

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG**

CASE NO. 11184/2008

In the matter between:

RUGIN VISVANATHAN

FIRST APPLICANT

AVASHA VISVANATHAN

SECOND APPLICANT

and

**THE PROVINCIAL DEPARTMENT OF
HOUSING FOR THE PROVINCE OF
KWAZULU-NATAL**

FIRST RESPONDENT

**THE REGISTRAR OF DEEDS FOR THE
PROVINCE OF KWAZULU NATAL**

SECOND RESPONDENT

JUDGMENT

SISHI J:

[01] On 15 September 2008, the Applicants applied for and were granted an order in the following terms:

- (1)(a) “That the purported cancellation by the First Respondent of the purchase and sale agreement entered into between the First and the Second Applicant on the one hand and the First Respondent on the other on 29 April 1999 be and is hereby set aside.

- (b) That the First and the Second Applicants provide guarantees to the First Respondent in respect of the balance of the purchase price payable by Applicants to the First Respondent in terms of annexure “A” to the Founding Affidavit.
 - (c) That upon Applicants’ complying with sub-paragraph (b) above, the First Respondent be directed to forthwith do all things necessary including but not limited to the signing of all documents necessary to effect the transfer of ownership of the property described as Lot 238, Copesville situated at 12 Opal Terrace, Copesville, Pietermaritzburg, KwaZulu-Natal, from the name of the First Respondent and its successor in title into the names of the First and Second Applicants.
 - (d) That in the event of the First Respondent failing to comply with paragraph (c) above, the sheriff or his duly authorised deputy be and is hereby directed forthwith to do all things necessary including but not limited to the signing of all documents necessary to effect transfer of ownership of the property, from the name of the First Respondent and its successor in title into the names of the First and Second Applicants.
 - (e) That pending the determination of this application, the First Respondent be and is hereby interdicted and restrained from dealing in and with the property and from alienating or entering into any agreement relating to the use, occupation and/or ownership of the property.
- (2) That pending the return date of the rule nisi the relief set out in paragraph 1(e) above operate as an interim relief with immediate effect”.

[02] This is the return date of the ***rule nisi*** granted by this court on 15 September 2008. The main issue in this case is whether the cancellation by the First Respondent of an instalment sale agreement in respect of an immovable property referred to in paragraph 1(c) of the Notice of Motion was properly done.

[03] The First Respondent based its right to cancel the agreement on the following grounds:

- That the Applicants let out the property without first obtaining the written consent of the First Respondent and in so doing, the Applicants breached clause 14.2 of the agreement of sale.
- That the Applicants failed to pay the requisite instalments and were in arrears with their payment obligations, which conduct on the part of the Applicants constituted a breach of clause 5 of the sale agreement.

The First Respondent contends that it was entitled to cancel the agreement as the Applicants were in breach of the sale agreement.

[04] Although the Applicants allege that on 1 April 1993, they took occupation and possession of the said property in terms of the Self Help Building Development Scheme instituted by the First Respondent, evidence has established that the Diaram family in fact took possession and occupation of the same property under the same

scheme in terms of an agreement of sale the Diaram family signed with the First Respondent on 6 February 1997.

[05] On 29 April 1999, the Applicant signed and entered into a purchase and sale agreement with the First Respondent (as it was then known as the KwaZulu-Natal Provincial Housing Development Board).

[06] To achieve its objective and to give effect to section 26 of the Constitution of the Republic of South Africa which provides that everyone has the right to have access to adequate housing, the First Respondent has instituted a number of programs and one of such programs is the self help upbringing development scheme. In terms of this program, individuals were given land and a grant which they used to purchase materials from an approved supplier and then build their own houses. Through such schemes, the First Respondent assists purchasers to buy their own homes, subject to the conclusion of agreements of sale. The Applicants and the First Respondent entered into such agreement in respect of the said property.

[07] The said property was sold to the Applicants for R29 771,00, payable by a purchaser over a period of 30 years calculated at the date of occupation. The clauses of the sale agreement between the Applicants and the First Respondent which are relevant to this application are the following:

Paragraph 5.1 “The balance of the purchase price, together with interest thereon including penalty interest shall be paid in monthly instalments as set out in the letter of advice and reduction of the amount outstanding. Unless otherwise specified in such letter of advice, the first such instalment shall be payable on or before the 1st day of the month subsequent to the date of this agreement and thereafter instalments shall be paid on or before the 1st day of each succeeding month until the whole of the capital and interest and any other sums of money due under the agreement shall be paid in full”;

Paragraph 12 “ The Board shall cause a letter of advise to be written to the purchaser from time to time in which it is set out the amounts to be paid to the Board in terms of the agreement”;

Paragraph 14.1 “During the currency of this agreement the purchaser shall not without the written consent of the Board having been first heard and obtained, mortgage, assign or pledge or in any way encumber the property hereby sold or any part thereof nor pass any general bond or any bond containing a general clause, or cede, transfer or make over rights under this agreement”.

Paragraph 14.2 “The purchaser shall be bound and obliged personally to occupy the property hereby sold for a period of five years from the date of this agreement and shall not without written consent of the Board having been first had and obtained let the property or any portion thereof within the stipulated period or until the whole of the balance of the purchase price and interest thereon has been paid whichever period is the longer.

Paragraph 14.3 “In terms of section 52 of the Act, the property may not be sold or otherwise alienated by the purchaser or his successors in title within a period of 5 years from the date of this agreement except to a person approved by the Board and then only after he has first offered it for sale to the Board, at the purchase price reflected in clause

3 notwithstanding the fact that the total amount of the purchase price together with all interest thereon has been paid and the mortgage bond which secured such purchase price has been cancelled by reason of such payment. This condition shall be embodied in the deed of transfer registered within the said period and shall be binding on the registered owner even though the total amount of the purchase price together with all interest thereon may have been repaid”.

Paragraph 21 “In the event of a breach by the purchaser of any of the conditions and obligations imposed upon him in this agreement, or if it is appearing that any statements recorded in his application and any accompanying documents for the purchase of the property are false, the Board shall have the right to enter upon and take possession of the property and to cancel this agreement by written notice addressed to the purchaser and in the event of such cancellation the purchaser shall be bound and obliged immediately to vacate the property, the property hereby sold...”

[08] As indicated above the grounds upon which the First Respondent cancelled the sale agreement between it and the Applicants is that they breached clauses 5.1 and 14.2 of the agreement of sale dealing with the non-payment of instalments and the letting of the property without the consent of the First Respondent respectively.

[09] In a letter dated 13 November 2007, the Applicants were informed by the First Respondent that they were in breach of clause 14.2 of the agreement in that they had without the necessary consent; let the property before such time as the balance of the purchase price had been paid. They were also informed that they were in breach of clause 5 of the agreement, in that they were in arrear with the instalment

payments and that the Applicants were obliged to make in terms of their agreement. They were further informed that should the Applicants not remedy the situation within 30 days, the agreement would be deemed cancelled. In a further letter dated 13 December 2007, the Applicants were granted an extension up to 13 January 2008 to rectify their breaches.

[10] In the letter of 13 November 2007 from the First Respondent, the Applicants were specifically informed that the department had received an affidavit that the property in question is being sublet to one Twala. As they were no longer in occupation of the above mentioned property, they were in breach of the conditions in clause 14.2 of the memorandum agreement of sale which states that they shall not without written consent of the department having been first had and obtained let the property or any portion thereof within the stipulated period until the whole of the balance of the purchase price and interest thereon has been paid whichever period is the longer. They were further informed that they had an outstanding balance of R167 410,05, and that they were in contravention of clause 5 of the memorandum of sale for non payment of instalments.

[11] In a letter dated 5 December 2007, and through their attorneys, the Applicants disputed that they were in breach of the sale agreement. The Applicants however, called upon the First Respondent to afford them and to allow them time to rectify the illegal occupation of the premises. In response to the letter of 5 December 2007, the First

Respondent afforded the Applicants until 13 January 2008 to remedy the breach.

- [12] In the letter dated 23 June 2008, the Applicants and their Attorney were informed that the Applicants had had more than enough time to remedy their breaches of the contract, but had failed to do so, and that the contract of sale was accordingly cancelled. One such letter was sent to the Applicants and the other letter was sent to the Applicants' Attorneys. Although the letter addressed to the Applicants is addressed to the First Applicant, it clearly states that the sale agreement between the Department of Housing and Mr and Mrs Visvanathan has been cancelled with effect from 13 January 2008. The letter addressed to the Applicants' Attorneys also clearly states that the sale agreement between the Department and Mr and Mrs Visvanathan is cancelled as from 14 January 2008, and that the attached copies of the cancellation letters were sent via registered mail to Mr and Mrs Visvanathan. Although it appears that there is a discrepancy as to the effective date of cancellation, this is neither here or there. However, a copy of the letter dated 23 June 2008 refers to the letter dated 13 November 2007 and collected by the First Respondent on 14 November 2007, giving then notice to remedy their breach of contract within 30 days. The heading of the said letter refers to Mr and Mrs Visvanathan, the Applicants.

[13] The Applicants submitted that the only copy of the cancellation letter that was attached to the First Respondents answering affidavit is a copy of the cancellation letter that was addressed to the First Applicant and was apparently sent by registered mail to 12 Opal Terrace, Copesville, Pietermaritzburg. The grounds for cancellation were set out with sufficient clarity in the letters sent to them and the Applicants did receive these letters. The relevant letters were put up as annexures to the founding affidavit and it is alleged by the Applicants that these letters were forwarded to them. I have already indicated that there is no case made out in the founding affidavit that these letters were not received. It is therefore not necessary to take this matter any further.

[14] Service on a chosen ***domicilium citandi et executand***: is deemed to be service at the person who chose that address as a ***domicilium***. In terms of clause 15.1 of the sale agreement between the Applicants and the First Respondent, the chosen ***domicilium*** is; postal address, 7 Vino Road, Raise Thorpe, Pietermaritzburg, and a physical address 12 Opal Terrace, Copesville, Pietermaritzburg. These are the addresses used by the First Respondent in communicating with the Applicants. The allegation that therefore these letters should not have been sent to these addresses is unfounded.

[15] It was conceded on behalf of the Applicant that the sale agreement clearly prohibits the letting out of the property. On the issue of breach of clause 14.2 of the agreement relating to sub-letting, Counsel for the Applicants submitted that the Twalas occupied the property pursuant to

a Deed of Sale. The Applicants' version is that the Twalas refused to vacate the property when the sale did not go through. It was in contemplation that they would become registered owners of the property. When the deal did not fall through, they instead elected to remain on the property as illegal tenants. The Twalas never became registered owners of the property.

[16] It was submitted on behalf of the Applicants that the issue of occupational rental is different from the concept of occupying as an ordinary tenant. The Court was referred to the case of ***Fen Sam Jackson vs Conradie N.O. and Another 1955 (4) SA 266 (E)***. It was submitted that in terms of this authority, the law recognises that the word "occupy" can be used in different senses. In terms of this case, the word "occupy" can bear a variety of meanings. This case is, however, of no assistance to the issues involved in the present case.

[17] The court was referred to clause 8.4 of the deed of sale between the Applicants and the Twalas, which specifically records that the occupation of the property by the Twalas did not constitute an agreement of tenancy between the parties. Eviction proceedings were instituted against the Twalas. Mr Chetty for the Applicants, submitted that it is clear that the occupation contemplated in clause 14.2 of the deed of sale between the Applicants and the First Respondent which prohibits the letting of the property, does not prohibit the handing over of the property to a prospective purchaser for the purposes of obtaining

occupation. Mr Chetty submitted further that the Twalas in their affidavit did not set out in detail the circumstances under which they came to be in possession of the property. The version of the Applicants that they handed over the occupation on the basis that the Twalas would become owners is uncontradicted.

[18] What is clear from the arrangement between the Applicants and the Twalas is that, the property was being let by the Applicants to the Twalas pending the sale and transfer of the property. Mr Crampton for the First Respondent submitted correctly in my view that the Twalas were paying rental for the occupation. In terms of common law this arrangement contains the essentials of an agreement of lease.

[19] There is no doubt that the property was being let by the Applicants to the Twalas pending the sale and transfer. The Twalas were paying rental to the Applicants. The Applicants also failed to evict the Twalas timeously when the deal collapsed. Certainly when the Applicants and the Twalas concluded the agreement, the Applicants were in breach of clause 14.2 prohibiting the letting of the proceeding agreement between the Applicants and First Respondent. Clause 21 of the sale agreement between the Applicants and the First Respondent is the breach clause. In terms of this clause, if the purchaser is in breach of any condition or obligation in terms of the agreement, the board or the seller shall have the right to *inter alia*, cancel the agreement.

[20] The argument by Mr Chetty for the Applicants, that the occupation contemplated in clause 14.2 of the Deed of Sale which prohibits the letting of the property does not mean that the handing over of the property to a prospective purchaser for the purposes of occupation cannot be correct: Firstly, this property was not simply handed over to the prospective purchaser, for the purposes of obtaining occupation, in terms of the agreement, they paid rental for the occupation pending sale or registration. Secondly, when the sale agreement involving the Twalas collapsed, the Applicants failed to evict them timeously despite being given an opportunity to do so.

[19] On the further issues raised in reply, it was submitted on behalf of the Applicants that the First Respondent's act of cancelling the agreement has to be regarded as inefficient for the following reasons:

- (a) The cancellation letter dated 23 June 2008 read with the letter dated 13 November 2007, does not comply with section 19(2) of the Alienation of Land Act 68 of 1981 and that no adequate description of the breaches are provided. The First Respondent provides no detail of the extent of the arrears but instead provides the extent of the outstanding balance due, which balance is in any event incorrect. **(See Section 19(1) and (2) of the Alienation of Land Act 28 of 1981).**
- (b) The letter dated 13 November 2007 was apparently collected by a Miss Visvanathan, who is assumed to be the Second

Applicant and the letter dated 23 June 2008, mentions that the letter dated 13 November 2007, was collected by the First Applicant. Since the First Respondent is reliant on both letters to establish due compliance with cancellation requirements, the discrepancy fatally undermines the First Respondent's attempts in this regard, and clearly the notice of cancellation was not unequivocal nor can it be said that it was conveyed to the Applicants. In this regard the Court was referred to the cases of ***Swart v Vooslo 1965 (1) SA 100 (A); Miller & Miller v Dikson 1971(3) SA 581(A).***

- [20] The Applicant submits further that no written notice of cancellation was given to the Second Applicant as was required by clause 21 of the sale agreement. The notice was addressed to the First Applicant only. The First Respondent provides no proof whatsoever that the cancellation notice was dispatched by the registered mail. The attempt in this regard is the allegation by its Deputy Director who clearly played no part in the posting of the letter. The First Respondent cannot rely on the sale agreement as its authority for sending a cancellation letter to 12 Opal Terrace at the time the Applicants were not in possession and occupation of the property. The sale agreement, it was submitted, sanctions the addresses nominated as chosen ***domicilium*** for only the periods prior to and during the times that the Applicants were in possession and occupation of the property. The conduct of the First

Respondent of sending the cancellation notice to twelve Opal Terrace at the time that it alleges that Applicants were neither in possession nor occupation of the property stands simply as unjustifiable and cannot be regarded as due fulfilment of its obligation regarding providing notice of cancellation of the agreement. I have already dealt with the issue of service on a chosen domicile in paragraph 14 of this judgment. In any event the Applicants have not alleged on the papers that, their chosen domicile was at any stage changed prior to the cancellation of the contract.

[21] A further issue raised in reply is the non-compliance with the National Credit Act 34 of 2005. The Applicant submits further that the instalment sale agreement falls within the ambit of the National Credit Act 34 of 2005 and the First Respondent's failure to comply with the provisions of section 129 and 130 of the said Act rendered its claim to have cancelled the agreement based on the Applicant's arrears without legal force and effect.

[22] The Applicants argued that the First Respondent provided no evidence that it furnished the letter of advice to the Applicants, which was an obligation it had to discharge in terms of the agreement before it could demand any payment from them and as such, it cannot place any reliance on the issue of the arrears to justify its rights to cancel the agreement.

[23] Mr Crampton submitted that it was incumbent upon the Applicants firstly to set out that they were not in breach of the agreement, and that they were not in arrears. The Applicants only made a vehement denial that they were not in arrears. In para 37 of the Founding Affidavit he states:

“I vehemently deny that I am in arrears with the payment of instalments. I place on record that the First Respondent has to date hereof not provided me with any letter of advice indicating to me what my instalments ought to have been and of any alleged areas”

Mr Crampton submitted, correctly in my view, that one would have expected the Applicants in the Founding Affidavit to provide information to the Court to show that they are not in arrears.

In annexure “C” to the Founding Affidavit, page 59 of the papers, the arrears item is clearly set out as R53 311,00. This document was sent to the Applicant prior to the cancellation of the agreement. It is therefore clear from the documentation placed before Court by the Applicants that they were in arrears and that they were notified that they were in arrears.

On the application of the rule ***Plascon Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634***, I have to decide the question of arrears, and notification thereof against the Applicant.

The submission on behalf of the Applicants that they were not in arrears and that they were not informed of the arrears has no substance and is accordingly rejected.

[24] In the supplementary heads filed with the leave of court, the First Respondent submits that the, Applicants raised three (3) new grounds upon which they contend that the cancellation of the agreement is invalid;

- (a) They submit that there was no compliance with section 19 of the Alienation of Land Act No. 68 of 1981, **(the Act)** ;
- (b) They seem to suggest that the letters of cancellation (annexures Q and R to the founding affidavit) were not sent or received by the Applicants;
- (c) They contend that there has not been compliance with Section 129 and 130 of the National Credit Act 34 of 2005.

The First Respondent submits that none of these grounds are raised in the Applicant's founding affidavit.

[25] The First Respondent submitted that an Applicant in an application for a declarator is required to set out in its founding affidavit the grounds for the relief that is sought. The Applicants cannot, if they are applying to court for a declarator, not mention their reasons in their Founding Affidavit and mention them for the first time in the Replying Affidavit, or even worse in the Heads of Argument. The factual bases for such relief

must be set out in the founding papers and new facts cannot be raised in reply. (*See Tilty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974(4) SA 362 (T); and Poseidon Ship's Agencies (Pty) Ltd v African Coaling and Exporting Company (Durban) (Pty) Ltd 1981(1) SA 313 (D).*

The First Respondent submits that the Applicants are therefore precluded from relying on these new grounds for the relief they sought.

[28] The grounds upon which the Applicants contend that the cancellation of the agreement is invalid, are indeed not set out in the Applicant's founding affidavit, they only appear for the first time in the Applicant's replying affidavit which was filed at a very late stage with the leave of the court and in their Heads of Argument.

[29] In the case of *Tilty's Bar and Bottle Store v ABC Garage and Others, supra*, in an application to strike out matters which were only raised in the replying affidavit, the court held that it has always been the practice of the courts in South Africa to strike out a matter in the replying affidavits which should have appeared in the founding affidavit including the facts to establish *locus standi* or the jurisdiction of the court. In this case, a case of *locus standi* was only made in the replying affidavit (*at 368 H*). The court in this case went on to state that it lies in the discretion of the court in each particular case to decide

whether the Applicants' founding contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. In the present case, the Applicant has not made out even a skeleton of a case in so far as his *locus standi* rests on the *stipulatio alteri*, (at 369 A-B). The Court went on to state that the Respondents in the striking out application would be greatly prejudiced in their case if the allegation referred to on the papers were not struck out. Not only in this new matter, which Respondents will not be able to deal with and refute unless they will be given leave to file a fourth set of affidavits, (at 370 A-B).

[30] In the case of *Poseidon Ships Agencies v African Coaling and Exporting Company, supra, Broome J*, stated the following:

"It is true that in certain circumstances, it would be unjust to confine an applicant to the contents of his launching affidavit. An example of further highly relevant facts coming into light later, and being introduced despite objection, is to be found in the case of *Registrar of Insurance v Johannesburg Insurance Company Ltd (1) 1962 (4) SA 546 W* where, in an application made by the Registrar of Insurance for the liquidation of the Respondent Insurance Company, a report prepared by a firm of Accountants was admitted. Another example of the court authorising an applicant to introduce new material in reply, is to be found in *Klein Hans v Van der Westhuizen NO 1971(1) SA 565 O at 568E* where the court considered that, as the ramifications of the Respondents affairs were extensive and complex, it was impossible for

the applicant to have had all the facts at his disposal before he launched the sequestration proceedings. See also ***Tilty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others*** 1974(4)SA 362 T at 369 A-B. But none of these cases go the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for the Applicant to make out a prima facie case in its founding affidavit” at 315 G – 316 A.

[31] Similarly in the present case, the three (3) issues in paragraph 23 above, raised by the Applicants in the reply, should have been raised in the Applicants founding affidavit. There is not even a suggestion on the papers that these issues came into light at a later stage after the Applicants had prepared and launched their founding affidavit. These issues raised in reply existed at the time the Applicant prepared its application and filed it in court. The Applicants did not rely on these new grounds in support of the relief that they sought. The First Respondent would have had to ask for leave of court to file a fourth (4) set of affidavits in order to deal with these new issues raised in reply.

[32] The Applicants are therefore precluded from relying of these new grounds for the relief that they are seeking.

[33] Even if this finding is wrong, the First Respondent has correctly contended that the new grounds are without merit. Chapter 2 of the Alienation of Land Act No.68 of 1981 includes section 19 of the same

Act and does not apply in respect of a contract in terms of which the State is the seller. Section 4 of this Act provides that this chapter shall not apply in respect of a contract in terms of which the state, the Community Development Board established by section 2 of the Community Development Act 3 of 1963, the National Housing Commission mentioned in the Section of the Housing Act 4, of 1966 or Local Authority is the seller.

[34] In paragraph 4 of the founding affidavit, the First Respondent is described as the Provincial Department of Housing for the Province of KwaZulu-Natal, a department of KwaZulu-Natal administration and whose offices are situated on 99 Pietermaritzburg Street, Pietermaritzburg, KwaZulu-Natal, and in paragraph 7.1 of the answering affidavit, the First Respondent is described as a government department in the provincial sphere of government.

[35] Furthermore, clause 25 of the agreement of sale entered into between the First Respondents and Applicants, provides as follows:

“It is hereby recorded that in terms of section 4 of Alienation of Land Act No. 68 of 1981 as read with section 61 subsection 2 of the Act, this agreement is not subject to the provisions of chapter 2 of the said Alienation of Land Act”.

[36] There is therefore no doubt that the seller in the present case is the State, and that section 19 of the said Act has no application in this

matter. See also ***Greater Johannesburg Transitional Metropolitan Council v Eskom 2000(1) SA 66.***

I therefore find that the alleged invalidity of the cancellation of the agreement based on non-compliance with section 19 of Act No.68 of 1981 is misplaced.

[37] The First Respondent, argued correctly, in my view that sections 29 and 130 of the National Credit Act 34 of 2005 apply only in respect of proceedings for the enforcement of a debt. These provisions do not apply in respect of the cancellation of an agreement. The present proceedings are proceedings instituted by the Applicants as debtors. Sections 129 and 130 of the National Credit Act No.34 of 2005 therefore are not applicable. The argument by the Applicants that these proceedings should have applied has no substance.

[38] In the light of the findings made in this matter it is not necessary to deal with further allegations raised by the Applicants.

[39] In the result, the Applicants application should fail. The rule nisi issued by this court on 15 September 2005 should be discharged with costs. There is no reason why the costs should not follow the result.

[40] The following order is made:

(1) The rule issued by this court on 15 September 2008 is discharged with costs.

SISHI J

Date of Hearing : 22 May 2009
Date of Judgment : 18 September 2009

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