

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES:
	YES/NO
(3)	REVISED
	3/5/2019
DATE	SIGNATURE

CASE NO: 16064/2017

IN THE MATTER BETWEEN

CHARL JOHAN SWANEVELDER

APPLICANT

AND

GOODWELL MBUSO MAGUBANE
WILMA MBUSO MAGUBANE
ALL OTHER UNLAWFUL OCCUPANTS
THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

JUDGMENT

SENYATSI AJ

- [1] This is an application for an eviction order in terms of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act no 19 of 1998 ("PIE"). There is also application for condonation of late filing of the supplementary answering affidavit.
- [2] The factual background is that the Applicant ("Mr Swanevelder") and the First and Second Respondents ("the Magubanes") concluded a sale of a house forming the subject of this application in 2011.
- [3] The Magubane aver that the house was sold by Mr Swanevelder for R200 000 which was payable by way of R25 000 deposit and the balance of R175 000-00 by way of R2000 monthly instalments.
- [4] The house was in a state of dilapidation and had been hijacked by illegal squatters. The Magubanes state that they spent a considerable amount of money renovating the house and they turned it into a home.
- [5] It was the term of agreement that Mr Swanevelder would be responsible for municipal bills for services rendered and rates

charges prior to September 2011. The Magubanes would be responsible for municipal bills for service post September 2011.

- [6] The Magubanes contend that they made prompt payments since the inception of the agreement. The total payments towards the purchase price including the deposit amount to approximately R169 800.00 (hundred and sixty nine thousand eight hundred rand).
- [7] The municipal bills were not sent to Magubanes for about six months until Mr Swanevelder's son contacted the Magubanes to advise that he had lost the key to the post, hence the delay in providing the municipal bills to the Magubanes. When the bills were eventually made available, the Magubanes paid R6000 which was the amount on the bill.
- [8] Subsequently, so contend the Magubanes, the municipality changed the old water meter after the digging thereof. The subsequent municipal bill after the meter change, spiked to R39 000. Upon inquiry they were advised by the City of Johannesburg that the previous payments were based on the estimates and that the debits in the account also include service rendered prior to September 2011. The account which has been

attached to the opposing affidavits shows an amount of R60 000 which is outstanding.

- [9] The closer analysis of "GM3" attached to the opposed affidavit confirms the pre-September 2011 reading period as averred by the Magubanes and this appears to be a common cause between the parties.
- [10] Mr Swanevelder contends that he has cancelled the agreement due to failure to pay the municipal bills by the Magubanes. He consequently states that the Magubanes have become illegal occupiers of the property and that they stand to be evicted in terms of PIE.
- [11] The problems relating to the contested municipal bills from the City of Johannesburg prompted the Magubanes and Mr Swanevelder to attend the offices of the City of Johannesburg to resolve the disputed amount. It appears no satisfactory solution was found for the water account. It was agreed that the account would be sent to the Magubanes, which never happened.
- [12] On or about 5th October 2016 a letter of demand was sent by Mr Swanevelder's attorney to the Magubanes demanding payment of R74 347-47 before close of business on 10th October 2016. The

Magubanes contacted the attorneys and Mr Swanevelder to resolve the matter. Another letter was sent by the attorneys of Mr Swanevelder on 25th October 2016 and stated that the failure to make payment of R74 347-42 on 10 October 2016 amounted to repudiation of the agreement and that Mr Swanevelder accepted such repudiation. The letter stated that the Magubanes were illegal occupiers of the property and that he was to vacate the property by 31 October 2016.

- [13] In an effort to resolve the account query the Magubanes through their attorneys contacted the City of Johannesburg's attorneys. They were informed that the obligation to resolve the account was with Mr Swanevelder, it appears from the evidence that once it was clear that the account included both pre and post September 2011 billings, Mr Swanevelder does not appear to have taken decisive steps to assist the Magubanes to resolve the account.
- [14] The issue for determination is whether Mr Swanevelder has succeeded in establishing that the Respondents are illegal occupiers as defined in PIE. If he has, whether it is just and equitable to evict the Magubanes.
- [15] In order to determine the issues, regard should be had to the provisions of the agreement.

- [16] The material provisions of the agreement of sale of the property are as follows:

16.1. Clause 2.2 "Undertaking by the Seller:

will ensure that all rates and taxes and electricity prior to date of occupation will be for his account."

16.2. Clause 3.3 "Undertaking by the Buyers:

to ensure the timeous payment of rates and taxes and water and electricity before the 7th of each month into the nominated account of the SELLER (clause 6)."

- [17] At the hearing of this matter, it was submitted by Mr Gwala, counsel for the Respondents that there is a dispute of fact and that the application stands to be dismissed with costs.

- [18] Mr Gwala submitted that the dispute of facts is of such nature that the dispute between the parties can only be ventilated through the trial proceedings.

- [19] Mr Rourke, Counsel for Mr Swanevelder submitted there can be no dispute of facts. He states that a dispute of fact arises when the Applicant and the Respondent have different versions. He submits furthermore that the Magubanes admits the Applicant's version but allege other facts which Mr Swanevelder disputes. When the

Respondent concedes he has no knowledge and puts the Applicant to the proof thereof.

[20] A version which is far-fetched or clearly untenable does not create a genuine dispute of fact. (*See Plascon Evan Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A)*).

[21] With Regards to the material terms of the agreement, it was held in *Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* that the proper approach to interpretation of contracts involves considering the language used, the context in which the provision appears and the apparent purpose to which it is directed.

[22] The parties in the agreement spelt out that Mr Swanevelder would be responsible for the municipal bills for services rendered and rates charged prior to 1 September 2011. That the municipal bill spiked after the change of water meter is not denied that the billing which is the subject of dispute between the parties includes a significant portion of services rendered way prior to 1 September 2011. To this dispute, Mr Swanevelder does not proffer any explanation whether he in fact settled that portion. He seems to focus more on the total bill running over R74 000 which he contends that Magubanes failed to pay. I do not accept that Mr

Swanevelder was entitled to hold a view that the Magubanes were in breach of the agreement as the amount clearly included services and rates and taxes for the period prior to 1 September 2011 as contended by Magubanes. I therefore find that there is a dispute of fact on this aspect and that Magubanes contention about the dispute of fact is not far-fetched. That dispute can only be ventilated at trial.

- [23] Failure by Magubanes to pay the amount in dispute does not amount to repudiation of the agreement. The test for repudiation of contract was held in *Street v Dublin* 1961 (2) SA 4 (W) at Para [10], to be whether fairly interpreted, the conduct said to amount to repudiation to justify cancellation is whether such conduct exhibits a deliberate and unequivocal intention no longer to be bound by the agreement. It is clear from the papers that once the bills started spiking after the change of the water meter, the Magubanes not only engaged on numerous occasions, Mr Swanevelder and the City of Johannesburg, but even asked to be sent the bills directly. It was clear from the bills, as already stated, that the huge amounts also included of services and rates prior to 1 September 2011. The City of Johannesburg's explanation was that the bills had previously been based on estimates. Mr

Swanevelder does not deal with this aspect in his papers. From the conduct of the Magubanes, it is clear to me that their conduct suggested that they were still bound by the agreement. The suggestion by the attorneys of Mr Swanevelder in their letter of demand that the Magubanes have repudiated the agreement has therefore no factual basis and is rejected by this court.

[24] The Magubanes have indeed, and this is a common cause, renovated the house to make it a home. It has not been denied that the squatters who lived in the house prior to the purchase thereof have been removed by the Magubanes. It has also not been disputed that since the purchase of the house a total of approximately R169 000 had already been paid to Mr Swanevelder leaving the balance of R31 000 towards the purchase price. I am of the view that will not be just and equitable to evict them.

[25] In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37, the Constitutional Court held that the justice and equity requires the Court to balance the opposing interests of the land owner and those of the occupier on the other hand. I have already stated that when the Magubanes purchased the house, it was in a dilapidated stage and it was renovated by them to be a


house. This was done after they managed to get the illegal occupiers out of it.

[26] Having considered the papers before me, I am not persuaded that a case has been made that the Magubanes are illegal occupiers in terms of PIE and that they stand to be evicted from the house. Consequently, the relief sought by the Applicant should fail.

ORDER

[27] The following order is made:-

- (a) The application for eviction is dismissed with costs.

A handwritten signature in dark ink, appearing to be 'M.L. Senyatsi', is written over a horizontal line. The signature is stylized with a large loop at the top and a series of vertical strokes.

M.L. SENYATSI
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing : 31 January 2019

Date of Judgment : 03 May 2019

For the Applicant : Adv M Rourke

Instructed by : Wynand Du Plessis Attorneys

For first Respondent : Adv M.Z Gwala

Instructed by : Wright Rose Innes Inc