REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 3406/2022

REPORTABLE: NO OF INTEREST TO OTHER JUDGES: NO JUDGE KUNY 7 December 2022

In the matter between:

CRYSTAL BALL PROPERTIES 27 (PTY) LTD (Reg No. 2005/004960/07)	First Applicant
CRYSTAL BALL PROPERTIES 58 (PTY) LTD (Reg No. 2006/010620/07)	Second Applicant
and	
DZUNISANI ALDWORTH MBALATI N.O.	First Respondent
LINDOKUHLE CHARLENE MBALATI N.O.	Second Respondent
KEVIN KRISHENPAUL SARABJIET N.O.	Third Respondent
DZUNISANI ALDWORTH MBALATI	Fourth Respondent
THE UNLAWFUL OCCUPIERS OF 39 KILLARNEY ROAD, SANDHURST	Fifth Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Sixth Respondent

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JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

The first, second, fourth and fifth respondent (“the respondents”) apply for leave to appeal against the judgment and order of this court given on 20 November 2022 evicting them from a residential property.

The first and second respondent are cited in their capacity as trustees of the Genesis trust (“Genesis”). The fourth respondent is also cited in his personal capacity. He, together with his wife (the second respondent) and their two children, reside in the immovable property owned by the applicants situated at 39 Killarney Road, Sandhurst (“the property”). The third respondent, an independent trustee of Genesis, has since resigned.

On 12 January 2021 the parties concluded an agreement (in terms of an offer to purchase) whereby Genesis purchased the property from the applicants for an amount of R35 million. The respondents took occupation of the property on 20 January 2021. Genesis paid the initial amounts required as deposit for the purchase. It however, failed to pay the balance of the purchase price of R32 million. On 25 November 2021 the applicants cancelled the agreement of sale and demanded the respondents vacate the property. These demands were not heeded and on 17 February 2022 the applicants brought an application to evict the respondents from the property. The rest of the facts appear from the judgment I handed down on 20 November 2022 in which I granted the eviction.

In summary the respondents' grounds of appeal are as follows:

The court erred in finding that no oral lease had been concluded between the fourth respondent and Ms Rossen, alleged to be acting on behalf the applicants. It was contended in this regard that there was a dispute of fact that could not be resolved in motion proceedings.

The court erred in finding that even if an oral lease had been established, the applicants had cancelled such lease on notice to the respondents and therefore, that the respondents could not rely on the alleged lease to remain in occupation of the property.

The respondents contend, based on the alleged oral lease, that they were not unlawful occupiers at the time eviction proceedings were instituted. They accordingly contend that the application under the PIE Act 19 of 1998 was irregular and incompetent.

The court erred in not upholding the respondents' interpretation of the Alienation of Land Act 68 of 1981 ("the Act"), that section 15(1) applied to all deeds of alienation contemplated in the Act, not merely to contracts in terms of which land was sold on installment.[1]

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1 In section 1 of the Act, 'contract'-

(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year 2;

(b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take;

The court erred in finding that Genesis had not established an enrichment lien in respect of the repairs, renovations and alterations that it had carried out to the property after taking occupation in January 2021.

The court erred in refusing to admit a supplementary affidavit filed by the respondents to support Genesis' enrichment claim.

ALLEGED ORAL LEASE

It is correct that in my judgment I did not deal in any detail with the grounds on which I rejected the allegation that an oral lease had been concluded. However, I made a definitive finding that the alleged oral lease did not raise a real, genuine or *bona fide* dispute of fact. In coming to this finding, I considered the following remarks of Corbett JA in *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) to be apposite:

> The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. [2] **In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact**. [emphasis added]

I did not reject the existence of an oral lease on the basis of the probabilities alone. The existence of the alleged oral lease was totally inconsistent with the

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2 *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd (supra) at page 635 "... a final order ..... 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"*

facts, even those advanced by the respondents. Conversely, the applicants' denial that an oral lease had been concluded was consistent with all the facts presented on the papers.

The respondents' reliance on the message of Rossen stating *"February rent is due Tuesday but we won't invoice him as we don't have an agreement so he needs to pay that on time",* was disingenuous. As pointed out by the applicants, this payment related to occupational rent that was provided for in the offer to purchase. The respondents continued to pay occupational rent after the agreement of sale had been cancelled and after they had been put on terms to vacate the property. The reference to *"February rent"* was clearly a reference to the occupational rent. The above statement ***"we don't have an agreement"*** and its implications are clear.

The applicants produced contemporaneous WhatsApp communications between Ms Rossen and the applicants' representatives, supporting their contention that the meeting that had taken place on 30 January 2022 with the fourth respondent had been in connection with a potential new offer for the property. No mention was made in these communications of the conclusion of any lease whatsoever.

Tellingly, in correspondence emanating from the respondents' attorneys soon after the oral lease was alleged to have been concluded, no mention was made of the alleged lease. On 2 March 2022, the respondents' attorneys addressed a letter to the applicants' attorneys in which they state:

> 7 Our clients vehemently deny that our clients are allegedly occupying your clients' properties illegally. You and your clients are again informed, for the umpteenth time that our clients are inter alia exercising liens over the properties due to the modifications and improvements made to the properties by our clients. Our clients have also been paying the rental and utilities in respect of the properties timeously.

Similarly, on 11 Feb 2022 the respondents' attorneys stated in a letter to the applicants' attorney:

> 6 We deny that our client is in unlawful occupation of the properties. We reaffirm our client's lien over the properties. We further confirm that your offices continue to hold in trust the sum of R 2 500 000.00 in respect of the deposit, and furthermore confirm that you have released the sum of R 500 000.00 to your clients already, despite the offer to purchase agreement being cancelled some time ago.

The applicants refer in paragraph 55 of their replying affidavit to the fact that there had been discussions between the parties' attorneys on 31 January 2022 concerning the revival of the sale, and that this had been followed up by a letter from the respondents' attorneys on 3 February 2022. The applicants alleged that no mention was made in this letter of an oral lease having been concluded on 30 January. The respondents' attorneys were invited to disclose the above letter (presumed to be without prejudice), to rebut this allegation. However, they did not do so. It can therefore be inferred that no mention was made of the alleged oral lease in this letter.

It is inconceivable, had an oral lease in fact been concluded, that the respondents' attorneys would not have asserted the existence of the lease in

their letters addressed to the applicants' attorneys. Their vigorous protestations regarding the respondents' right to remain in occupation of the property allege an enrichment lien only. The silence in relation to the alleged oral lease, together with all the other surrounding evidence, leads to the inescapable conclusion that no such lease was ever concluded.

It was common cause that the alleged conclusion of an oral lease was only raised for the first time by the respondents' in their answering affidavit filed on 18 March 2022. Accordingly, when in February 2022, the applicants instituted proceedings to evict the respondents, they did not and could not have foreseen or anticipated an allegation that an oral lease had been concluded. The applicants were within their rights to deal with this issue in reply. Indeed, it was incumbent on them to do so. The rule that a party cannot supplement his or her case in reply is not cast in stone.[3]

In my view, the applicants did not introduce a new cause of action in reply. Their case, and the steps they took to evict the respondents after having cancelled the sale, remained constant throughout. Having been confronted for the first time in the respondents' answering affidavit with an allegation that a monthly oral lease had been concluded, the applicants, in my view, were entitled to adopt the stance that in any event, they would cancel such lease.

On general principles a party is entitled to plead in the alternative, even

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3 Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others 2003 (5) SA 1 (C)

where claims are inconsistent.[4] The position taken by the applicants did not cause prejudice or occasion any embarrassment to the respondents and the applicants cannot be faulted for their cancellation of the alleged lease in the alternative. The respondents' submission that the applicants' should have withdrawn their eviction application, cancelled the oral lease, and then re-instituted fresh proceedings to evict the respondents, is nothing short of perverse.

It was conceded in argument of the matter, that the fourth respondent and his family could not rely on Genesis' alleged enrichment lien to claim beneficial use and enjoyment of the property. The only right to occupy relied upon by them, flowed from the alleged oral lease. In my view, there is no reasonable possibility that another court would uphold the existence of the alleged lease. Accordingly, the fourth and fifth respondents' defence cannot succeed and their application for leave to appeal against their eviction must fail.

ALLEGED ENRICHMENT LIEN

Genesis conceded both in argument of the main application and the application for leave to appeal, that in light of the contractual arrangements between the parties, the existence of its alleged enrichment lien could only be substantiated if the respondents' interpretation of section 15(1) of the Act were upheld.

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4 Jardin v Agrela 1952 (1) SA 256 (T), Barclays National Bank Ltd v Pretorius 1978 (3) SA 885 (O), p887

In this regard, the respondents contend that the words “an agreement” in section 15(1) of the Act, in the context in which it is used, is intended to apply to all deeds of alienation for the sale of land, and not merely contracts for the sale of land on installments. This intention, the respondents argue, is to be gleaned from the fact that section 15(1) uses the word “an agreement” in place of the word “a contract”.

The respondents’ argument proceeds on the basis that section 15(1)(b) prohibits the enforcement of a stipulation in a deed of alienation whereby a party forfeits a claim for necessary expenditure and improvements to a purchased property. They attempted to persuade the court that the stipulations in clause 7.4 of the offer to purchase namely, that Genesis was not entitled to make alternations and additions and would vacate the property if the agreement is terminated, amounted to forfeiture clauses and therefore, were unenforceable.

The respondents’ argument in relation to section 15(1) is unsustainable. It ignores the context in which the words sought to be interpreted, are used. Furthermore, it ignores the definitions attributed to the terms used in section 1 of the Act. It also ignores the distinct Chapters into which the Act is divided and their subject matter. These aspects have been fully dealt with my judgment and it is not necessary to repeat what I have said there. In my view, there is no reasonable prospect that another court would uphold the interpretation contended for by the respondents.

A further glaring deficiency in the respondents' argument in relation to section 15(1)(b) is that clause 7.4 of the offer to purchase does not contain a forfeiture clause as envisaged in this subsection. The undertakings in clause 7.4, relied upon by the applicants are the following:

> No tenancy shall be created by the Trust taking occupation prior to transfer and the Trust shall immediately vacate the property upon termination or cancellation of the agreement.
>
> The Purchaser shall not be entitled to make any alterations or additions to the Property prior to Transfer.

These undertakings remain unaffected by section 15(1)(b), even if the interpretation contended for by the respondents were to be accepted. However, as I held, the interpretation cannot be supported.

In argument of the eviction application, the applicants referred the court to *De Aguiar v Real People Housing (Pty) Ltd 2011 (1) SA 16 (SCA)*. The decision is apposite. In that case the appellant (being a lessee) had agreed to purchase the property in which he resided and had undertaken, in similar terms to this matter, to vacate the said property should he be unable to pay or secure the purchase price by an agreed date.

Subsequently, on appeal, the appellant sought to raise an enrichment lien as a defence to an application to evict him. It was held that the appellant's

purported reliance on an enrichment lien was incompatible with his undertaking to vacate the property should be unable to pay the purchase price. The court also held that no amount of further evidence relating to improvements could avoid the consequences of the appellant's undertaking or affect the outcome of the application.

The case for the applicants *in casu* is stronger than in *De Aguiar.* Side by side with the undertaking to vacate the property upon termination or cancellation of the sale, Genesis undertook not to make any alterations or additions to the property prior to transfer. In terms of an exchange of correspondence soon after the respondents took occupation, the applicants consented to Genesis making certain specified alterations and repairs. However, Genesis expressly agreed that these would be at its own expense and that in respect of some of the alterations, it would have to reinstate the property if the sale did not go though. This adds considerable force to the argument that the respondents' right to an enrichment lien was not permitted in terms of the parties' agreement. *De Aguiar's* case also reinforces the basis of my decision to disallow the respondents' further affidavit, tendered at a very late stage, containing evidence relating to the alleged improvements to the property.

The applicants urged me to dismiss the application for leave to appeal and to order the respondents to pay the costs on an attorney and client scale. I was referred to clause 15.3 of offer to purchase where the following is provided:

> 15.3 Should a party choose to enforce rights by way of legal proceedings then the parties agree that any costs awarded will be recoverable on the scale as

> between attorney and own client unless the Court specifically determines that such scale shall not apply. ln which event the cost will be recoverable in accordance with the scale of costs so ordered.

I held in the eviction application that the above clause did not compel the court to award costs on a higher scale or override its discretion in relation to costs. However, it shows that the parties anticipated that in litigation between them, a court should incline towards an award of costs on a higher scale, unless it was found that the circumstances do not warrant such an order. The applicants have been deprived of their ability for over a year to exercise their rights of ownership over their very valuable residential property. The sale was cancelled due to the failure of Genesis to pay the purchase price. The applicants run a substantial risk of not being able to recover compensation from the respondents for damages they claim they are suffering arising from inappropriate alterations alleged to have been made by the respondents and from their inability to regain possession of their property. They facing ongoing and mounting prejudice caused by the refusal of the respondents to vacate. In the circumstances, I am of the view that the grant of costs against the respondents on an attorney and client scale is justified.

Accordingly, I make the following order:

1 The first, second, fourth and fifth respondents application for leave to appeal is dismissed.

2 The first, second, fourth and fifth respondents are ordered to pay the

costs of the application on an attorney and client scale, such costs to include the costs of two counsel.

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JUDGE S KUNY

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of application for leave to appeal: 5 December 2022

Date of judgment: 7 December 2022

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