REPUBLIC OF SOUTH AFRICA

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

CASE NO: 35029/2014

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

....
DATE SIGNATURE

In the matter between:

[M……..] [P……..] [V……..] First Applicant

[J……..] [G……] [M……] [V……..] Second Applicant

And

GERRIT LODEWIKUS COETZEE Respondent

J U D G M E N T

MAKUME, J:

[1] In this matter the Applicants who are the owners of certain property described as PTN 1 of Erf 1……., V……..], Ext 6 Registration Division I.R. Province of Gauteng ("*the property*") seek an order evicting the Respondent and all those in occupation of the property. The application is opposed.

[2] It is common cause that during or about the 28th March 2011 the Applicants and the Respondent entered into a written agreement of sale in terms of which the Applicants sold to the Respondent the property.

[3] The purchase price of the property was the sum of R2,4 million which amount was payable in monthly instalments of R53 386,67 the first instalment was to be paid by the Respondent on the 1st April 2011 and subsequent instalments to be paid on the first day of each of the following months.

[4] Occupation of the property was given to the Respondent on the 1st March 2011. On the 27th May 2014 the Applicants' attorneys Messrs De Beer Attorneys addressed a letter of demand to the Respondent in which the Applicants informed the Respondent that he was in breach of clause 2.2 of the sale agreement in that he has made no payments since June 2013 up to May 2014 and was accordingly in arrears with payments in the amount of R497 173,27. The letter of demand proceeded to request the respondent to remedy the breach as per clause 9 of the sale agreement within a period of 30 days.

[5] In the letter of the 27th May 2014 the Applicants informed the Respondent that should he fail to remedy the breach that will be taken as repudiation of the agreement by him and that Applicants will accept such repudiation and cancel the sale agreement.

[6] On the 1st July 2014 the Applicants' attorneys addressed a letter to the Respondent informing him that the sale agreement is now cancelled in view of the Respondent's failure to remedy the breach as set out in their letter of the 27th May 2014.

[7] On the 29th July 2014 the Respondent replied to the above letter and told the Applicants that he had up to April 2014 paid a total of R1 608 208,38 and claims that in terms of the sale agreement he was entitled to take transfer of the property and seeing that Applicants had failed to effect transfer of the property into his name that is why he had stopped making further payment. He concluded by demanding that transfer be effected in the name of a Trust not into his name as per the sale agreement.

[8] The Respondent's letter of the 29th July 2014 did not address the cancellation of the agreement instead the Respondent demanded that the property be transferred into the name of a Trust. He followed up that letter with another letter dated the 31st July 2014 in which he gave his new address as:

Centara Karon

The Lagoon Resort

502/3 Patak Road

Karon Beach

B 3110

Thailand

The Respondent said nothing about the cancellation of the sale agreement.

[9] On the 12th August 2014 the Applicants through their new attorneys Messrs Steyn, Steyn and Partners addressed a letter to the Respondent that despite cancellation of the agreement that Applicants were prepared to agree to transfer of the property at that stage on the following conditions:

9.1 That a new instalment sale agreement be concluded between the Applicants and the Trust on the same terms and conditions as the previous agreement.

9.2 That the Respondent would be required to sign surety in his personal capacity as co-principal debtor *in solidum* for payment of the purchase price together with the Trust.

9.3 That a bank guarantee be delivered to the Applicants within 30 days for payment of the arrears of R634 026,99.

9.4 That a bond be registered in favour of the Applicants over the property in terms of section 27 of the Alienation of Land Act.

[10] In the letter Applicants requested the Respondent to indicate by close of business on the 27th August 2014 whether the new offer was accepted or not failing which Applicant would proceed with an eviction application.

[11] On the 27th August 2014 the Respondent replied to the above letter and made a counteroffer in which he offered to pay an amount of R1 million in full and final settlement as the purchase price for the property by the Trust. This letter was immediately followed by another one dated the 2nd September 2014 in which letter he denies having breached the agreement and in a conciliatory gesture he proposed a new settlement in which he will continue with the monthly payments whilst transfer into his name take place and further agrees to a bond being registered over the property for the balance.

[12] The Applicants responded to this letter on the 9th September 2014 and in their response the Applicants were still prepared to transfer the property to the Respondent against payment of the arrears. The Respondent was referred in this regard to the decision of *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC). The Respondent was allowed time until the 12th September 2014 to accept the Applicants' proposal or face litigation for his eviction from the property. An itemised statement was attached. This statement indicated that between the 20th September 2013 and April 2014 no payments were received. The last payment of R50 000,00 was received

during April 2014 and at that time only an amount of R1 608 202,70 had been paid.

[13] On the 12th September 2014 being the date on which the Respondent had to respond to the final offer made by Applicants he wrote a letter saying that he is seeking legal opinion and requires more time, he further said that although he had signed the sale agreement in English and had in fact requested that he now for some strange reason says he want all correspondence in Afrikaans.

[14] It would appear that no further correspondence exchange hands between the parties and on the 8th October 2014 the Applicant obtained an order in this Court to serve this application on the Respondent by sending it to the Respondent's email address as well as service by the Sheriff on the security guard at 176 Bendor Avenue, Heidelberg.

[15] The Respondent filed his answering affidavit resisting eviction on the 10th November 2014. In his affidavit the Respondent raises three points *in limine* which are the following:

15.1 The Respondent argues that the Applicant failed to comply with the provisions of section 7(1) of the Alienation of Land Act ("*the Act*") in that the Applicants failed to hand to the Respondent a certificate by the mortgagee indicating the amount owed on the property by the Applicant.

15.2 Secondly, the Respondent argues that the Applicants failed to comply with the provisions of section 20 of the Alienation of Land Act in that the Applicants failed to record the agreement and have such agreement of sale endorsed by the registrar of deeds on the title deed of the property within 90 days.

15.3 Thirdly, the Respondent says that the Applicants contradicted the provisions of section 26(1)(b) of the Alienation of Land Act in that no person shall by virtue of a deed of alienation receive consideration until the sale agreement shall have been recorded in terms of section 20 of the Act.

[16] In paragraph 22 of his answering affidavit which is in answer to paragraph 9 of the founding affidavit the Respondent admits that a sale agreement was concluded as pleaded but denies that it has been legally complied with in terms of the Act. He then refers to the three points *in limine* and continues to deny that he was in arrears with the monthly instalments.

[17] In paragraph 30 of his answering affidavit the Respondent having in his previous paragraph admitted receipt of the letter of demand dated the 27th May 2014 he denies that he repudiated the sale agreement and says that in the alternative should this Court find that a valid and binding agreement had been entered into in terms of section 20 of the Act. He denies that the Applicants complied with the requirements of section 19(3) of the Act.

[18] The Respondent admits that on the 15th July 2014 a letter of cancellation of the agreement was sent to him. He however says that there was no compliance with the provisions of section 19(3) of the Act prior to cancellation of the agreement.

[19] At paragraph 36 the Respondent denies that he is in unlawful occupation of the property since cancellation of the agreement. He however does not say on what basis is his further stay lawful.

[20] Besides the three points *in limine* it is clear that the Respondent attacks not only the validity of the sale agreement but also that cancellation was not in compliance with the provisions of section 19(3) of the Alienation of Land Act. He further denies that he was in arrears with his monthly instalments as at the time that the letter of demand dated the 27th May 2014 was dispatched to him.

THE POINTS *IN LIMINE*

[21] Section 1 of the Act sets out a number of definitions amongst that is the word "*land*" in that section under the heading land subparagraph (c) thereof reads as follows:

> "*'land' in section 3(2) and Chapter II –*
>
> *(i) means any land used or intended to be used mainly for residential purposes;*"

[22] Section 3(2) of the Act deals specifically with land sold by public auction. Sections 7 and 20 of the Act are contained within Chapter 2 of the Act. It is common knowledge that the property hereby sold is industrial and not residential. According to sections 7 and 20 had no application to the property. The points *in limine* are accordingly dismissed.

[23] It is only section 26 which falls outside Chapter 2. Sections 26(1) and 26(2) read as follows:

> "*26(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until –*
>
> *(a) such erf or unit is registrable; and*
>
> *(b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.*
>
> *26(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000,00 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.*"

[24] Section 26 refers to erf and unit. There is no suggestion that the property sold in this matter is an erf or a unit. In the definition clause of the Act erf is described as meaning an erf as defined in section 102 of the Deeds Registries Act and unit is defined as meaning a unit as defined in section 1 of the Sectional Titles Act and includes any proposed unit. If is accordingly clear

that section 26 has no application and accordingly the point *in limine* raised under that section is dismissed.

[25] Even if I was wrong in my conclusion section 26(2) prescribes a form of punishment in the event of contravention of section 26(1)(b) it does not invalidate the agreement.

[26] Reverting to the defences if any raised on the merits at paragraph 20 of his heads of argument the Respondent says that the sale agreement is still binding and that the Respondent is entitled to take transfer of the property in terms of section 27(1) of the Act as he has paid in excess of 50% of the purchase price. The Respondent adds that as the agreement is still in force that he is not in illegal occupation of the property and pleads that the Applicant is not entitled to the relief he seeks.

[27] It is common cause that when the Applicants sent a letter of demand to the Respondent during May 2014 the Respondent had already paid an amount of R1 608 202,70 in reduction of the purchase price. This much is evident from a copy of the statement attached to Applicants' letter addressed to the Respondent dated the 9th September 2014. If no interest is taken into consideration it is correct that at that stage the Respondent had paid over 50% of the purchase price. However, it must be kept in mind that he had not been paying any instalment for a period of seven months and then made a payment of R50 000,00 during April 2014 shortly before the letter of demand was dispatched to him.

[28] Section 27(1) of the Alienation of Land Act reads as follows:

> "*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 future and who has paid 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.*"

[29] Registration of the property in the name of the purchaser is not automatic or at the instance of the seller as the Respondent would want this Court to believe. The *onus* lies on the Respondent to firstly prove that he had paid not less than 50% of the purchase price and thereafter demand that the Applicants transfer the property into his name. That transfer would only take place provided there is a simultaneous registration of a first mortgage bond over the property in favour of the Applicants for the balance of the purchase price including interest.

[30] A further argument raised by the Respondent is that the Applicant failed to comply with the provisions of section 19(3) of the Act. That section falls within Chapter II and is not applicable to the property hereby sold. This argument is not pursued by the Respondent in his heads of argument.

[31] It is against this background that I now deal with the remedies available to the Applicants both in terms of the agreement as well as in terms of the Act.

CANCELLATION

[32] I am satisfied that the Respondent breached the agreement when he for no reason stopped paying the agreed monthly instalments during April 2013. The letter sent to the Respondent on the 27th May 2014 as in accordance with the provisions of clause 9(1) of the sale agreement.

[33] The Respondent failed to remedy the breach within the time set out in the letter or at any later stage instead he became argumentative and started questioning a number of clauses in the agreement. Clause 9.1.1. grants the Applicants the right to cancel which they did and I find nothing wrong with that.

EVICTION

[34] In the notice of motion all that the Applicants seek is that the Respondent be evicted. The notice of motion says nothing about what should happen to the amount of money or instalments already paid by the Respondent to the Applicants now that the sale agreement has been cancelled. Section 28 of the Act sets out various steps that can be followed or that should result after cancellation.

[35] Section 28 reads as follows:

"*(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation of contract, and –*

(a) the alienee may in addition recover from the alienator –

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for –

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee -

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable."

[36] I have not been asked in this application to pass judgment on the future of the amounts already paid and I shall desist from so doing.

[37] The application is granted and I order as follows:

37.1 The Respondent and all that occupying by, through or under the Respondent (if any) are hereby evicted from the premises namely PTN 1 of Erf 1……., V……., Ext 6 Registration Division I.R. Province of Gauteng.

37.2 In the event the Respondents refuse to vacate the premises aforesaid voluntarily the Sheriff of this Honourable Court or his duly authorised Deputy is hereby authorised to forthwith do and take all steps necessary to evict the Respondent and all those occupying by, through or under the Respondent (if any) from the premises.

37.3 The Respondent is ordered to pay the costs of this application on a party and party scale.

DATED at JOHANNESBURG on this the 5th day of JUNE 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	14TH JUNE 2015
DATE OF JUDGMENT	05TH JUNE 2015
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