IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
20/5/2015 — DATE; SIGNATURE

17/02/2015.

CASE NO: 77700/2010

IN THE MATTER BETWEEN

JOSIAH OUPA SHIBAMBO	First Applicant
ESTHER VELEMINAH SHIBAMBO	Second Applicant
and	
I R PITJE	First Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Second Respondent

JUDGMENT

LEGODI, J

[1] The dispute in this matter was prompted by the sale of one and the same immovable property to two different persons. The second purchaser in whose names transfer was registered seeks to evict the first purchaser from the property in question. The first purchaser happens to be a brother to the seller. The first purchaser is in occupation of the property used as primary residence.The seller is not a party to the present proceedings.

[2] The eviction is resisted. The main grounds for resisting the eviction are that the sale agreement between the first respondent (the first purchaser) and his brother (the seller) in respect of the property is valid and enforceable. It is further contended that the applicants (second purchasers), are not bona fide purchasers and that they have no better right over that of the first purchaser. In other words, the transfer of the property into the names of the applicants did not confer unassailable right to them.

[3] I find it necessary to deal with the latter aspect first, preceded of course, by a brief background. On the 3 September 2001 a written sale agreement was concluded between the first respondent and his brother in respect of a property described in the pleadings as ERF 4157 MAMELODI TOWNSHIP, REGISTRATION DIVISION JR, PROVINCE OF GAUTENG (Physical address; HOUSE 4157 BLOCK M, MAMELODI, PRETORIA).

[4] The agreement had one of the usual suspensive conditions. For example , the first agreement was subject to a suspensive condition that a loan of R63 000 secured by a Mortgage Bond to be registered over the property, is obtained by the first purchaser within a period of 14 days from the last date of signature, being the 3 September 2001.

[5] Under SPECIAL CONDITIONS written by hand in the agreement, is recorded as follows:

> *"Should the said loan not be secured, then the purchaser is irrevocably authorised by the seller to make whatever arrangements with NEDCOR Bank Ltd. The current bond holders, to liquidate the outstanding amount on the bond until the above purchase price is paid in full, whereupon the transfer shall be given to the purchaser as aforesaid".*

[6] The handwritten addition to the agreement is disputed by the seller who had filed a supporting affidavit to the applicant's replying affidavit. On the 1 December 2009 an offer to purchase the said property was concluded between the applicants and the seller. On the 7 July 2010 transfer into the names of the applicants took place.

[7] One is remanded of the 'doctrine of notice' and the 'doctrine of bona fide purchaser'. If A and B enter into an agreement which entitles A to have a servitude registered over the land of B, A has a personal right to claim that B should co-operate in procuring registration of the servitude, as this is a requirement for the creation of the real right that A has bargained for. Once registration has taken place, any subsequent purchaser of the land will be bound by the servitude. If however, B should sell his land and transfer property to C before registration, C would normally not be bound to give effect to the servitude. But, if C had knowledge of A's unregistered servitude at the time the contract of sale was entered into between B and C, C will be bound not only to give effect to the servitude, but also to co-operate in having the servitude registered[1]. That is, ' the doctrine of notice'.

8] Similarly, if a seller A sells a thing, be it movable or immovable to B and subsequently sells same thing to C, ownership is acquired, not by the earlier purchaser, but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his or her right is unassailable. If the second purchaser, C, is the first transferee, his or her right of ownership is equally unassailable, if he or she had purchased without knowledge of the prior sale to B. But, if C had purchased with such prior knowledge, B is entitled to claim that transfer to C be set aside so that ownership of the thing sold can be transferred to B[2]. The underlining is my own emphasis.

[9] Now using the same examples as above, two things must happen in the present case in order to avert the eviction. The first respondent, being the first purchaser, must allege and prove that the applicants had prior knowledge of the agreement concluded on the 21 September 2001 between himself and his brother. Secondly, he must have the transfer of the property into the names of the applicants set aside.

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[1] *Bowring v Vrededorp Properties cc and Another* 2007 [5] SA 391(SCA) at 394 paras [7] and [8].
[2] *Bowring supra* at 395 para 11

[10] In paragraph 12 of the answering affidavit, the relevant averments are made as follows:

> *"12.6 The applicants have known or alternatively, sought to have known in detail of my claim to the right to own my residence flowing from the said Deed of Sale I have duly concluded with my brother M H Pitje".*

[11] These averments without more, in my view, do not come closer to establishing as a fact that the applicants had a prior knowledge of the sale thereof. But, clearly, the first respondent is uncertain whether or not applicants had such a prior knowledge. 'Alternatively ought to have known in detail of my claim...,' in my view, points to such uncertainty. He should therefore be found not to have discharged the onus in this regard. The applicants are found to be bona fide purchasers.

[12] Now, coming back to the other issue referred to in paragraph [9] above, the first respondent knew as way back as 2010 that the property has been transferred into the names of other people. On his own version, he knew in July 2010 that the property had been sold. He received a letter from the applicants' attorneys to this effect. The first respondent contacted his lawyers on the 6 August 2010, but, to date no application to set aside both the first agreement and the transfer. I am not satisfied that the first respondent seriously wanted to pursue such an application.

[13] Initially, the first respondent wanted to suggest that the applicants were not entitled to the relief sought because there was no compliance with section 4 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act NO 19 of 1998.. It is not correct. Such a notice was given and the order in this regard was granted. In any event, counsel for the first respondent did not pursue the point.

[13] There is of course another application. This is an application in terms of Rule 30A launched by the first respondent. He wants certain portion of the replying affidavit to be struck out. The allegations are that the applicants introduced new facts in their replying affidavit to which they are not entitled to do. Paragraphs 11, 12 and 14.6 of the replying affidavit were cited as the cause of the complaint.

[14] In paragraph 11 of the replying affidavit the first applicant as a deponent thereto attached a confirmatory affidavit of the second applicant, his wife. In it, the second

applicant confirms that she is the second applicant and that she was supporting her husband in the application for eviction. This was prompted by the suggestion in the answering affidavit that there was no basis to cite her as an applicant. I am unable to see how this can be a new fact. The same applies to paragraph [12] of the replying affidavit. Here the applicants attached the tittle deed. In the founding affidavit, the applicants averred that they were the registered owners of the property in question. The first respondent in the answering affidavit sought to question this as being inadequate because no proof of ownership was annexed to the founding affidavit. This cannot be a new fact introduced in the replying affidavit.

[15] The last complaint is about paragraph 14.6 of the replying affidavit. In this paragraph, for the first time the applicants alleged that the first respondent has alternative accommodation in that he has been granted an approval in his application for a government house. The first respondent's application for the house is said to have been approved in March 2008 and that one of the requirements for such housing is that one may not be an owner of another house. The suggestion was that the first defendant is therefore having an alternative accommodation.

[16] I do not find it necessary to deal with the merits or otherwise of the point taken in this regard, seen in the light of my finding regarding the doctrine of notice and bona fide purchaser and failure to set aside the second sale agreement and transfer of the property into the applicants' names. Had it not have been for the finding, one would have been inclined to grant the first respondent opportunity to file the fourth affidavit.

[17] Consequently, an order is hereby made as follows:

17.1 The first respondent and all those holding under him, are hereby ejected from the property ERF 4157 MAMELODI TOWNSHIP, REGISTRATION DIVISION JR, PROVINCE OF GAUTENG; (Physical address: HOUSE 4157, BLOCK M MAMELODI, PRETORIA);

17.2 The first respondent to pay the costs of the application.

M F LEGODI
JUDGE OF THE HIGH COURT

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HEARD ON: 03 FEBRUARY 2015

JUDGEMENT HANDED DOWN: 17/02/2015