



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 49050/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[17 SEPTEMBER 2024]

SIGNATURE

In the matter between:

HEDO INVESTMENTS CC
(REGISTRATION NUMBER 2007/019316/23)

Applicant

and

MATSICO FUNERAL SERVICES (PTY) LTD
(REGISTRATION NUMBER 2016/194496/07)

First Respondent

MAMAKOLE HOSEA THABO MADIHLABA

Second Respondent

J U D G M E N T :

NEL AJ

INTRODUCTION

- [1] This is an opposed application in terms of which the Applicant seeks, *inter alia*, the eviction of the First and Second Respondents, and any persons occupying the immovable property through the Respondents, from the immovable property described as Portion 316 of the Farm Witfontein 301, Registration Division JR, Gauteng ("the Immovable Property").
- [2] The Respondents contend, *inter alia*, that they are entitled to remain in occupation of the Immovable Property, and in the alternative, if evicted, that there should be restitution to the Respondents of monies paid to the Applicant.
- [3] At the outset, I extend my apologies to the parties for the delayed delivery of this Judgment, which occurred as a result of an administrative oversight solely on my part.

PRELIMINARY ASPECTS

- [4] There are a number of preliminary aspects to be dealt with, relating to the Answering Affidavit, condonation and an amendment.
- [5] The Applicant pointed out in its Heads of Argument that although both the First and Second Respondents appear to oppose the relief sought, only the Second Respondent filed a Notice of Intention to Oppose and an Answering Affidavit.
- [6] It is clear from a Condonation Application filed on behalf of the Respondents and the Respondents' Heads of Argument, that both Respondents are opposing the relief sought by the Applicant.

- [7] The Applicant recorded in its Heads of Argument that the Applicant does not object to the Answering Affidavit filed being regarded as the Answering Affidavit of both the First and Second Respondents.
- [8] I have accordingly considered the Answering Affidavit as setting out the opposition by both the First and Second Respondents.
- [9] The Applicant sought condonation for the late filing of its Replying Affidavit, and the Respondents sought condonation for the late filing of their Answering Affidavit. The parties did not oppose the respective condonation applications, and at the hearing of the Application, I granted condonation as sought.
- [10] The Applicant sought the amendment of the citation of the First Respondent, as the First Respondent had changed its name after the Application had been launched. The Respondents did not oppose the amendment sought, and at the hearing of the Application, I granted the amendment as sought. This is reflected in the heading of this Judgment.

THE ORDER OF 12 AUGUST 2019

- [11] On 12 August 2019, Davis J made an order, *inter alia*, to the effect that, pending the final adjudication of this Application, the Respondents are to make payment of an amount of R19 000.00 per month to the Applicant for the continued occupation of the Immovable Property.
- [12] The Applicant's counsel stated that the Respondents were in contempt of the Order of Davis J, but such alleged contempt is not an aspect that was before

me for determination. There are of course remedies available to the Applicant if the Respondents are not complying with the Order of Davis J.

THE MAIN COMMON CAUSE FACTS

- [13] It is common cause that the Applicant is the registered owner of the Immovable Property, and that the Respondents are in occupation of the Immovable Property.
- [14] It is also common cause that the Immovable Property is not used by the Respondents for residential purposes, but rather solely for business purposes.

THE APPLICANT'S MAIN CONTENTIONS

- [15] The Applicant alleges that the Respondents have no legal entitlement to be in occupation of the Immovable Property, that the Respondents are therefore in unlawful occupation, and should be evicted from the Immovable Property.
- [16] The Applicant contends that despite a number of attempts by the Respondents to purchase the Immovable Property, this has not occurred, as the Respondents have been unable to raise the monies to be paid as a purchase price.
- [17] On 4 March 2016, the Applicant and the First Respondent concluded a written Agreement of Sale, in terms of which the First Respondent would purchase the Immovable Property from the Applicant, with the purchase price being R2 680 000.00.

- [18] The Agreement of Sale was subject to a suspensive condition that the First Respondent would obtain an approved loan in an amount of not less than R1 880 000.00 within 30 days from the date of the conclusion of the Agreement of Sale. It is common cause that the suspensive condition was not met.
- [19] The Applicant states that the Agreement of Sale became null and void, and that the Applicant and the Second Respondent agreed that the Second Respondent would make payment of an amount of R20 000.00 per month for the occupation of the Immovable Property, and would pay the municipal charges, while the Second Respondent continued to seek financing of the purchase price. This is admitted by the Second Respondent.
- [20] The Respondents admit that the financing was not obtained, and that the agreed amounts were not paid timeously.
- [21] On 4 February 2018 the Second Respondent requested the Applicant to provide a new Agreement of Sale. The document was provided, but there was no conclusion of the Agreement of Sale.
- [22] The Respondents instead presented a counter-offer to the Applicant, which counter-offer was not accepted.
- [23] No Agreement of Sale was ever concluded as between the Applicant and the Respondents or either Respondent.
- [24] The Applicant contends that therefore the Respondents have no legal right to occupy the Immovable Property.

THE RESPONDENTS' MAIN CONTENTIONS

- [25] The Respondents contend that Matsemela Investments (Pty) Ltd ("Matsemela") ought to have been cited as a respondent in the Application, as Matsemela had "*taken over*" a lease agreement concluded between the Applicant and Permtypes Investments (Pty) Ltd ("Permtypes"), and the failure to do so constitutes a non-joinder.
- [26] This is not an aspect that was raised in the Respondents' Heads of Argument, and was not dealt with by Respondents' counsel during argument.
- [27] The Respondents contend that there was a mis-joinder, as the First Respondent was incorrectly described in the heading of the Notice of Motion. This aspect was resolved by the granting of the amendment sought by the Applicant, and as referred to above.
- [28] The Respondents submitted, in their Heads of Argument, that the Respondents occupy the Immovable Property in terms of an oral lease agreement.
- [29] The Respondents submitted in their Heads of Argument that there are disputes of fact in respect of the relationship between the parties.
- [30] The Respondents submitted in their Heads of Argument, that the Applicant did not make out a case for the eviction relief sought, as the lease agreement of 2013 was not dealt with by the Applicant.
- [31] The Respondents contend that there should be a restitution of amounts paid to the Applicant in terms of the Agreement of Sale.

- [32] The Respondents contend that they are in lawful occupation of the Immovable Property.

ISSUES TO BE DETERMINED

- [33] The issues that need to be considered and determined are the following:

[33.1] Should Matsemela have been joined to the Application as a respondent;

[33.2] Are there disputes of fact that prevent the determination of the Application on the Affidavits;

[33.3] Are the Respondents in lawful occupation of the Immovable Property?

[33.4] Are the Respondents entitled to restitution?

FIRST ISSUE: NON-JOINDER OF MATSEMELA

- [34] The Respondents allege that Matsemela ought to have been joined to the Application as a respondent.

- [35] The issue was not raised by the Respondents' counsel in either Heads of Argument or at the hearing of the Application. I have however considered and determined this issue, as it was raised in the Answering Affidavit and dealt with by Applicant's counsel.

- [36] The Respondents' allegations pertaining to the First Issue are essentially that the Applicant and Permttype concluded a lease agreement, that the lease

agreement was “*taken over*” by Matsemela, and that the lease agreement is still of full force and effect.

[37] The Respondents’ argument is that Matsemela occupies a portion of the Immovable Property, and cannot be evicted from the Immovable Property, as it has not been joined by the Applicant.

[38] There is no allegation that Matsemela is honouring the lease agreement relied on, and that it is making rental payments to the Applicant in terms of such lease agreement. An allegation and proof of payment of rental by Matsemela would have provided a clear manner of resolving this issue.

[39] The lease agreement between the Applicant and Permttype which the Respondents allege was “*taken over*” by Matsemela, was allegedly concluded on 13 January 2013.

[40] A copy of the lease agreement is alleged to be attached to the Respondents’ Answering Affidavit as “TM2(B)”. The lease agreement incorrectly refers to Permttype as the lessor and to the Applicant as the lessee. It is however clear that this is the lease agreement that all of the parties refer to in respect of the First Issue.

[41] Clause 4 of the lease agreement stipulates the duration of the lease, being one year, commencing on 1 April 2013, and therefore expiring on 31 March 2014.

[42] Provision is made in clause 4 of the lease agreement for an option to renew the lease agreement for a further year.

- [43] The Respondents do not allege that the option was exercised, but even if it was, the period of the lease agreement would only have been extended until 31 March 2015.
- [44] The Respondents allege that the lease agreement is still of force and effect on the basis that “*such lease agreement has not, to date, been cancelled by the applicant*”.
- [45] Such proposition is however unsound, as the lease agreement terminated by the effluxion of time, by no later than 31 March 2015.
- [46] There is accordingly no existing lease agreement in place as between the Applicant and Permttype, or between the Applicant and Matsemela, even if it was possible to simply “*take over*” the lease agreement.
- [47] There was accordingly no need to join Matsemela, and the Respondents’ *in limine* point is clearly without merit.

THE SECOND ISSUE: DISPUTES OF FACT

- [48] In the Respondents’ Heads of Argument, it is submitted that disputes of fact exist in respect of the relationship between the parties and the law applicable to such relationship. It was also submitted that there is a dispute as the Applicant alleges that there is no lawful basis upon which the Respondents can occupy the Immovable Property, while the Respondents contend that a lease agreement and a purchase agreement exists.

[49] The mere existence of disputed versions in affidavits does not automatically mean that an opposed application cannot be determined on the contents of the affidavits filed by the parties in an application.

[50] In the matter of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited*¹ the then Appellate Division stated as follows:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact...Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...”

[51] In the matter of *Soffiantini v Mould*² it was stated as follows:

“It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem.”

[52] A robust approach must be balanced by carefully considering whether denials which seem improbable may “*take on a different colour*” through oral evidence.³

¹ 1984 (3)SA 623 (A) at 634G-635C; See also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

² 1956 (4) SA 150 (EDLD) at 154.

³ *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Limited* 1971 (2) SA 388 (W) at 390C-H.

[53] In the matter of *Wightman t/a JW Construction v Headfour (Pty) Limited and Another*⁴ the Supreme Court of Appeal stated that:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.”

[54] The disputes raised by the Respondents are vague and generalised.

I specifically enquired from Respondents' counsel at the hearing of the Application what the factual disputes are. Respondents' counsel submitted that the factual disputes related to the number and the nature of the agreements concluded in 2013, and whether or not the terms of the Agreement of Sale had been breached.

[55] Respondents' counsel also submitted, in response to the Applicant's counsel's replying argument, that there was some form of new agreement, and that if the Respondents were making payments in terms of the new agreement, their occupation of the Immovable Property would be lawful. Respondents' counsel submitted that these facts were not before Court, and could be resolved by way of oral evidence.

[56] There was no attempt by the Respondents to place these “new” facts before the Court by way of a supplementary affidavit, and there was no application to refer any disputes to oral evidence.

[57] The disputes of fact raised by the Respondents are clearly not real, genuine or *bona fide* disputes of fact.

⁴ 2008 (3) SA 371 (SCA) at para [13].

- [58] The number and the nature of the agreements concluded in 2013 are clearly set out in the affidavits filed. The alleged breach of the Agreement of Sale is clearly not a relevant fact at all, as the parties are in agreement that the suspensive condition contained in the Agreement was not met.
- [59] In the circumstances, I am satisfied that there are no disputes of fact that would prevent the opposed Application being determined on the contents of the affidavits filed in the Application.

THE THIRD ISSUE: EVICTION

- [60] The third issue that requires determination is whether or not the Applicant is entitled to the relief of the eviction of the Respondents. Coupled to such issue is whether or not the Respondents have a lawful right of occupation of the Immovable Property.
- [61] It is common cause that the Applicant is the registered owner of the Immovable Property, and that the Respondents are in occupation of the Immovable Property.
- [62] The Applicant alleges that after a number of attempts to sell the Immovable Property to the Respondents, all of which were unsuccessful, the Respondents had no right to continue to occupy the Immovable Property, and the Respondents are in unlawful occupation of the Immovable Property.
- [63] At the hearing of the Application, I enquired from the Respondents' counsel as to the legal basis on which the Respondents rely for the continued occupation of the Immovable Property. I was advised that there was initially an oral agreement, concluded in 2013, which coincided with the purchase of

the members' interest, which was renewed on a monthly basis. The oral agreement then allegedly "mutated" and the submission was that the right of occupation then arose from the written Agreement of Sale.

[64] Respondents' counsel submitted that if regard is had to the Agreement of Sale, it appears from such document that the Respondents were in lawful occupation at the time that the Agreement of Sale was concluded.

[65] The thrust of the Respondents' argument as to the right to occupy the Immovable Property is that an oral agreement of lease was concluded, either expressly or tacitly during 2013, that the contents of the Agreement of Sale, recording that the Respondents are already in occupation of the Immovable Property evidences such oral lease agreement, and that the oral lease agreement has never been cancelled.

[66] No details of the oral lease agreement were set out in the Answering Affidavit, such as who represented the parties in concluding the oral lease agreement, or what the terms of the oral lease agreement are. There are no details set out as to how an oral lease agreement was concluded tacitly.

[67] The Respondents allege that payments have been made by the Respondents to the Applicant, in respect of rental, but no specific detail is provided. The Respondents refer to a reconciliation prepared by the Applicant, but such reconciliation only commences as from 7 November 2015.

[68] The Respondents appear to allege in the Answering Affidavit that such payments were made in reduction of the purchase price for the Immovable Property, and yet at the same time, that it was for rental.

- [69] The Respondents state that once a dispute had arisen as to the deposit paid by the Respondents, in terms of the Agreement of Sale, the Respondents had ceased to pay rental. Once again there is no detail provided as to when cessation occurred, or why the Respondents were entitled to cease making payments of rental, if the lease agreement relied on by the Respondents was an oral agreement, separate from the Agreement of Sale.
- [70] The Respondents allege that there are amounts owing to the Applicant for rental.
- [71] The Applicant admits that the Respondent paid rental amounts to the Applicant in respect of the occupation of the Immovable Property, but states that the Respondents had ceased making payment of rental. This accords with the Respondents' version in such regard.
- [72] It is accordingly common cause that the Respondents were obliged to pay monthly rental amounts to the Applicant for being in occupation of the Immovable Property.
- [73] There is no evidential proof of the conclusion of an oral lease agreement in 2013, and the Applicant denies the conclusion of such an oral agreement.
- [74] It is accordingly clear that the Respondents' occupation of the Immovable Property arose (or as the Respondents contend, "*mutated*") from the Respondents' intention to purchase the Immovable Property. The Respondents' attempts to purchase the Immovable Property have however been fruitless.

- [75] The Respondents seek to justify their continued occupation of the Immovable Property, despite not paying any rental, and despite being provided with a demand to vacate, by suggesting that a reconciliation needs to be performed, in order to determine whether the Respondents are indebted to the Applicant for rental.
- [76] The Respondents have failed to show which payments relate to the purchase of the Immovable Property, and which payments relate to rental for the occupation of the Immovable Property.
- [77] The Respondents are unable to show how the payments must be allocated, yet persist that a restitution of payments should be ordered.
- [78] What is not in dispute is that the Respondents ceased making rental payments in mid-2017.
- [79] The Respondents' entitlement to occupy the Immovable Property ceased once the various attempts to purchase the Immovable Property were terminated.
- [80] I am accordingly satisfied that the Applicant has established that the Respondents do not have any lawful right to remain in occupation of the Immovable Property.

THE FOURTH ISSUE: RESTITUTION

- [81] Respondents' counsel submitted that if I find that the Respondents should be evicted, I should make an order of restitution. It was submitted that I am in a position to order restitution, and I must determine the amount to be repaid.

- [82] The Respondents however contend in the Answering Affidavit that a reconciliation would have to be performed in order to determine the allocation of amounts paid by the Respondent between rentals and purchase price. It is therefore impossible for me to determine the extent of any restitution.
- [83] The Respondents did not raise any counter-application for restitution, and did not set out any facts in support of an order for restitution.
- [84] In the Answering Affidavit, the Respondents allege that if the Offer to Purchase is found to be null and void, the Respondents would be entitled to restitution. The Respondents, however, do not seek restitution in the Answering Affidavit, but seek a reconciliation in order to determine what amounts may be due to the Applicant.
- [85] In the circumstances, there is no proper application before me for restitution, and I accordingly am not required to determine the issue of restitution.

COSTS

- [86] It is submitted in the Applicant's Heads of Argument that the conduct of the Respondents warrant a punitive costs order being made against the Respondents.
- [87] I am in agreement that the conduct of the Respondents in remaining in occupation of the Immovable Property, whilst failing to pay any rental amounts, and forcing the Applicant to bring an application for the relief sought, amounts to vexatious conduct. In addition, the nature of the opposition to the relief sought, the vagueness of the defences and the allegations made in the

Answering Affidavit, and the dilatory defences raised by the Respondents warrant the granting of a punitive costs order.

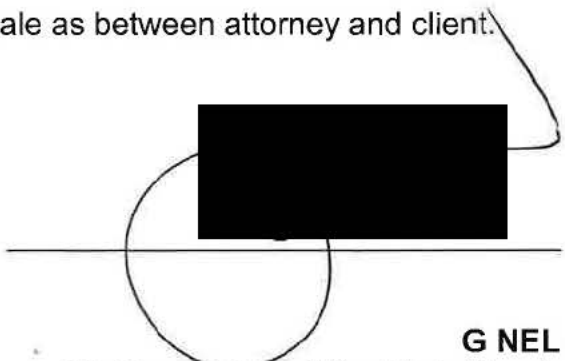
THE ORDER

[88] In the circumstances, I make the following order:

[88.1] The First and Second Respondents ("the Respondents") and any persons or entities occupying the immovable property described as Portion 316 of the Farm Witfontein 301, Registration Division JR Gauteng ("the Immovable Property") through the Respondents, are to vacate the Immovable Property within 20 (twenty) days of the granting of this Order;

[88.2] In the event of the Respondents and/or any persons or entities occupying the Immovable Property through the Respondents failing or refusing to vacate the Immovable Property within 20 (twenty) days of the granting of this Order, the relevant Sheriff of the High Court is authorised to evict such persons and/or entities from the Immovable Property;

[88.3] The Respondents are to, jointly and severally, pay the costs of the Application, on the scale as between attorney and client.



G NEL
[Acting Judge of the High Court,
Gauteng Division,

Date of Hearing: 3 October 2022

Date of Judgment: **17 September 2024**

APPEARANCES

For the Applicant: Adv. NC Hartman (082 921 3526)

Instructed by: Gerneke & Potgieter Attorneys (012 565 5782)

For the Respondents: Adv. LK Van der Merwe (082 747 4827)

Instructed by WS Badenhorst Attorneys (012 329 6057)