REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

..... **.....**

SIGNATURE **DATE**

Case number: 20075/2022

In the matter between:

ANDERSON, MICHAEL STUART	Applicant
and	
CHIMUCHERE, GIDEON WILLIAM CHATAIKA	First Respondent
CHIMUCHERE, SILIVIA	Second Respondent
CITY OF JOHANNESBURG	Third Respondent

JUDGMENT

SMIT AJ

INTRODUCTION

1. Mr Gideon and Ms Silivia Chimuchere reside on an agricultural holding in Chartwell, Johannesburg. Mr Anderson is the registered owner of the property. Mr Anderson applies for an order evicting Mr and Ms Chimuchere from the property.

FACTUAL BACKGROUND

2. The matter has a long history. Mr Chimuchere and Mr Anderson entered into a written agreement of sale in relation to the property during June 2020 (*first agreement*). The purchase price was R4.75 million payable in instalments, with the full price to be paid by 31 January 2021. Transfer would only occur once the full purchase price was paid. Occupational rental in a monthly amount of R40,000.00 (payable monthly in advance) would be payable only if Mr Chimuchere failed to comply with payment of the purchase price.

3. Mr Chimuchere made several payments, but it is common cause that by 31 January 2021, R2.89 million remained outstanding. Mr Anderson proceeded to cancel the contract and applied for the eviction of the Chimucheres on 26 April 2021.

4. The first eviction application was not persisted with, and the parties entered into a further written agreement on 31 July 2021 (*second agreement*). The second agreement substituted Mr Chimuchere with Ms Chimuchere as the purchaser of the property. The parties further agreed that, as of 28 July 2021, the amount outstanding was the sum of R3,511,074.16 plus interest. This amount

apparently included arrear occupational rental, electricity and amounts due to the municipality and for insurance.

5. Importantly, the second agreement provided, in relation to the outstanding amount, that "*guarantees will be provided by the substituted Purchaser within 14 days of date of signature hereof.*" The second agreement incorporated the other terms of the first agreement by reference.

6. It is common cause that, by 17 August 2021, no guarantees had been provided. On that day, Mr Anderson's attorney directed a letter to the Chimucheres recording that no guarantees had been provided. The attorney further demanded, in terms of the breach clause of the first agreement, that this be rectified within 7 days of the date of the letter (17 August 2021), failing which she asserted that Mr Anderson would be entitled to cancel the agreement of sale without further notice.

7. On 19 August 2021, SA Home Loans (Pty) Ltd issued a letter to Ms Chimuchere which advised her that her home loan application had been approved. The letter attached a "*letter of acceptance*" recording a "*total loan amount*" of R2.5 million.

8. Ms Chimuchere's answering affidavit states that this "*bond offer*" was sent to Mr Anderson's transferring attorney within two days of having been received. I assume in favour of the Chimucheres that it was sent before 25 August 2021.

9. On that day, Mr Anderson's attorney sent a further letter to the Chimucheres. The letter stated that she was still not in receipt of the necessary guarantees

and that the Chimucheres have not rectified their breach asserted in the letter of 17 August 2021. The letter further stated that Mr Anderson cancelled the agreement.

10. There were further interactions and negotiations between the parties. They culminated on 9 June 2022 in Mr Anderson instituting this eviction application.

THE PARTIES' CONTENTIONS

11. Mr Anderson contends that he validly cancelled the sale on 25 August 2021 and that the Chimucheres are, accordingly, in unlawful occupation of the property.

12. Ms Chimuchere contends that the cancellation of the sale on 25 August 2021 was invalid. She contends that the communications from SA Home Loans constituted the guarantees required by the second agreement. Appreciating that the bond amount of R2.5 million specified in those communications did not cover the full outstanding amount of approximately R3.5 million, she contends as follows:

> "The bond offer had a shortfall on the full purchase price, based on the deposit paid and the bond itself, which shortfall was agreed to be paid in cash at the time of transfer."

13. Although Ms Chimuchere does not specify when, how or by whom this alleged agreement was reached, she states – in the course of dealing with further negotiations following the cancellation letter of 25 August 2021 – that:

> "I then [apparently after 11 October 2021] informed the applicant that I already have a bond to cover the shortfall and the cash as well…"

14. In relation to whether an eviction would be just and equitable, Ms Chimuchere took a point *in limine* that Mr Anderson did not deal with factors bearing on this issue (other than the lawfulness or otherwise of her occupation). She also contends that it would not be just and equitable to make an eviction order, because she heads the household and she resides with her helper, her husband and their child on the property. It is common cause that the helper was previously employed by Mr Anderson.

DISCUSSION

15. The main issues in dispute are: (a) whether Mr Anderson was required to deal, in his founding affidavit, with those factors pertaining to the Chimucheres which make it just and equitable (or not) to grant the order; (b) whether the Chimucheres are in unlawful occupation of the property; and (c) whether it is just and equitable to grant an eviction order. It is convenient first to deal with the question whether the Chimucheres are in unlawful occupation, and then with the remaining issues regarding the just and equitable enquiry.

The status of the Chimuchere's occupation of the property

16. As explained above, Ms Chimuchere contended that the sale was not validly cancelled, because the communications with SA Home Loans constituted compliance (within the seven-day period permitted to rectify a breach) with the requirement to furnish guarantees. She also contended that it was agreed that the shortfall would be made up with cash, payable on transfer. She therefore

contends that the sale was not validly cancelled, because she had complied with her obligations under the agreements.

17. In my view, Ms Chimuchere did not comply with the obligation to furnish guarantees for the outstanding amount of approximately R3.5 million, either within the initial period of fourteen days (from 31 July 2021) or within the seven-day period afforded to rectify her breach (between 14 August and 24 August 2021).

18. In the first place, neither the letter from SA Home Loans, nor the attached letter of acceptance constituted a guarantee. The letter from SA Home Loans advised Ms Chimuchere that it "*does not constitute the final and binding agreement in respect of your home loan*". The letter of acceptance contains a "*note to attorney*" which states that "*Guarantee to be limited to R2500000.00.*" (Emphasis added.) Both these features indicate that nothing was, as yet, guaranteed. Indeed, Ms Chimuchere's answering affidavit refers to these communications as a "*bond offer*". An offer is not a guarantee.

19. In the second place, the bond offer did not cover the outstanding amount and fell short by more than R1 million. Ms Chimuchere contended that there was an agreement that the shortfall could be covered by cash. Her answering affidavit did not explain when such an agreement was reached, by whom or how. It did suggest, however, that there were communications after 25 August 2021 about a potential cash payment to Mr Anderson, which would not avail – since the sale had been cancelled by that time. Even if there were an oral agreement before that date, it would not be enforceable, by virtue of section 2(1) of the

Alienation of Land Act.[1]

20. In argument, Ms Chimuchere's legal representatives contended that there was a tacit or implied agreement that, insofar as there was a shortfall in the bond offer, that could be made up in cash. But such a tacit or implied term directly contradicts the express terms of the second agreement, which requires guarantees – not cash.[2]

21. It is notable that Ms Chimuchere at no stage put up any evidence showing that she had cash available to make up the shortfall – either in answer to the letter of 17 August 2021, or before this court. Further, in later correspondence the Chimucheres had threatened to institute proceedings for specific performance of the agreements against Mr Anderson, on the basis that the cancellation was invalid and that he had repudiated the sale. There is nothing before this court indicating that this was done either. The facts are suggestive, rather, of purchasers with some means, but insufficient to meet the full purchase price.

22. At the hearing of this matter, the attorney appearing for the Chimucheres raised the further contention that the sale was in any event not validly cancelled, because the cancellation did not comply with section 19 of the Alienation of Land Act, 68 of 1981.[3] It was contended that, on the face of the letters dated 17 August 2021 and 25 August 2021, they were not sent to the Chimucheres by

[1] "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority." See *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA) para 22.

[2] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 19.

[3] Section 19 reads, in relevant part, as follows:

> "**19 Limitation of right of seller to take action**
>
> (1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled-

registered post; and that that the demand to rectify the breach within 7 days was inconsistent with the requirement in section 19(2)(b) that no less than 30 days should be allowed to rectify the breach.

23. Given that this contention was neither raised on the papers, nor in the parties' heads of argument, the court requested the parties to file further submissions. The court is grateful for the further submissions it received from both parties.

24. The requirements for notice and demand in section 19 of the Alienation of Land Act relates only to a "*contract*" as defined in that Act. The definition states:

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

> *(a)* to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
>
> *(b)* to terminate the contract; or
>
> *(c)* to institute an action for damages,
>
> unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.
>
> (2) A notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain-
>
> *(a)* a description of the purchaser's alleged breach of contract;
>
> *(b)* a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and
>
> *(c)* an indication of the steps the seller intends to take if the alleged breach of contract is not rectified."

25. The first agreement was, unambiguously, not a deed of alienation under which land was sold against payment in more than two instalments over a period exceeding one year.[4] It contemplated full payment of the purchase price by 31 January 2021, less than a year from conclusion of the sale.

26. Could it be said that the second agreement, concluded on 31 July 2021 – which has to be read together with the first in order to make sense of the sale to Ms Chimuchere – created a "*contract*" (as defined the Alienation of Land Act)? In my view, it did not.

27. According to The Chambers Dictionary (12th Edition), an "*instalment*" is "*one of a series of partial payments*". In a similar context, the High Court has found that "*[a]n instalment is a portion of a debt, a sum of money divided into portions that are made payable at different times*". Accordingly, a further instalment is one where a further amount formed part of a series of payments agreed upon in the deed of alienation.[5]

28. The second agreement did not add a further "*instalment*" which had to be paid outside of the one-year period. Instead, it provided that all mounts paid under the first agreement would be retained by the seller and appropriated towards the amount owing by Ms Chimuchere. The second agreement simply added a date by which payment of the arrears had to be guaranteed, without mentioning a further partial payment in a series of partial payments to be made. The furnishing of such a guarantee is not, in my view, an "*instalment*" for purposes of the Alienation of Land Act.

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[4] Compare *Bubu v Kay* [2022] ZAGPJHC 779 (10 October 2022); 2022 JDR 2902 (GJ) para 19.

[5] *Warr and Another NNO v Clarke* 2003 (3) SA 551 (C) para 25.

29. Even if the furnishing of the guarantees may be construed as an obligation to make a further payment, such a payment does not constitute an instalment for purposes of the Alienation of Land Act, because it was not the last in a series of payments agreed upon; it was the purging of a default under the first agreement in one lump sum. The second agreement did away with the payment of instalments by deleting the instalment schedule of the first agreement and replacing it with the guarantee for settlement of the default in a lump sum.

30. Thus, section 19 of the Alienation of Land Act did not apply to the first and second agreements, even when read together. Mr Anderson validly cancelled the sale to Ms Chimuchere on 25 August 2021. Subsequently, he withdrew his consent for the Chimucheres' occupation and demanded that they vacate the property. They are, accordingly, unlawful occupiers of the property for purposes of the PIE Act.[6]

The just and equitable enquiry

31. Ms Chimuchere contended in her answering affidavit that the eviction order should be refused solely because Mr Anderson did not deal in his founding affidavit with factors personal to the occupants of the property that bear on the analysis whether it is just and equitable to grant the order.

32. It is common cause that section 4(7) of the Prevention of Illegal Eviction from

[6] The PIE Act defines "unlawful occupier" as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996".

and Unlawful Occupation of Land Act, 19 of 1998 (*PIE Act*) applies to this application. It states:

> "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, 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, 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."

33. The Supreme Court of Appeal dealt with the issue of onus in *Changing Tides*.[7] It found that the enquiry into what is just and equitable requires the court to make a value judgment on the basis of all relevant facts. While that may mean that technical questions relating to onus of proof should not play an unduly significant role, the onus of proof can be disregarded. If, at the end of the day, the court hearing an eviction application is left in doubt whether an eviction order would be just and equitable, it must refuse an order.

34. That mean that in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. In some cases, it may suffice for an applicant to say that it is the owner, and the respondent is in occupation, because those are the only relevant facts, in others it will not.[8]

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[7] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) paras 28-34.

[8] *Changing Tides supra* para 30.

35. Thus, there is no immutable rule that an applicant in an eviction application must deal with factors personal to the respondents. It depends on the circumstances. An applicant who avers no facts, or insufficient facts, in this regard in the founding papers runs the risk that the respondent may put up sufficient facts in answer to convince a court that issuing an eviction order is not just and equitable. But respondents in eviction applications likewise bear an evidentiary onus to put up facts regarding the just and equitable enquiry, outweighing their unlawful occupation, including whether an eviction would likely render the respondents (and other relevant occupiers) homeless.

36. In this case, the Chimucheres did not indicate that they would be rendered homeless by an eviction. Ms Chimuchere explained she resides on the property with her helper, her husband and their child. They were previously employed by Mr Anderson. She therefore indicated that a household headed by a woman would be evicted and suggested (without stating it) that this may cause particular problems for her helper (and the helper's family).

37. Mr Anderson indicated that Ms Chimuchere's domestic worker (previously employed by him) is not liable to be evicted. He only seeks eviction of the Chimucheres and persons occupying the property through them. Given that he was the domestic worker's previous employer, that does not apply to her and her family.

38. In addition, it appears from the papers that the Chimucheres are persons of some means. Mr Chimuchere paid approximately R1.86 million towards the purchase price of the property before defaulting. Ms Chimuchere is a businesswoman who exports products to Zimbabwe. Her income, described as

"*steady*" in her answering affidavit, apparently justified a home loan of R2.5 million. On her version, she had the cash to make up a shortfall of more than R1 million.

39. The Chimucheres were legally represented throughout these proceedings.[9] Despite this, there are no facts before the court which indicate that they would not be able to procure appropriate alternative accommodation if evicted, given their means. I therefore conclude that it would be just and equitable, in the circumstances, to issue an order evicting the Chimucheres from the property.

40. This leaves the question as to what justice and equity requires in relation to the date of the eviction. Mr Anderson's counsel submitted that one month was the "*usual*" order made in these circumstances. The Chimucheres' attorney stated that orders of various lengths were made by the courts. He did not argue, however, that there was any particular reason why one month would be inappropriate in these circumstances.

41. It seems to me that one month would afford the Chimucheres sufficient time to procure appropriate alternative accommodation, given Ms Chimuchere's steady income.

ORDER

42. I make the following order:

1. The following persons shall, within one month of making this order, vacate the immovable property described as Holding 141 Chartwell Agricultural

[9] As to the relevance of the respondents' legal representation, see *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) para 47.

Holdings, Registration Division J.Q., Gauteng, situate at 2nd Road, Chartwell Agricultural Holdings:

1.1 Mr Gideon William Chataika Chimuchere;

1.2 Ms Silivia Chimuchere; and

1.3 Any and all unknown persons occupying the property by, through or under the authority of Mr and Ms Chimuchere.

2. The Sheriff for the area within which the property is situated is authorised and directed to take all steps and do all such things necessary to evict the persons referred to in paragraph 1 of this order and to return possession of the property to Mr Michael Stuart Anderson, in the event that such persons fail to comply with the order granted in terms of paragraph 1.

3. The South African Police Services is directed to assist the sheriff to execute the order granted in paragraph 2, to the extent necessary.

4. Mr and Ms Chimuchere shall pay the costs of this application, including the interlocutory application in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, jointly and severally, the one paying, the other to be absolved.

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DJ SMIT

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 2 May 2023

Date of judgment: 13 June 2023

Appearances:

Counsel for the applicant: Ms C. Gordon

Instructed by: Vermaak Marshall Wellbeloeved Inc.

Counsel for the respondents: Mr T. Hadebe (attorney)

Instructed by: Khupane Attorneys