IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case Number: 4217/2022

In the matter between:

JOHAN DE BEER N.O.	First Applicant
LIZL DE BEER N.O.	Second Applicant
LAURENCE SAHD N.O.	Third Applicant
and	
SHABBIR GHULAM	First Respondent
ENOCH MGIJIMA LOCAL MUNICIPALITY	Second Respondent

JUDGMENT

RUSI J

[1] At the center of this application are two immovable properties described as the remainder of Erf 8[...], Queenstown and remainder of Erf 1[...], Queenstown (the first property); and the remainder of Erf 8[...], Queenstown (the second property) which the first respondent occupies.

[2] The applicants are the trustees for the time being of the UITSUG Trust. They shall conveniently be referred to in this judgment as ‘the Trustees’. Whenever reference is made in the judgment to the Trust, it must be taken to be reference to the Trustees.

[3] The Trustees now seek an order evicting the first respondent from these properties in terms of section 4(1) of PIE. Notice was given to the first respondent as envisaged in section 4(2) of the same Act, of the Trust’s intention to apply for his eviction from the properties.

[4] No substantive relief is sought against the second respondent (the Municipality), having been cited in these proceedings as an interested party to the extent that it may be required by this Court to provide the first respondent with emergency temporary accommodation. It is necessary to indicate at this early stage that even though the Municipality was given due notice of these proceedings, it has never participated in them, in particular, by the submission of a report regarding the availability of alternative accommodation in the event of the eviction order sought is granted.

[3] The first property is situated at 33 B[...] Street, Komani and the second property at 31 B[...] Street, Komani. Both the first and second properties are owned by the UITSIG Trust as shown in the Deeds Registry property search report which the Trust annexed to its founding papers. The Trust sold these properties to the first respondent in terms of two written sale agreements that were concluded in October 2019 and July 2020, respectively. For convenience, I will refer to the first property as “33 B[...] Street”, and to the second as “31 B[...] Street”. The purchase price for 33 B[...] Street was R2million, while 31 B[...] Street was sold for R1 750 000.00. These amounts were payable in instalments over a period of time.

[4] The two sale agreements simultaneously made provision for occupational rental by the first respondent who had already taken their possession and occupation as provided for therein. They also made provision for payment by the first respondent of municipal charges relating to the properties which included but were not limited to all rates, services, insurance, water, electricity and levies.

[5] The first respondent allegedly fell in default of the payment terms set out in the first agreement. In order to cure the default and, *inter alia*, to regulate the future terms of payment of the balance of the purchase price in respect of 33 B[...] Street, and the monthly occupational rental for both properties, he and the Trust entered into a settlement agreement (the settlement agreement) on 13 January 2021. He failed to honour the terms set out in the settlement agreement too, resulting in the cancellation of all three agreements.

[6] It was a term of the settlement agreement that in the event of its cancellation due to breach, the first respondent would be evicted from both properties. The eviction is opposed by the first respondent who, simultaneously with his opposing papers, filed a counter application.

[7] The ground on which the Trust seeks the eviction of the first respondent from the properties is that since the sale agreements and the settlement agreement have been cancelled owing to his breach of these agreements, his continued occupation of the properties is unlawful.

[8] In opposing the application, the first respondent raised several points in limine, namely that: *(a)* the first and second agreements are unlawful due to non-compliance with section 40(1) of the National Credit Act in that they are credit agreements as defined in the Act, and when they were concluded the Trust was not registered as a credit provider; *(b)* the first and second agreements are invalid in that they were not recorded and registered by the Registrar of Deeds as required by section 20(1) of the

Alienation of Land Act 68 of 1981 (the ALA) hence, the cancellation of the two agreements is premature and ought to be set aside in that in terms of section 26 of the ALA no payments were due by the first respondent until the two agreements were recorded as envisaged in section 20(1) of the ALA; *(c)* the settlement agreement is void *ab initio* as it was induced by material misrepresentation; *(d)* the cancellation of the second agreement is unlawful as the first respondent has paid the purchase price for 33 B[...] Street in full.

[9] These points *in limine* are also the grounds for the various declaratory reliefs that the applicant seeks in his counter-application.

[10] On the date of hearing of the application, the first respondent abandoned the point of law relating to non-compliance with the provisions of section 20(1) and 26 of the ALA. Since the points *in limine* that the first respondent raised constitute the bases on which the counter-application is founded, the abandonment of this point in limine simultaneously disposes of the declaratory relief sought by the first respondent based on the provisions of sections 20(1) and 26 of the ALA.

[11] The remaining declaratory relief that the first respondent seeks in his counter application is, therefore, that *(a)* the first and second agreements are unlawful due to non-compliance with section 40(1) of the National Credit Act in that they are credit agreements as defined in the Act and when they were concluded, the Trust was not registered as a credit provider; *(b)* the settlement agreement is void *ab initio* as it was induced by material misrepresentation.

[12] He further seeks, in the counter application, an order directing the Trust to transfer to him the first property (remainder of Erf 8[...] Queenstown and remainder of Erf 1[...] Queenstown) situated at 33 B[...] Street Komani, as well as other ancillary relief. As the basis of this relief, he states that he has paid more than 50 per cent of the purchase price in respect of 33 B[...] Street, therefore, in terms of section 27(1) of the ALA, the Trust is obliged to transfer this property to him.

[13] The counter-application is opposed by the Trust on the basis that its cancellation of the agreements is lawful and not premature as the first respondent asserts. According to the Trust, the first and second agreements are not invalid in that they are incidental agreements as opposed to credit agreements, and as such, it did not have to register as a credit provider as envisaged n section 40(1) of the NCA when it concluded them.

[14] It must further be stated at this early stage that the Trust's cancellation of the second agreement is accepted by the first respondent who further states in his answering affidavit that he has vacated the property forming the subject of the second agreement (that is, 31 B[...] Street) and has handed over the keys to the Trust. He, however, denies that he is in unlawful occupation of 33 B[...] Street. This fact notwithstanding, it was suggested by counsel for each of the parties at the time of hearing of the application that the facts relating to the second agreement still bear relevance to the determination of the issues that remain in respect of 33 B[...] Street. I agree.

The background facts

[15] In October 2019 the Trust, duly represented by the first applicant entered into a written sale agreement (the first agreement) in respect of 33 B[...] Street for the purchase price of R2 million. This amount would be payable by way of 10 equal instalments of R200 000.00. The first instalment was payable on 15 October 2019, and thereafter, on the 25th day of each month.

[16] Since the first respondent was already in occupation of 33 B[...] Street at the time the sale agreement was entered into, it was a further term of the agreement that he would pay occupational rental of R9 000.00 per month. As a result, the total monthly instalment that the first respondent would pay to the Trust in respect of 33 B[...] Street was R219 000.00 and his tenth and last instalment towards the full purchase would be payable on 15 July 2020.

[17] Further in terms of this first agreement, the transfer of 33 B[...] Street would be given by the Trust to the first respondent after the full purchase price had been paid. The first respondent also had an obligation to pay municipal charges relating to the property which included but were not limited to all rates, services, insurance, water, electricity and levies.

[18] It was a further term of the first agreement that where the prescribed payments were not made on their due date, interest at the prevailing prime rate at the time, plus 2% would be charged from the date of the default or delay to the date on which the delay was cured, both dates inclusive as certified by the conveyancer.

[19] On 16 July 2020, the Trust sold 31 B[...] Street to the first respondent in terms of a written sale agreement (the second agreement) for the purchase price of R1 750 million, similarly, to be paid in ten instalments. The first nine instalments would be in the amount of R150 000.00 and the final and tenth instalment would be R100 000.00. The first payment towards the purchase price for 31 B[...] Street, in terms of the second agreement, would be payable upon the first respondent paying the last instalment in respect of the purchase price of 33 B[...] Street. This would be on the 25th day of the month succeeding that in which the first respondent made payment of the last instalment for 33 B[...] Street. Arithmetically, in relation to 15 July 2020, this would be 25 August 2020.

[20] The second agreement further stipulated that an amount R300 000.00 which the first respondent had paid to the Trust in respect of the first agreement would be allocated to the acquisition of this property as a non-refundable deposit.

[21] Similar to the first agreement, the first respondent had an obligation to pay all costs relating to municipal rates, insurance, water electricity and levies as well as costs of the full maintenance of the property.

[22] The transfer of 31 B[...] Street from the Trust to the first respondent would be given once the full purchase price was paid. Since the first respondent had already taken occupation of 31 B[...] Street by 06 June 2020, an amount of R10 000.00 per month was payable in advance as occupational rent.

[23] Any default by the first respondent in paying the agreed amounts under the second agreement would result in interest being payable at the prevailing prime rate plus 5% from the date of commencement of the default until it is cured, both dates inclusive as certified by the conveyancer.

[24] A payment schedule annexed to the papers filed of record as FA7 shows that the first respondent failed to make payment of the first instalment towards the purchase price of 33 B[...] Street on the due date of 15 October 2019. His failure to make the agreed payments on their due date as envisaged in the first and second agreements persisted. As a result of his persistent breach of payment terms under the two agreements the first respondent was charged default interest.

[25] Upon demand of payment by the Trust by a letter dated 20 November 2020, the first respondent admitted his default, and made an offer to the Trust to re-negotiate the payment terms of the purchase price for 33 B[...] Street. He proposed to pay an amount of R50 000.00 towards the balance of the purchase price.

[26] The first respondent's offer was encapsulated in the letter written by his legal representatives to those representing the Trust. These are the relevant contents of the said letter dated 27 November 2020:

> *"We act for Mr Shabbir Ghulam.*
>
> *Your letter of demand dated 20 November 2020 addressed to our client has been handed over to us for attention and reply.*

Due to the Covid 19 Pandemic our clients business has been severely hampered causing him to experience a severe cash flow problem.

Prior to the failure to pay his instalment for the month of November, he did his level best to, within each month, to meet his obligation of paying your client the R200 000.00 within each month and to pay his occupational rental of R9 000.00 per month.

As a result of the impact of Covid 19 on his business his cash resources have dwindled and would like to re-negotiate the balance of the purchase price by paying the balance in the sum of R50. 000.00 per month.

To date our client has paid R1.3 Million towards the purchase price leaving the balance of R700 000.00.

Our client would like to re-negotiate the repayment of the balance of R700 000.00 by offering to pay the balance at the rate of R50. 000.00 per month.

Kindly request your client to consider our clients proposal and vary the agreement to accommodate our client."

[27] This offer culminated in a settlement agreement dated 13 January 2021. Its introductory portion records the following in its clause 3 regarding the first respondent's admitted breach of the first and second agreements and what he and the Trust intended following such breach:

'3. The Purchaser defaulted on is payments since inception and the Seller reached an agreement with him on 21 September 2020 whereby the Purchaser would pay monthly instalments of 219 000.00 from 15 November 2020 onwards together with outstanding rent until the property in clause 1 has been paid in full.[1] Once the capital on the property referred to in clause 1 has been paid in full, the Purchaser would pay the interest, insurance, municipal rates and taxes. Once this has been settled, he would commence with monthly instalments of R160 000.00 until the property in clause 2 has been paid in full[2], whereafter he would pay the interest, insurance and municipal rates and taxes.

[28] The terms of the settlement agreement were as follows: The first respondent would pay monthly instalments of R50 000.00 with interest on the outstanding balance of the purchase price of 33 B[...] Street at the prevailing rate of 6% from the date of commencement of the default calculated daily and compounded monthly until the purchase price; rental interest, insurance premiums and municipal rates and taxes had been paid in full.

[28] The payment of the instalments agreed upon in terms of the settlement agreement would commence on 15 January 2021 with the next instalment being payable on the 15th day of each succeeding month. The agreed monthly instalment of R50 000.00 would escalate with 10% per annum while the monthly rental would escalate with 9% per annum. The escalation would commence in December 2021 and would further be escalated in December of each subsequent year.

[29] Further in terms of the settlement agreement, the monthly instalments of R50 000.00 would be utilised first in covering the rental, as well as the municipal rates and taxes paid by the Trust which the first respondent was otherwise responsible for in terms of the first and second agreements; insurance and the capital amount being the balance of the purchase price of 33 B[...] Street with interest thereon.

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[1] **Clause 1** of the recordal of the settlement agreement sets out the terms of payment of the Purchase price of 33 B[...] Street and the agreed occupational rental for that same property as these terms were set out in the first agreement.

[2] **Clause 2** of the recordal of the settlement agreement sets out the terms of payment of the Purchase price of 31 B[...] Street and the agreed occupational rental for that same property as these terms were set out in the second agreement.

[30] It is common cause that at the time of conclusion of the settlement agreement, the Trust had registered as a credit provider as required by the NCA. Subsequent to the conclusion of the settlement agreement, the first respondent made various intermittent payments which did not comply with the payment schedule agreed to between him the Trust in terms of the settlement agreement. The last payment he made was of an amount of R50 000.00 on 17 July 2022. He stopped further payments, and he indicates on this score that he stopped making further payments as he saw that the amounts owing by him did not decrease despite the payments he made.

[31] The first respondent's failure to honour the terms of the settlement agreement resulted in the cancellation of the agreements and the eviction that the Trust now seeks. At the time of this application, the first respondent had already paid the Trust in total the amount of R2 346 072.22.

[32] These facts are either common cause between the applicants and the first respondent or have not been seriously disputed.

The case for the applicant

[33] In substantiating the eviction application, the Trust contends that since the agreements have been cancelled there is no basis for the first respondent and all persons occupying the two properties through him to remain in their occupation.

[34] As regards the alleged breach, the Trust contends that the first respondent ought to have paid to it on 15 July 2020 the full purchase price of R2 million in respect of 33 B[...] Street but failed to do so. Despite being afforded further opportunities to cure his default, he failed to pay the monthly instalment of R219 000.00 which was due on 15 November 2020. By the time the settlement agreement was entered into, he had only paid to the Trust a total sum of R1 396 072.22.

[35] The first respondent further breached the terms of the settlement agreement that was concluded on 13 January 2021. According to the Trust, as at 15 October 2022, he should have paid to the Trust, in keeping with the terms of the settlement agreement, R1 205 000.00 representing 12 monthly instalments of R50 000.00 for the period of 15 December 2020 to 15 November 2021; and the escalated monthly instalment of R55 000.00 for the period of 15 December 2021 to 15 October 2022 which equalled the total sum of R605 000.00. As a result, says the Trust, in so far as the settlement agreement is concerned, by 02 December 2022 he had paid R950 000.00. According to the Trust, the first respondent had, therefore, fell in arrears of R255 000.00 under the settlement agreement, which excluded interest.

[36] The Trust goes on to state that from the total amount of R2 346 072.22 that the first respondent had paid from 21 October 2019 until 17 June 2022, it applied an amount of R921 403.08 towards the occupational rental for both properties and associated costs. In this regard the applicants annexed to their application papers the relevant schedules depicting the amounts that were payable by the first respondent.

[37] Also annexed to the applicant's founding papers is a payment schedule marked Annexure FA7 ("FA7") which sets out the amounts owing and paid by the first respondent to the Trust, together with interest thereon, both in relation to the purchase price of the two properties and their occupational rental and associated costs. The total interest that, according to Annexure FA7 was owed to the Trust by the first respondent under the first and second agreements and the settlement agreement as at 30 September 2022 is R1 053 616.05.

[38] It is the Trust's evidence further that it utilises the properties to generate income, and the first respondent's continued unlawful occupation is severely detrimental to it. It contends that the first respondent's continued occupation of the properties in circumstances where he has made no payments since June 2022 is prejudicial in that it prevents it from exercising its rights in relation to the properties as their registered owner. It further states that it remains liable to pay insurance taxes, rates, refuse

removal and water consumption in respect of the properties while the first respondent continues to occupy the properties without making any payments for its continued occupation.

[39] Further, according to the Trust, there is sufficient and adequate accommodation readily available to the first respondent in Komani against payment of reasonable rent which would be suitable for his residential needs. For these reasons, the Trust asserts that it is just and equitable that the first respondent be evicted from the properties.

The case for the first respondent

[40] I set out first, the points *in limine* that the first respondent persists with in opposing his eviction from 33 B[...] Street.

(a) The non- compliance with section 40 of the National Credit Act

[41] The first respondent contends that the first sale agreement is an instalment sale agreement as envisaged in the National Credit Act 34 of 2004 (the NCA). Therefore, the Trust was required in terms of section 40(1) of the NCA to register as a credit provider when the agreements were concluded.

[42] In the light of the fact that the Trust had not registered as a credit provider as required by section 40(1) of the NCA, so the first respondent contends, in terms of section 89(2)*(d)* of the same Act the second agreement is accordingly void *ab initio*. On these bases, the first respondent contends that he did not commit any breach of the agreements when the settlement agreement was concluded, and he is not indebted to the trust at all and therefore his occupation of the property is not unlawful.

(b) The settlement agreement is void on the ground of misrepresentation

[43] The first respondent states that he signed the settlement agreement under a false misrepresentation made by the Trust that he was in breach of both sale agreements. It was subsequent to the legal advice he obtained that he became aware that he was in fact not in breach of any of the sale agreements. This, he says, was so because the Trust was not registered as a credit provider and therefore the agreements are unlawful and void *ab initio*, alternatively, that he was not in breach of the second agreement as payments of the purchase price in respect of 31 B[...] Street would only commence after the instalment sale agreement had been registered. In this regard, he further sates that he saw from Annexure FA7 that the purchase price for 31 B[...] Street was incorrectly debited on his account on 16 July 2020.

[44] The first respondent goes on to state that the misrepresentation by the Trust was a material one and it induced the conclusion of the settlement agreement. He further states that it was reasonable for him to believe the misrepresentation. He had no reason to believe that the Trust was not allowed to enter into the sale agreements with him when it was not registered as a credit provider.

(c) The cancellation of the first agreement is unlawful

[45] The first respondent contends that he has fully paid the purchase price in respect of the 33 B[...] Street which forms the subject of the first agreement and therefore its cancellation is unlawful.

[46] In substantiating this point *in limine*, the first respondent asserts that the settlement agreement amends the terms of the first and second agreements in relation to interest. In terms of the settlement agreement, he was obliged to pay interest on the outstanding balance at the prevailing rate of 6%. He contends that this interest clause in the settlement agreement also exceeds the rate of interest prescribed from time to time for contracts of the class to which the sale agreements belong.

[47] As regards his obligation to commence payment in respect of 31 B[...] Street, the first respondent asserts that he was incorrectly charged interest on the purchase price of R1 750 000.00 in respect of 31 B[...] Street in circumstances where his obligation to pay this purchase price had not become effective. He bases this contention, as already mentioned, on the fact that in terms of the second agreement, his obligation to pay the purchase price for 31 B[...] Street would commence once he had paid in full the purchase price in respect of 33 B[...] Street.

[48] The first respondent further states that the variation of interest on the purchase price of 33 B[...] Street is not provided for in either the original sale agreement or the settlement agreement. He therefore disputes the interest charges and calculations reflected in Annexure FA7. He also disputes liability for the debited charges on a monthly basis for insurance, municipal rates and water on both properties, stating that he never agreed to such a debit and that the Trust has failed to adduce proof of supporting vouchers to verify these expenses.

The first respondent's opposition on the merits of the application

[49] On the merits of the application, the first respondent denies indebtedness to the Trust in the amounts it alleges. The Trust, he says, incorrectly calculated interests on the outstanding amounts based on his indebtedness under the second agreement when he was not in default of that agreement as his obligation to make payments had not taken effect.

[50] According to the first respondent, the total purchase price for both properties is R3 750 000.00. He contends that the arrear amount of R219 000.00 was incorrectly calculated, and the actual amount of arrears was R150 000.00. He further states that he had paid to the Trust a total amount of R 1 745 000 .00 by December 2020 and not the R950 000.00 that the Trust alleges to be the total amount paid.

[51] The first respondent further states that the eviction grounds relied upon by the Trust cannot be sustained in that the remaining agreement (the first agreement) is unlawful, alternatively, its cancellation is premature, and further alternatively, that the settlement agreement itself is invalid and should be set aside.

[52] The first respondent states as his personal circumstances that he has used 33 B[...] Street as a residence for his family including his wife, brother-in-law and minor children since the year 2015. Prior to purchasing this property, he had been renting from the Trust. He moved to Komani to start a business and to support his family. His business was severely affected by the COVID-19 pandemic. However, he has, to the best of his ability, paid the instalments due to the Trust in terms of the settlement agreement and acted in good faith in so doing at all times.

[53] The first respondent further contends that it is not just and equitable to evict him from 33 B[...] Street in circumstances where the Trust has not tendered the return of the purchase price which he has paid in full and that this conduct is unconscionable.

The counter-application

[54] To avoid repetition, it is sufficient to state that the facts relied upon by the first respondent in support of his counter-application are the same as the facts he relies on in opposing the main application, as they relate to both the points *in limine* and the merits of his opposition.

[55] Of note from the counter-application are the assertions made by the first respondent regarding the settlement agreement that was concluded on 13 January 2021. In this regard he states that the settlement agreement which is recorded in English was drawn by the legal representatives of the Trust. He goes on to state that English is his second language as he is from Pakistan and therefore his ability to read, speak and understand English is limited; hence, he never confirmed what was recorded in the settlement agreement as its material terms.

[56] In demanding the transfer to him of the property forming the subject of the first agreement the first respondent relies on the provisions of section 27(1) of the ALA in terms of which a purchaser is entitled to demand the registration of transfer of property into his name where he has, *inter alia*, paid not less than 50% of the purchase price of that property.

[57] In tandem with his claim to the transfer of the property situated at 33 B[...] Street as envisaged in section 27(1) of the ALA, he tenders payment of all amounts owing, if any, in terms of the first agreement.

The Trust's replying affidavit

[58] In reply to the first respondent's answering affidavit, the applicants persist with the relief that they seek, contending in essence that, in any event, if the first respondent asserts that the second agreement and the settlement agreement are invalid, there is no legal basis for his occupation of 33 B[...] Street, and there is no legal basis for a transfer of this property to him.

[59] In dealing with the first respondent's assertion that its conduct in evicting him without a tender of monies paid by him is unconscionable, the Trust contends that the first respondent never made a demand of repayment of monies paid by him under the first agreement.

[60] It is further the Trust's evidence in reply that the first respondent breached the terms of these agreements by failing to pay occupational rental in respect of 33 B[...] Street in the amount of R252 077.83 which amount includes associated costs; as well as occupational rental and associated costs in respect of 31 B[...] Street in the amount of R84 571.31. Further according to the Trust, the total amount that was owing, and payable by the first respondent was R3 086 649.00, and he had only paid R1 396 072.22 at the time of conclusion of the settlement agreement.

[61] The Trust further states that it is incorrect that the first respondent had paid the full purchase price 33 B[...] Street. It states in this regard that since the settlement agreement provided for interest on the purchase price of R2 million, that interest over the period of default of 1 135 days at 9% amounted to R864 943.11. It goes on to state that when the interest computed according to the terms of the settlement agreement is added to the balance owed by the first respondent, he has not paid 50 per cent of the purchase price for 33 B[...] Street and therefore he is not entitled to the transfer of this property in terms of section 27(1) of the ALA.

[62] The Trust further contends that the first agreement is an incidental agreement as opposed to credit agreements. Therefore, the Trust was not required to register as a credit provider when it concluded it.

[63] That the settlement agreement is void on the ground of false representation as to the first respondent's breach and indebtedness is denied by the Trust. In this regard, it contends that the settlement agreement was proposed by the first respondent's legal representatives by way of the already quoted correspondence written to the legal representatives of the Trust.

[64] Regarding the first respondent's tender to pay any amount that may be outstanding in respect of 33 B[...] Street, the Trust states that this is an acknowledgement by him that he has not in fact paid the full purchase price in respect of the said property which as he contends would entitle him to a transfer.

The Trust's opposition of the counter-application

[65] In opposing the counter application, the Trust persists with the same contentions it made regarding the first respondent's breach of the agreements in its founding affidavit and in reply to the first respondent's answering affidavit in the main application. It reiterates that there was no misrepresentation by the Trust which, according to the

Trust, led to the conclusion of the settlement agreement. It further states that the settlement agreement was entered into after the first respondent acknowledged his default during which time he was legally represented.

The Trust's reply in the counter-application

[66] In reply the Trust states that in computing the amount owed to it by the first respondent, it applied the lowest interest rate of 7% to the full purchase price, plus 2% upon default. This, it says, is a calculation to the benefit of the first respondent. It determines this to be 9 per annum over 1135 days.

The issues for determination

[67] The issue to be determined by this Court in the main application, is whether the Trust has made out a case for the eviction of the first respondent from 33 B[...] Street. In the counter application I am called upon to determine whether the first respondent is entitled to the transfer of 33 B[...] Street to his name, and whether he is entitled to the declaratory relief that he seeks.

The parties' submissions

[68] Dealing with the points *in limine* raised by the first respondent in the main application, Ms *Watt* submitted that since the agreements provided for payment of interest only upon default of the payments that are due, they are incidental agreements. According to Ms *Watt*, they are excluded from the registration requirement of section 40 (1) of the NCA, the first agreement is not void, therefore. Ms *Watt* further submitted that if it is so that the first agreement is void *ab initio*, there is, therefore, no basis for the first respondent's occupation of 33 B[...] Street.

[69] On the score of the alleged false premise which renders the settlement agreement void according to the first respondent, Ms *Watt* submitted that the contention

made by the first respondent cannot be sustained in that it is his legal representatives who, acting upon his instructions, proposed the settlement agreement.

[70] Regarding the point *in limine* that the first respondent is entitled to the transfer of 33 B[...] Street as envisaged in section 27(1) of the ALA, it was submitted on behalf of the Trust that it is not correct that he is so entitled. Ms *Watt* further submitted that the Trust was, in any event, entitled to cancel the sale agreement following the first respondent's breach of its terms.

[71] Ms *Watt* further submitted that the first respondent makes a bald denial of the Trust's computation of the amounts owed to it by the first respondent. She re-iterated the fact that the first respondent's application of the agreed total amount that he paid overlooks the fact that interest was payable on the capital purchase price. She further submitted that the 16% interest charged according to Annexure FA7 represents 1.33% per month. Ms Watt took the view that the court is not called upon to determine how much is owing to the Trust but rather whether the eviction sought is just and equitable.

[72] In similar vein, Ms Watt accepted that the Trust debited the first respondent with the purchase price for 31 B[...] Street on the 10th month when the first respondent fell in breach of the first agreement.

[73] On behalf of the first respondent, Mr *Cetywayo* submitted that the first and second agreements are credit agreements and not incidental agreements as contended by the Trust in that the Trust levied on the two agreements interest more than the 2% that is allowed in terms of the NCA. Such interest, so Mr *Cetwayo* submitted, was 6% in respect of the first agreement, and 5% in respect of the second agreement, respectively. Therefore, the Trust was required to register as a credit provider. In this regard, Mr *Cetywayo* argued that the amount owing from both agreements combined brings them within the purview of a credit agreement in terms of the NCA.

[74] He further submitted that in respect of 31 B[...] Street, interest of 16% per annum was charged by the Trust even though the first respondent had not fallen in default of the second agreement since his obligation to pay the purchase price under the second agreement had not come into effect. This, he said, meant that the interest charged on the second agreement was not incidental to default.

[75] For these reasons, he persisted with the first respondent's contention that the two agreements are unlawful and fall to be declared void from the date of their conclusion as envisaged in sections 89(2)*(d)* and section 89(5) of the NCA. In this regard, he further submitted that a just and equitable order that section 89(5) envisages would, in the present circumstances, be that since the first respondent has paid the Trust the sum of R2 346 072.22 it must transfer 33 B[...] Street to him.

[76] In developing the contention that the first respondent is entitled to the transfer of 33 B[...] Street, Mr *Cetywayo* submitted that the interest that was charged by the Trust in terms of the settlement agreement was incorrectly computed on the purchase price for 31 B[...] Street in respect of which no payment obligations had yet arisen. In this regard he relied on *Botha and Another v Rich NO and Others*[3], in which the Constitutional Court considered the import of section 27(1) of the ALA.

[77] As regards the settlement agreement, he submitted that apart from the fact that the first respondent was not in breach of the second agreement when the settlement agreement was concluded, he had limited understanding of the language in which it was written. Relying on *Ratanee v Maharaj*[4] where the court set aside an ante-nuptial agreement which was induced by mistake. He submitted that the Trust's misrepresentation that the first respondent was in breach of the agreements induced the conclusion of the settlement agreement, hence, it must be set aside.

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[3] *Botha and Another v Rich NO and Others* [2014] ZACC 11 at para 34.
[4] *Ratanee v Maharaj* [1950] All SA 98 (D), at 113.

[78] Regarding the disputed calculation by the Trust of the arrear amounts that are owing by the first respondent on 33 B[...] Street, Mr *Cetywayo* submitted that the first respondent has advanced reasonable and justifiable grounds for disputing the arrear amount determined by the Trust. This, he said, was an issue that the first respondent raised with the Trust before these proceedings were instituted, and therefore, the Trust should have foreseen the dispute and not sought relief by way of an application. He submitted that this on its own is a ground for the dismissal of the application with costs.

[79] It was submitted on behalf of the first respondent, as an alternative, that in the light of the material dispute of fact regarding the amounts owed by the first respondent to the Trust, the application must be referred to oral evidence.

The Law

[80] Evictions from land are governed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Section 4 of this Act which deals with the eviction of unlawful occupiers by an owner or a person in charge of land, provides that courts may only grant an order for eviction if it is just and equitable to do so, after considering all the relevant circumstances. In this regard, section 4(7) of PIE provides as follows:

> '(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, <u>a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances</u>, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.' (Emphasis added)

[81] In *Port Elizabeth Municipality v Various Occupiers*[5], it was held that in determining whether an eviction order should be granted, the court is enjoined to balance out and reconcile the opposing claims in as just a manner as possible, taking into account all the interests involved and the specific factors relevant in each particular case.

[82] Part of the central issue in the instant application being the sale and transfer of the already mentioned properties, two other legislations are applicable – the National Credit Act and the Alienation of Land Act.

[83] In terms of section 40(1) of the National Credit Act, a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1) of the same Act.

[84] An incidental credit agreement is defined in section 1 of the NCA to mean *'an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply—*

> (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
>
> (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.'

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[5] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (PE Municipality), para 17; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011) (*"Blue Moonlight"*), para 29.

[85] A “credit agreement” is defined to mean an agreement that meets all the criteria set out in section 8, and relevant to the instant case are the provisions of section 8(3) and (4), which provide as follows:

> ‘(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or
>
> section 4 (6) (b), constitutes a credit facility if, in terms of that agreement—
>
> (*a*) a credit provider undertakes—
>
> > (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
> >
> > (ii) either to—
> >
> > > (*aa*) defer the consumer’s obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
> > >
> > > (*bb*) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
>
> (*b*) any charge, fee or interest is payable to the credit provider in respect of—
>
> > (i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or

(ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.

(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is—

(*a*) a pawn transaction or discount transaction;

(*b*) an incidental credit agreement, subject to section 5(2);

(*c*) an instalment agreement;

(*d*) a mortgage agreement or secured loan;

(*e*) a lease; or

(*f*) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of—

(i) the agreement; or

(ii) the amount that has been deferred.'

[86] Section 1 of the NCA limits the definition of *"an instalment agreement"* to a sale of movable property.

[87] The calculation of interest which is applicable to various types of agreements to which the NCA applies is, in terms of section 103, set out in Regulation 39 and 42 of the Regulations to the NCA. In terms of Regulation 42, the maximum interest that a credit provider may charge in incidental agreements is 2% per month.

[88] Concerning a purchaser's claim to the transfer of property where he has, under a sale agreement, paid more than 50% of the purchase price, section 27(1) provides:

> '27. (1) Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.'

[89] The Constitutional Court had occasion to consider the meaning and import of the already quoted provisions of section 27(1) of the ALA in *Botha*[6], when it held:

> 'A plain reading of section 27(1) reveals that it seeks to protect the rights of a purchaser who has paid not less than half of the purchase price. The section states that a purchaser "*shall* . . . be entitled to *demand* . . . transfer" (emphasis added). Plainly, this section requires the presence of the following jurisdictional facts before the purchaser can enjoy the protection under it. First, the purchaser must have undertaken to pay the purchase price in specified instalments. Second, the purchaser must have paid to the seller in such instalments not less than 50 per cent of the purchase price. Third, the property in question must be registrable. . .'[7]

[90] There is no controversy between the parties that 33 B[...] Street is registerable property. Emphasizing the protective characteristic of section 27 of the ALA of seeking to ensure fairness between sellers and purchasers, the Court went further and said:

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[6] Footnote 3, supra.
[7] Id, para 34.

> 'Its provisions are in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.'[8]

[91] The common law principles of contract are trite – a binding contract comes to being when one or more persons of appropriate contractual capacity who have a serious intention of creating a legal obligation, communicate such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts, which are possible of performance.[9]

[92] Consensus requires that the contracting parties are of the same mind regarding their intention to contract (*animus contrahendi*). This is the cornerstone of any agreement. Misrepresentation and mistake will exclude such consensus. Where a party to an agreement raises mistake and wishes to escape contractual liability, he/she must prove not only that the mistake is material but also that it is reasonable (*iustus* error).[10] Misrepresentation will exclude consensus if it is material and in fact induced the representee to conclude the contract.[11]

[93] These being application proceedings, a final order will be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent,

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[8] Id para 46.
[9] Gibson's South African Mercantile and Company Law (Juta, 2003) 8th Edition – Vesser Pretorius Shamrock and Van Jaarsveld, page 9 -10.
[10] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).
[11] *Service v Pondart-Diana* 1964(3) SA 277(D), at 279.

together with the facts alleged by the latter, justify such an order, unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[12]

[94] In the discussion that follows I deal with the application of these principles of the law to the facts of this application, starting with the points *in limine* raised by first respondent.

Discussion

[95] As regards the point *in limine that* the first sale agreement is unlawful because the Trust was not registered as a credit provider when it was concluded, the starting point is that from the terms of the first agreement, it is evident that the interest charged was incidental upon default. A reading of the first and second agreements shows that the Trust did not intend to make a profit from them by charging interest on the purchase price of the two properties.

[96] The agreements provide for payment of interest on the deferred amount if payments are not made on the agreed date. There is a difference between this situation and one where the payment of the debt is deferred, and interest is charged immediately on the deferred amount. This is what constitutes the difference between a credit agreement and an incidental credit agreement.[13]

[97] The submission made on behalf of the first respondent that the agreements are instalment sale agreements loses sight of the fact that in terms of the NCA, the definition of an instalment sale agreement is limited to the sale of movable property.

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[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634- 635 (*"Plascon Evans"*).

[13] See *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* [2011 1 All SA 318 (KZD), WALLIS J, followed and applied by REVELAS J in *Seaworld Frozen Foods (Pty) Ltd v Butcher's Block and Another* (CA 122/2011) [2011] ZAECGHC 67 (24 November 2011).

[98] It is so, that section 8(4)*(f)* provides for a catch all category of 'any other agreement, other than a credit facility or credit guarantee', in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of- (i) the agreement; or (ii) the amount that has been deferred. This cannot extend to the first sale agreement for the same reason that in terms of that agreement, interest would be charged on the deferred amount not immediately upon deferral, but when the first respondent failed to make payments of the date agreed for the payment of the deferred amount.

[99] Mr *Cetywayo* took the view that since the two sale agreements provided for interest of more than 2%, that excludes them from the ambit of incidental credit agreements. When regard is had to the NCA's definition of an incidental agreement, this submission cannot be sustained as the interest is charged upon default of the payment time frames agreed between the parties.

[100] That being said, I take note of the fact that the default interest charged in terms of the first sale agreement is stated as the applicable prime interest rate plus 2%. In terms of Regulation 42 of the Regulations to the NCA, the maximum interest rate applicable to incidental agreements is 2% per month.

[101] What this means is that for the purposes of the first sale agreement the default interest determined was not in accordance with the Regulations determined by the Minister in terms of section 103 of the NCA. As I will demonstrate, this has a bearing, not *per se* on whether the first agreement is an incidental agreement or credit agreement, but on whether the Trust's computation of the amount of debt owed by the first respondent was a correct one.

[102] Therefore, as regards the question whether the first agreement is unlawful for non-compliance with the provisions of section 40(1) of the NCA, I make a finding that it is an incidental agreement, and therefore, the Trust was not required to register as a credit provider. The point *in limine* that the first sale agreement is a credit agreement in

respect of which the Trust was required to register as a credit provider in terms of section 40(1) of the NCA fails.

[103] I deal next with the point *in limine* that the settlement agreement is void as it was induced by misrepresentation. In buttressing this contention the first respondent relies on two grounds. The first is that he could not have been in breach of the two agreements as the Trust falsely represented that it was entitled to conclude the first sale agreement and induced him to conclude it in circumstances where it was not registered as a credit provider as section 40(1) of the NCA requires. In the light of the finding that I have made that the first sale agreement is an incidental agreement and therefore excluded from the registration requirement of section 40(1), this contention cannot be sustained.

[104] The second ground on which the first responded states that the settlement agreement is void *ab initio*, is that the Trust incorrectly charged interest on the purchase price for 31 B[...] Street whereas the first respondent's obligation to make payment on the purchase price for that property had not yet arisen. It is correct that the payment schedule (FA7) reflects that on 16 July 2020 the purchase price for 31 B[...] Street was debited against the first respondent with interest, as well as interest on the occupational rental where it was paid out of the agreed time.

[105] A closer look at the terms of the settlement agreement reveals that nowhere is it provided therein that the R50 000.00 monthly instalments would be applied towards the purchase price for 31 B[...] Street. As recorded in the introductory portion of the settlement agreement, at the time it was concluded the first respondent owed the Trust default interest on the purchase price of 33 B[...] Street and occupational rental. This has not been disputed.

[106] As the Supreme Court of Appeal held in *North East Finance v Standard Bank of SA*,[14] in assessing what the intention of the contracting parties was regard must be had

[14] 2013 (5) SA 1 (SCA), and all authorities referred to therein.

to the purpose of their contract which must be interpreted so as to give it a commercially sensible meaning.[15]

[107] The settlement agreement is not a free-standing agreement. It sought to afford the first respondent an opportunity to regularize his payment obligations under the first agreement. It further sought to regulate future payments in relation to the purchase price of 33 B[...] Street and occupational rental in respect of both properties.

[108] On his own admission, when the settlement agreement (which his attorneys initiated) was concluded the respondent had fallen in default of his payment obligations in respect of the purchase price of 33 B[...] Street and occupational rental for both properties, i.e. 33 B[...] Street and 31 B[...] Street as set I have alluded to in the foregoing discussion. The settlement agreement stipulates that part of the R50 000.00 instalment would be applied first towards payment of the default interest that the first respondent owed, *inter alia*.

[109] Apart from the fact that the first respondent has made a sweeping allegation that the Trust incorrectly charged him interest under the settlement agreement, he has not seriously disputed the Trust's assertion that at the time the settlement agreement was concluded he owed the Trust default interest in relation to payment of the purchase price for 33 B[...] Street and occupational rental for the two properties.

[110] In so far as the first respondent's complaint regarding computation of interest payable on the purchase price of 31 B[...] Street is concerned, regard must also be had to the fact that he has accepted the Trust's cancellation of the second agreement following his breach of that agreement and of the settlement agreement. It is rather opportunistic of him to rely on the Trust's alleged incorrect charging of interest on the purchase price of 31 B[...] Street (whose cancellation he has accepted) as his basis for

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[15] At para 25; see also *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494, para 12; *Novartis v Maphil* (20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) (3 September 2015), para 27 - 31 and the authorities referred to therein.

impugning the validity of the settlement agreement when his contractual obligations relating to 33 B[...] Street remain uncontroverted.

[111] I therefore come to the conclusion that the settlement agreement is not void but enforceable against the first respondent. The point *in limine* that it is void as it was induced by misrepresentation and by reason of the Trust's incorrect computation of interest payable in respect of the purchase price of 33 B[...] Street and 31 B[...] Street must accordingly fail.

[112] This leads me to the last point *in limine*, that the cancellation of the first agreement is unlawful as the first respondent has paid the full purchase price of 33 B[...] Street. This point *in limine* is inextricably linked to the claim that the first respondent makes in the counter-application to the transfer of 33 B[...] Street. In substantiating this point *in limine*, the first respondent asserts that the interest that was charged by the Trust on the purchase price of 33 B[...] Street and 31 B[...] Street exceeds the interest prescribed for the category in which the two agreements fall. According to him, he has, as a result, in actual fact paid the full purchase price for 33 B[...] Street.

[113] Put in another way, the first respondent states that if the interest that the Trust says he owes is disregarded, he has paid the full purchase price for 33 B[...] Street. This contention overlooks the fact that in tandem with the default interest that he was liable to pay to the Trust in terms of the first sale agreement, the first respondent also agreed in the settlement agreement, to pay interest on the amount outstanding on the purchase price of 33 B[...] Street.

[114] It has been held that interest is the 'life-blood' of finance and that late payments by debtors deprives the creditors of the productive use of that money thereby causing them loss.[16] If regard is had to this principle, which ought to be accepted as correct, it then becomes difficult to fathom the basis on which the first respondent asserts that the

[16] *Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Others* (460/12) [2013] ZASCA 105; [2013] 4 All SA 385 (SCA); 2013 (6) SA 319 (SCA) (13 September 2013), para 13.

interest that he agreed, in the settlement agreement, to pay on the outstanding amount of the purchase price must be ignored in calculating whether he has paid over 50% of the purchase price for 33 B[...] Street.

[115] Under the settlement agreement, which in effect replaced the first respondent's payment obligations under first agreement (a novation), the first respondent had an obligation to pay the purchase price with interest <u>in specified instalments</u>. For him to successfully claim the transfer of 33 B[...] Street, he must also have paid the Trust <u>in such instalments</u> not less than 50% of the purchase price.

[116] No issue is taken by the Trust concerning the manner and form of the first respondent's demand for the transfer of 33 B[...] Street to him as envisaged in section 27(1) of the ALA. In any event, there is authority from this Division and elsewhere, to the effect that a demand which is made for the first time in summons or notice of motion is a valid demand for the purposes of asserting the purchaser's right created by section 27(1) of the ALA.[17] I am in respectful agreement with such authority.

[117] That being the case, it seems to me that there is a material dispute of fact regarding the amount which the first respondent has paid towards the purchase price of 33 B[...] Street. It has not been disputed that the first respondent previously challenged the Trust's computation of the amount he had thus far paid to it under the first sale agreement and the settlement agreement. What compounds the issue, in my view, is the fact that FA7 sets out payment transactions emanating from four different contractual obligations, viz, payment towards the purchase price of 33 B[...] Street; occupational rental for both 33 B[...] Street and 31 B[...] Street, respectively; rates and services in respect of the two properties; as well as default interest on each of these amounts where there was late payment.

[17] *Chetty v Erf 311, Southcrest CC* 2020 (3) SA 181 (GJ), para 17; followed in Christ the King Primary School CC v V.F. Group Trust (3668/2022) [2023] ZAECMKHC 132 (28 November 2023), at para 22 -23.

[118] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* (*Wightman t/a J W Construction v Headfour (Pty) Ltd and Another Another*[18] the Court said:

> '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. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[119] In his submissions on behalf of the first respondent Mr *Cetywayo* took the view that it can only be resolved with the benefit of oral evidence. I agree.

[120] As held in *National Director of Public Prosecutions v Zuma,* [19] motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.

[121] Hence, where a case is properly made out, the disputes of fact are genuine, far-reaching and fundamental and cannot be resolved by application of the rule in *Plascon-*

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[18] *Whightman t/a JW Construction v Headfour (Pty) Ltd and Another* (*Wightman t/a J W Construction v Headfour (Pty) Ltd and Another Another* [2008] ZASCA 6; [2008] 2 All SA (SCA); 2008 (3) SA 371 (SCA), para 13.

[19] *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) (12 January 2009) para 26.

Evans, the proper course is, in general, referral to oral evidence or trial. In this regard, Rule 6(5)(g) provides:

> 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the a foregoing, it may direct that oral evidence he heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[122] I readily accept that the first respondent's claim in the counter-application to the transfer of 33 B[...] Street has a life of its own. However, a finding that there is a material dispute of fact regarding whether he is entitled to such transfer necessarily has a bearing, in my view, on whether the Trust has made out a case for the eviction of the first respondent. I elaborate below.

[123] That the respondent is an unlawful occupier of 33 B[...] Street is beyond dispute – he no longer has the consent of the Trust to occupy this property. However, the Constitutional Court has held that a finding that an occupation is unlawful in matters regarding PIE does not necessarily lead to an order of eviction without a consideration of other relevant factors. The court must exercise its discretion in deciding whether an eviction order is just and equitable in light of the facts of the given case.[20] In this regard I am enjoined to strike a balance between the rights of the occupier and those of the owner in order to attain justice and equity in my enquiry whether the eviction sought is just and equitable.

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[20] *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32; 2023 (1) SA 321 (CC); 2024 (1) BCLR 115 (CC) (20 September 2022) para 29; section 4(7) of PIE.

[124] I am alive to the legal principle, as authoritatively enunciated in *Ndlovu*,[21] that PIE was not enacted to allow for the expropriation of land from a private land owner from whose property the eviction is being sought. In *Blue Moonlight*, the Court recognized the need for the private land owner to accept that his right to take possession of his land where occupation has become unlawful may be restricted in certain circumstances.[22]

[125] It is, furthermore, not without significance, that the first respondent is in breach of his obligations under the first sale agreement and the settlement agreements. He is no doubt bound by the principle of reciprocity and sanctity of agreements. However, where in a particular set of circumstances a rigid application of the principle of reciprocity may lead to injustice, there ought to be flexibility to ensure fairness. The position in our law is that justice, reasonableness and fairness constitute good faith in contracts.[23]

[126] In the instant matter, I have taken account of the fact that in purchasing the property situated at 33 B[...] Street and simultaneously paying occupational rental since a time before the conclusion of the first sale agreement (i.e. a time before October 2019) until such time as the purchase price would be paid in full, the first respondent intended to make the property his and his family's home. In this regard, his personal circumstances which I have set out elsewhere in this judgment stand undisputed. Barring his default, he made attempts to make payments towards the purchase price, occupational rental, and all the associated costs of occupational rental. Furthermore, in these proceedings, he has made an undertaking (in the context of his claim in terms of section 27(1) of the ALA) to pay to the Trust any amounts outstanding under the agreements.

[127] With reference to *Claytile*,[24] a case decided by the Constitutional Court in 2017, TSHIQI J put it this way in *Grobbler:*[25]

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[21] *Ndlovu v Ngcobo, Bekker and Another v Jika* (1) (240/2001, 136/2002) [2002] ZASCA 87; [2002] 4 All SA 384 (SCA); 2003 (1) SA 113 (SCA) (30 August 2002).
[22] *Blue Moonlight*, at para 40.
[23] *Botha*, at para 45.
[24] *Baron and others v Claytile (Pty) Limited and Another* (CCT241/16) [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC) (13 July 2017).

> '*Claytile*, as well, reminds us that there has to be "some give by both parties". In essence, when balancing the interests, compromises have to be made by both parties in order to reach and equitable outcome. . .'

[128] I am in respectful agreement with these sentiments. In as much as the Trust asserted its contractual right to cancel the agreements and to apply for the eviction of the first respondent, it is a disconcerting feature of its case that it makes no undertaking to pay back the monies paid to it by the first respondent towards the purchase price for 33 B[...] Street.

[129] As far as I could have ascertained from the first sale agreement and the settlement agreement, none of them make provision for the forfeiture of monies paid by the first respondent towards the purchase price of 33 B[...] Street in the case of breach of the agreements. While it is so that the respondent would not be barred, as correctly submitted by *Ms Watt*, from instituting appropriate proceedings in which he claims restitution of the monies paid by him towards the purchase price of 33 B[...] Street, an important question which remains whether there is the fairness and reasonableness in his eviction in the present circumstances.

[130] When regard is had to the foregoing facts and circumstances, equity and justice demand, that the first respondent's eviction from 33 B[...] Street be refused.

[131] Concerning referral of an application to oral evidence, the general rule is that litigants should apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged but the rule is not an inflexible one.[26] Even though in the instant case the request to refer the application to oral evidence was made on the

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[25] Footnote 20, supra.
[26] *Mamadi and Another v Premier of Limpopo Province and Others* (CCT 176/21) [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC) (6 July 2022), para 44, in which THERON J referred to *Law Society, Northern Provinces v Magami* [2009] ZASCA 107; 2010 (1) SA 186 (SCA) at 195C-D.

date of hearing of the application, I have had regard to the nature and ambit of the disputed facts and the interests of justice.

[132] I come to the conclusion that it is with the benefit of oral evidence that the court will be better placed to determine whether the first respondent has paid more than 50% of the purchase price for 33 B[...] Street. On the facts set out above, I hold the view that the issues to be determined at the hearing of oral evidence are simple and discrete.

[133] In the result, I make the following order:

1. The application for the eviction of the first respondent from the property described as the remainder of Erf 8[...], Queenstown and remainder of Erf 1[...], Queenstown, situated at 33 B[...], Komani, is dismissed, with costs.

2. The counter application is referred to the hearing of oral evidence on a date to be determined by the Registrar, on the following issues:

   (a) whether the first respondent has paid more than 50% of the purchase price for 33 B[...] Street; and if so,

   (b) whether the Trust is obliged to register the transfer of the property described as the remainder of Erf 8[...], Queenstown and remainder of Erf 1[...], Queenstown, situated at 33 B[...], Komani, in the name of the first respondent.

3. The evidence to be adduced at the hearing of oral evidence shall be that of any witnesses whom the parties or either of them may elect to call.

4. The provisions of rules 35, 36, 37 and 37A of the Uniform Rules of Court shall apply concerning the hearing of oral evidence.

5. Costs of the counter-application shall be costs in the hearing of oral evidence.

L. RUSI

JUDGE OF THE HIGH COURT

<u>Appearances</u>:

Counsel for the applicants	:	Adv. *K L Watt*
Instructed by	:	BOWES McDOUGALL INC. c/o 119 High Street MAKHANDA
Counsel for the first respondent	:	Adv. *Y Cetywayo*
Instructed by	:	T. ADAM ATTORNEYS INC. No 3A Douglas Street KOMANI

Date heard	:	06 June 2024
Date delivered	:	26 November 2024