict with the written provisions of a contract.[1]

[1] TRANSNET LIMITED v RAUBENSTEIN 2006 (1) SA 591 (SCA).

[11] Attributing the plain, ordinary meanings to the words employed in the expression of the terms in the agreement of sale, the obligation on the part of the respondent to make payment of the full purchase price within ninety days of the date of signature of the agreement of sale, or to furnish bank or building society guarantees in respect thereof is expressed as a suspensive condition. In the event that the respondent failed to comply with the terms embodied therein, the agreement of sale would automatically cease to be of any force or effect. The respondent did not comply with this obligation and the applicant did not elect to seek specific performance thereof. In the circumstances the agreement of sale ceased to be of any force or effect ninety days after the date of its signature. The argument that by its conduct the applicant extended the life of the agreement of sale cannot succeed.

[12] Even if one were to assume an academic position in favour of the respondent by entertaining the notion that the agreement of sale had not ceased to be of any force or effect but remained extant, the respondent's right to make any claim against the applicant based upon the agreement of sale has prescribed. An obligation to pass transfer of immovable property is a debt as contemplated in terms of s10 of the Prescription Act No 68 of 1969 and accordingly the obligation to procure registration of transfer of the immovable property in terms of the sale agreement has been extinguished by prescription.[2] The obligation to transfer is reciprocal to the obligation to pay or to make provision for the payment of the purchase price and other costs incidental to transfer referred to in clause 3 of the agreement of sale.[3] The counter application is a claim for specific performance. One of the essential elements of a claim for specific performance in terms of a contract is to allege and prove compliance with any

[2] DESAI NO v DESAI AND OTHERS 1996 (1) SA 141 (A) 146 A-H.
[3] MLUNGISI JULY v EASTERN CAPE DEVELOPENT CORPORATION, CASE NO 919/05, unreported judgment ECD TK Local Division, 13 July 2006.

reciprocal obligation or to tender timeously to perform such obligation[4]. No merit exists in the respondent's apparent claim that he is not obliged to furnish the applicant with the full purchase price or bank or building society guarantees until the applicant complies "with its side of the bargain by showing me a title deed registered in its name over the property in question". No such obligation existed on the part of the applicant and nothing emerges in this matter as a valid basis for any contention that prescription did no commence to run or was in any way interrupted.

[13] A further argument was raised in opposition to the application. Mr NTSALUBA, who appeared on behalf of the respondent, submitted that the applicant could not obtain an order for the eviction of the respondent from the immovable property because the applicant had not followed the procedures prescribed in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE).

[14] In my view, the argument is without merit for a number of reasons. Firstly, PIE is predominantly designed to protect the rights of persons who may have taken up occupation of land under somewhat precarious circumstances and who would otherwise be faced with eviction proceedings of which they have had no notice and which would take them by surprise to their substantial disadvantage. The respondent, who is described in the affidavits filed of record as a duly admitted attorney of this court is not such a person. His rights *vis-ả-vis* the immovable property were created and regulated by agreement between the parties, including the right of the applicant to seek the eviction of the respondent in certain circumstances. The respondent makes no claim in the answering affidavit that he was ignorant of these rights or was mislead into signing either the original agreement of lease or the agreement of sale. Secondly, this application has served previously before the court and the respondent has been more than adequately represented. No purpose would be

[4] R. M. VAN DE GHINSTE AND CO. (PTY) LTD vs VAN DE GHINSTE 1980 (1) SA 250 (C) 252G-254A.

served in the circumstances by requiring the applicant to give notice to the respondent of its intention to apply for the eviction of the respondent from the immovable property. Even if it were to be ordered that the applicant give such notice, it would do no more than occasion a further postponement of the matter for the duration of the notice period. No change in the affidavits filed of record or the substance of the arguments set out therein would occur.

[15] A final argument raised on behalf of the respondent in an attempt to defeat the application was to the effect that s19 of the Alienation of Land Act No 68 of 1981 prescribes that there can be no termination of the respondent's right of occupation of the immovable property without prior written notification by the applicant calling upon the respondent to remedy his breach.

[16] In my view, there is no merit in this submission. In the present circumstances, the suspensive condition set out in clause 4 of the agreement of sale was not fulfilled. The result was that the agreement of sale automatically ceased to be of any force and effect. The right on the part of the applicant to evict the respondent in such circumstances found expression in the provisions of clause 10 of the agreement of sale. In these circumstances, s19 of the Alienation of Land Act No 68 of 1981 is of no application. Ultimately the applicant did not rely upon any breach of contract in seeking the eviction; in reality, the applicant relies upon the automatic termination of the agreement of sale.

[17] It follows that for the reasons set out in this judgment I am of the view that the application should succeed and that the counter application falls to be dismissed. No reason exists why costs should not follow the result, including the wasted costs which were reserved on 9 October 2015 when the matter was postponed at the request of the respondent.

[18] The following order will issue:

1. Prayer 1 is amended by the deletion of the words “within 15 calendar days” and the substitution therefor of the words “by 30 April 2016”.

2. The application is granted and orders are made in terms of prayers 1, 2 and 4 of the notice of motion (as amended);

3. The respondent is further directed to pay the wasted costs reserved on 9 October 2015.

4. The counter application is dismissed with costs.

RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Counsel for the Applicant:	**ADV A BEYLEVELD SC**
Instructed by	**BNI Attorneys**
	MTHATHA
Counsel for the Respondent:	**ADV S NTSALUBA**
Instructed by	**B. G. SANDLANA & Co**

MTHATHA

Matter heard on:	**18 February 2016**
Judgment delivered on:	**01 March 2016**