

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 661/2015

In the matter between:

PETRUS THEMBA MOLATSELI

Applicant

and

**OCCUPIER OF ERF [.....], MANGAUNG
BLOEMFONTEIN, FREE STATE**

1st Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

2nd Respondent

HEARD ON: 20 AUGUST 2015

JUDGMENT BY: N.M. MBHELE, AJ

DELIVERED ON: 5 NOVEMBER 2015

DRAFT JUDGEMENT

- [1] This is an application for eviction in terms of section 4 of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 14 of 1998 (PIE Act) from Erf [.....] Mangaung (Extension 23, District Bloemfontein, Free State Province the property).

- [2] The application hinges on a deed of sale alleged to have been signed between the Applicant and Meiki Agnes Thulo (Thulo) on 26 November 2009.
- [3] Seipone Ruth Lentanta (1st Respondent) is the current occupier of the property.
- [4] The property is currently registered in the name of the applicant. The applicant could not take occupation of the property upon registration, due to the first respondent's refusal to vacate the same.
- [5] The first respondent claims ownership of the property and alleges that it was fraudulently registered in the applicant's name.
- [6] Prior to the commencement of the hearing the applicant consented to condonation of the late filing of the first respondent's opposing affidavit and I granted condonation.

ISSUES IN DISPUTE

- [7] Parties are in dispute as to who is the rightful owner of the property, insofar as the first respondent alleges that she purchased the same property from Thulo in 2009.

CONTENTIONS BY THE PARTIES

- [8] Mr Mene, for the Applicant, submits that title deed is the only proof of ownership. He submits further that the contract of Sale of Land is not complete until a transfer has been registered with the deeds office, which is what makes the respondent's claim to ownership of the property invalid.
- [9] It is not enough for the first respondent to claim that Thulo did not authorise the transfer of property into the name of the applicant when she aligned herself with the sale by receiving money from the applicant.
- [10] Mr Buys contends that Thabo's affidavit was not filed in terms of the rules and should therefore be declared *pro non scripto*.
- [11] He contends further that the applicant should have realised when he moved his application that a serious dispute of fact incapable of resolution on the papers, was bound to develop. He called for the dismissal of the application with costs.

LEGAL PRINCIPLES

- [12] Parties are in agreement that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by both parties thereto or by their agents acting on their written authority. See **(Section 2(1) of the Alienation of Land Act 68 of 1981.)**
- [13] In application proceedings where there is a material dispute of facts, the respondent's version can only be rejected if it is

farfetched or clearly untenable (See: **Plascon-Evans Points Ltd v Van Riebeeck Points (Pty) Ltd** 1984 (3) SA 623 (A).

- [14] A real genuine and bona fide dispute of fact can exist only where the party who purports to raise the dispute has unambiguously and clearly addressed the disputed facts in its papers. See (**Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA)

In Kalil v Decotex (Pty) Ltd & Another 1988 (1) SA 943 (A) at 979 (H-I) it was said:

“...in exercising its discretion to refer the matter for oral evidence, the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scale are depressed against the applicant the less likely the court would be to exercise the discretion in his favour.”

APPLICATION OF PRINCIPLES AND FINDINGS

- [15] It is clear from the papers that respondent seriously and unambiguously deals with the disputed validity of the contract of sale of land and consequent transfer thereof in the name of the applicant.
- [16] Ex facie the papers probabilities are, in my view, evenly balanced in so far as the transfer of the property in the name of the applicant is *prima facie* valid while there exist a possibility that same was obtained without the knowledge of Thulo.

[17] I am satisfied that the oral evidence and cross examination will disturb the balance of probabilities apparent from the papers.

ORDER

1. The application is postponed to 14 December for certification as ready for hearing of *viva voce* evidence by the pre-trial judge.
2. The issues to be determined are the following:
 - 2.1 Whether the transfer of property into the Applicant's name was authorized by Agnes Thulo.
3. For the purpose of such a hearing, the respondent shall deliver sworn statements of witnesses he wishes to call, inclusive of any supplementary affidavits, within 10 days, calculated from the date hereof.
4. On its part the applicant shall deliver sworn statements of witnesses it wishes to call, inclusive of any supplementary affidavits, within 10 days from the date on which the respondent shall have delivered statements or was supposed to deliver statements.
5. Within 10 days after the delivery of statements or supplementary affidavits by the applicant, the parties shall make discovery under oath in terms of the provisions of Rule 35 of Uniform Rules of

Court and the provisions of Rule 35 (6) with regard to inspection and production of discovered documents or items shall apply.

6. The costs shall be costs in the application.

NM MBHELE, AJ

On behalf of applicant: Adv. Mene
Instructed by:
SMO Seobe Attorneys
BLOEMFONTEIN

On behalf of 1st respondent: Adv. Buys
Instructed by:
Willie J Botha Inc.
BLOEMFONTEIN

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