IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT – PORT ELIZABETH

REPORTABLE

Case no: 616/2010
Date argued: 27/1/2011
Date delivered: 14/6/2011

In the matter between:

TRANSNET LIMITED	**Applicant**
vs	
TATISE JACKSON TEBEKA	**First respondent**
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	**Second respondent**
EVELYN TEBEKA	**Third respondent**

JUDGMENT

Summary: *In terms of the employment scheme available to personnel employed by applicant (an organ of state) the latter, in 1989, entered into an agreement with first respondent, its employee. Consequently first respondent agreed to repay applicant the sum of R47 407.78 which was the value of the house allocated to first respondent in terms of the scheme. This was in 1989. A sum of money was to be deducted monthly from the first respondent's salary until paid in full.*

In 1999 first respondent was dismissed from his employment with applicant, presumably on operational requirements. This resulted in applicant taking the entire pension money of first respondent to reduce the balance of the price.

Since 1999 no communication ever occurred between the parties until in 2010 when applicant instituted eviction proceedings against respondent having unilaterally cancelled the agreement in 2009 on grounds that first respondent has failed to pay. In the house first respondent stays with his wife and three children. The third child is their six year old granddaughter. Both children are not employed. First and third respondents are old age pensioners.

First respondent has disputed any liability to applicant and this resulted in a real and genuine dispute of fact.

Relying on the provisions of section 26 of the Constitution the Court refused to grant the order of eviction against respondents holding, inter alia, that it would not be just and equitable to do so. The house in question is registered in the name of the applicant.

TSHIKI J:

A) INTRODUCTION

[1] First and third respondents both old age pensioners, are husband and wife and reside at no 76 Cerus street, NU5, Motherwell in Port Elizabeth. In the said house they stay with their two children aged 23 and 24 years respectively. Their second child, a daughter, has a child a girl who is 6 years old and living with the respondents. Respondents survive only on old age pension for a living. The first respondent is 62 years old and had since 1975 been employed by Transnet (then South African Railways and Harbours), the applicant, until he was dismissed from his employment in 1999. For the sake of convenience when I refer to first and third respondents, I shall refer to them as respondents. The second respondent, Nelson Mandela Metropolitan Municipality, will be referred to as the municipality.

[2] On the date of argument of the application Mr. B. Pretorius appeared for applicant and Mr. V. Naidu for respondents. There was no appearance for the municipality and neither did it oppose the application.

B) FACTS (UNDISPUTED)

[3] In August 1989 first respondent entered into a written contract which is referred to in the papers as a Deed of Sale. In terms of the said contract first respondent acquired immovable property in terms of the applicant's House Ownership Scheme which was available to applicant's Personnel at the time. In terms of the said House Ownership Scheme applicant, on first respondent's

request, arranged for the acquisition of the property known as Erf 6714 Motherwell, situate at 76 Cerus Street, Motherwell, Port Elizabeth subject to the following conditions (contained in paragraph 8 of the applicant's founding affidavit):

> '8.1 The applicant will acquire the property on behalf of the first respondent for a purchase price of R47 407.78 exclusive of the costs of erection of buildings, if applicable, costs and charges and duties paid by the applicant in procuring the acquisition and transfer of the property.
>
> 8.2 The total amount of the first respondent's indebtedness shall be repaid by the first respondent in equal monthly instalments over a period of 38 years.
>
> 8.3 The ownership of the property will remain vested in the applicant until such time that the first respondent has liquidated its indebtedness to the applicant, whereafter applicant shall issue a Deed of Grant to the first respondent.
>
> 8.4 The monthly instalments will be recovered from the first respondent's salary.
>
> 8.5 In the event of the first respondent retiring from the applicant's employment and the balance of his superannuation fund being insufficient to settle the outstanding indebtedness and the first respondent fails upon demand to settle the balance aforesaid, applicant will refund the first respondent an amount equal to the capital redeemed during the currency of the agreement less depreciation and costs of repairs, provided that the first respondent shall remain liable for any shortfall if the redeemed capital is less than the amount that may be deducted.
>
> 8.6 The applicant will have a similar obligation to refund the first respondent the amount equal to capital redeemed less deductions aforesaid, in the event of the agreement [been] terminated through death or upon the first respondent's request.'

[4] Applicant contends that as a consequence of the first respondent's

breach of contract by his failure to effect payment that is due monthly, first respondent is in arrears of R95 635.44 which excludes interest accrued. The said breach has resulted in applicant's cancellation of the agreement.

[5] Upon dismissal of the first respondent by applicant, presumably on operational requirements, in December 1999, applicant deducted a sum of R17 638.41 from the pension money due to first respondent. This amount was used by applicant to credit the first respondent's account thus reducing the amount owed to applicant by first respondent.

[6] I am not happy with the manner in which the applicant's papers have been drafted, in particular the founding affidavit deposed to by Johan Van Der Spuy. There is very little that the applicant told the Court to substantiate its cause of action against the respondents except to emphasize that it is entitled to evict the respondents consequent upon the applicant's cancellation of the contract an act allegedly resulting from first respondent's breach of his obligations in terms of the contract. The founding affidavit does not even state the capacity of the deponent to the founding affidavit in that it is silent on whether he or she is a major or minor person. Though there is a disclosure of the deponent being 'duly authorised to depose [of] the contents of this affidavit', no other document in the form of a resolution or authority or any explanation for that matter to authorise the institution of these proceedings has been referred to and/or annexed. In addition to the above, and most importantly, applicant has not been described at all. Only page one of

annexure ‘JV 3’ has been annexed to the bound papers and for the reason that the annexed page is incomplete there is supposed to be more than one page of that annexure. This is the document on which applicant relies on as proof of having made a demand from the first respondent to pay the outstanding amount of the contract. I regard this omission as carelessness in the highest degree on the part of the applicant’s attorneys to whom applicant relied for the preparation and processing of its case. More to this will be dealt with later in this judgment.

C) DISPUTED FACTS

[7] In their answering affidavits respondents explained that first respondent was not in breach of the contract in that the amount due by him was paid in full to the applicant.

[8] Applicant, having heard the respondents’ answer, filed a lengthy replying affidavit in which it annexed various documents including the letter purporting to be cancelling the contract as well as ‘JVS6’ the printout which purports to show the first respondent’s account regarding the monthly payments of the house in issue. In the founding affidavit the only documents annexed were the conveyancer’s certificate ‘JVS I’, the copy of the agreement in issue ‘JVS 2’ the letter of demand dated the 19 October 2009, ‘JVS 3’ and the letter of cancellation of the contract dated 26 November 2009, ‘JVS 4’. The replying affidavit’s contents include ‘JVS 6’ a printout relating to first respondent’s account, ‘JVS 5’ a power of attorney, ‘JVS 7’ a municipal account and ‘JVS 8’ a letter also dated 4 March 2008 advising the applicant

that his bond account was transferred to applicant's agent First National Bank. Even if applicant's purpose in instituting these proceedings was to evict the respondents it was obliged to furnish the court, which has no clue of the facts of its case, with all the relevant documents in its founding papers which accompanied the notice of motion.

D) DISPUTE OF FACT

[9] The first respondent's answer to applicant's contentions has, in my view, raised a genuine and real dispute of fact. In his response first respondent contends that after he was informed by applicant's employees in 1999 that his pension deductions did not settle the full amount he was advised by the applicant's employee, described as 'a man of Indian origin' that a housing subsidy was to be arranged by this man on his behalf. After a few weeks he was called again and was informed by this man that the subsidy has been obtained. The money received on his behalf for the subsidy was paid to settle the outstanding balance of the house debt as well as the municipal levies. This happened during the years 1999-2000.

[10] In my view, what makes the first respondent's explanation raise a real dispute of fact is that:

[10.1] Applicant in its replying affidavit does not deny the first respondent's allegations specifically regarding the applicant's employee of 'Indian origin', who is alleged to have assisted and attended to the first respondent, instead, the allegations aforesaid were only noted by the applicant. In my view, if the applicant was disputing that it had no employee answering to such description

it would have stoutly denied the allegations.

[10.2] The fact that applicant did not make any demand from the first respondent for the payment of the alleged balance of the contract price for a period of at least nine years suggests that it is reasonably possible that there was some form of acceptable arrangements between the parties on how the balance was, or was to be, settled.

[10.3] It is not clear from the applicant's affidavits and annexures how the sum of R95 635.44 was arrived at. All the documents filed do not assist the Court.

[11] For the above reasons the case may have to be decided in accordance with the judgment in ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***[1] where at page 634 F-I and 635 A-C Corbett JA remarked as follows:

> 'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, 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. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 155 (T) at 1163-5; Da Mate v Otto NO 1972 (3) SA 858 (A) at 882 D-H.* If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (*CF Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164)*

1 1984 (3) SA 623 (A) at 634 F-I

> and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283 E-H.* Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case *supra* at 924 A).'

[12] I have no reason to believe that applicant did not expect first respondent not to oppose the application. It would be unreasonable for the applicant to launch court proceedings against first respondent hoping that he or she would not oppose it. Once the application is opposed a possibility of a dispute of fact should always be expected. This could be so in a case where there has been no communication between the two parties for a period in excess of eight (8) years. Even in this case applicant must have forseen the possibility of the first respondent opposing this application and if one has regard to the facts as deposed to by first respondent applicant must have expected that there could have developed a material and genuine dispute of facts. Despite this possibility applicant proceeded to go by way of application instead of action proceedings.

[13] In a situation as above the Court has a discretion to dismiss the application with costs[2].

F) FAILURE TO COMPLY WITH RULE 6 R/W RULE 17(4)

[14] Having reserved my judgment after argument of this matter, I realised

2 Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 93) SA 155 (T) at 1162

during my preparations that the founding affidavit of the applicant does not comply with rule 6 read with Rule 17 (4)(b). The applicant has not been described in the founding affidavit, and that there is no allegation to establish its *locus standi in judicio*. I then requested the parties to furnish me with additional written heads of argument addressing my above concerns. Both parties have furnished me with their additional written heads and I am indebted to them for assisting me in this regard.

[15] Mr Naidu for the respondents, contends that applicant has not complied with the Rules in that it has neither described the applicant nor has it annexed a copy of the resolution or authority for the institution of the present proceedings. He, therefore, contends that the omission is fatal to the applicants and he applies for the dismissal of the application with costs.

[16] Applicants contend that in the notice of motion applicant is cited as Transnet Limited and then relies on section 49 (1) of the Companies Act 61 of 1973. The applicant's argument in the heads is couched such that, in my view, I get the impression that the drafter of the heads got the incorrect impression that my contention is that the applicant has no *locus standi in judicio* in these proceedings. This is not my concern, as I have alluded to in the following paragraphs, applicant may have been clothed with *locus standi* but this is not what is contained in its founding affidavit as required by Rule 6 (1).

[17] In the case of an artificial person such as a company the position is not the same as that of natural persons where *locus standi* will be presumed. An

artificial person, unlike an individual, can function only through its agents and can take decisions only by passing of resolutions in the manner prescribed by its constitution or statute establishing it. It cannot be assumed from the mere fact that proceedings have been brought in its name that those proceedings have in fact been authorised by the artificial person concerned[3].

[18] In ***Mall (Cape) (Pty) Ltd v Merino KO-operasie Bpk***[4] the Court dealt with the situation that where a company commenced proceedings by way of petition it was necessary to show that the person who brought the petition on behalf of the company must have been fully authorised by the company to do so. This also applies to the proceedings by way of notice of motion. In ***Mall***'s case *supra* Watermeyer J said:

> 'In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of a individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by the official of the company annexing a copy of the resolution but I do not believe that that form of proof is necessary in every case.'

[19] Although Rule 6 of the Uniform Rules of this Court (the Rules) does not specifically require the applicant's full name, address and *locus standi* it is clear from the provisions of the Rules[5] relating to pleadings that this is a

3 Mall (Cape) (Pty) Ltd v Merino Ko-operasieBpk 1957 (2) SA 347 (C) at 351 E-G. See also Pretoria City Council v Meerlust Investments (Pty) Ltd 1962 (1) SA 321 (A) at 325 C-E. Griffiths and Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (4) SA 249 (C)
4 See footnote 3 *supra*
5 Spoornet v Watson 1994 (1) SA 513 (W). See also Commentary in Erasmus – Superior Court

requirement even in application proceedings. In this matter, the applicant's founding affidavit as deposed to by Johan Van Der Spuy does not have an allegation which describes the applicant, whether it is a natural or juristic person, its business, address or status as well as whether or not it has *locus standi in judicio*. Rule 17 (4)(b) provides:

> '17(4) Every summons shall set forth-
>
> a) …
>
> b) The full name, sex and occupation and the residence or business of the plaintiff, and where he sues in a representative capacity, such capacity. If the plaintiff is a female the summons shall state her marital status.'

[20] This Rule is couched in terms which might create the wrong impression that it refers only to natural persons yet it is not. It should be interpreted to mean that it is of general application inclusive of natural persons and juristic persons as well as those plaintiffs contemplated in Rule 14. Indeed it covers every plaintiff or applicant who has the right in law to sue. The Rule as it also apply to juristic persons requires every applicant to furnish in its founding affidavit with sufficient details which enable the court as well as the respondent to establish whether or not the applicant has the requisite *locus standi* to sue[6].

[21] I gather from the name of the applicant which is followed by the word LIMITED that applicant is supposed to be a public company. This averment and others including the description of the applicant, its address and place of business, its nature of business or operation, whether or not it has *locus*

Practice pages B1-123 to B1-126 HH. Rich v Lagerway 1973 (1) SA 485 (W) at 487 B-D
6 Scott and others v Hanekom and others 1980 (3) SA 1182 (C)

standi in judicio as well as the authority to institute the proceedings on the part of its representative have not been mentioned in the launching papers. These averments are expected to be contained in the founding affidavit. The relevant paragraph of the applicant's founding affidavit reads:

> 'I am the manager collections of the plaintiff and/or its successor in title and I am as such duly authorised to depose [of] the contents of this affidavit, the facts, save where the contrary appears, are within my personal knowledge and are to the best of my knowledge and belief true and correct. Where any of the facts deposed to are not within my own personal knowledge, I verity believe them to be true and correct.'

[22] It is clear from the above extract that applicant's basis for its *locus standi in judicio* as well as other necessary averments in terms of Rule 6 (1) read with Rule 17 (4)(b) are lacking herein.

[23] I am aware that in a subsequent affidavit of the applicant deposed to by the applicant's attorney one Willem Abraham Christiaan Labuschangne filed in support of an application for joinder, paragraph 4 thereof describes the applicant as 'a public company registered and incorporated in accordance with the provisions of the Companies Act, with registered offices at 26 Wellington Road, Parktown, Johannesburg.' Applicant's attorney's affidavit referred to above does not assist applicant for the reason that it was not filed with the launching affidavits and has only been annexed to the notice of application for the joinder of one of the respondents. The required averments should be filed with the launching affidavits that accompany the notice of motion and not with the documents accompanying an interlocutory application. In any event, even if I were to consider the contents of that

affidavit the averments contained therein are insufficient to comply with the provisions of Rule 6 (1) read with Rule 17 (4)(b) and cannot solve applicant's problem.

[24] The applicant makes his or her case in the founding affidavit. Failure by the applicant to do so is no mere technical defect but that the *locus standi in judicio* of the applicant is fundamental to the applicant's rights to claim the orders sought in the founding affidavit in the absence of which the court should not entertain the application[7]. In ***SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle***[8] Caney J held as follows at page 543 C-D:

> 'I consider it to be necessary for a plaintiff to make in his declaration the averments required not only to show that he has *locus standi*, but also that the defendant has. No doubt this will be presumed when the parties are natural persons and there is nothing to indicate lack of legal capacity, but if there is a departure from this or a party is not *prima facie* qualified to litigate, the necessary authority to sue or to be sued must be disclosed. I do not think there can be any presumption that a voluntary association is a corporate body, and in my view grounds for citing it as a party must be disclosed.'

[25] In application proceedings the applicant makes his, her or its case in the founding affidavit which should contain evidence upon which applicant relies for the order sought. In this case the applicant's right to apply, that its *locus standi in judicio,* should have been alleged in the launching affidavits and not in any other affidavit unless an application to supplement the founding

7 Spoornet v Watson *supra* at page 514 E-I
8 1955 (3) SA 541 (D)

affidavit to cure this defect has been granted in which event the appropriate allegations have to be stated in that affidavit[9]. There are no such allegations in the applicant's founding affidavit herein and this is fatal to the applicant's case.

[26] In ***Scott and others v Hanekom and others***[10] Marais AJ (as he then was) on this very point held as follows (at page 1188 H and 1189 A):

> 'It is trite law that appropriate allegations to establish the *locus standi* of the applicant should be made in the launching affidavits and not in the replying affidavits. This it is indeed so that the challenged passages in the replying affidavits are not legitimate responses to first respondent's allegations and have been included solely to remedy an omission in the launching affidavits, they are liable to be struck out.

[27] Indeed what is important is what the applicant said in its launching affidavits in regard to its *locus standi* as well as other requirements in terms of Rule 6 (1). If there is none or insufficient allegations on that point the matter is *cadit quaestio* and the results are that there is no *locus standi* established.

[28] In this matter respondents have not raised the issues of lack of compliance with Rule 6 (1) by the applicant nor, has the applicant applied for the amendment of the founding affidavit to rectify the said omission. Rules of the Court are for good reasons made for the Court and not for the litigants and should at all times be complied with. Even if there is no objection from the other party against his or her opponent's flagrant disregard of the rules, the

9 Scott v Hanekom 1980 (3) SA 1182 (C) at 1188H-1189A.. See also Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A) at 575 H-I, Kommissaris van Binnelandse Inkomste v Van der Heerver 1999 (3) SA 1057 (SCA) at 1057 G-H

10 See footnote 9 *supra*

Court has powers to raise and/or consider the matter on its own with a view to rectify the omission or to enforce compliance with the relevant Rule(s). In the process the Court will dismiss the application or action if it comes to the conclusion that it was obligatory for the guilty party to have complied with the requirements of the relevant Rule and that he or she has failed to do so. In this case applicant has not annexed any document in the form of at least a resolution justifying the institution of the present proceedings neither is there an averment to prove authority to institute these proceedings.

[29] Having said the above, I am aware of the constitutional provision in terms of section 34[11] which provides as follows:

> 'ACCESS TO COURTS
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum.'

[30] I do not, even for a moment, think that my condemnation of the manner in which the applicant has drafted his papers and consequently failed to comply with the specified Rules of the Court could amount to unfairly preventing the applicant from exercising its rights in terms of the above and any other applicable constitutional provisions[12]. In a given case, as the one *in casu*, the court is entitled to enforce compliance with the Rules of the Court and this does not amount to chasing away litigants from approaching the Court to enforce their disputes. Compliance with the Rules of the Court is consistent with orderly practice and should as a matter of necessity be seen

11 Section 34 of the Republic of South Africa Constitution Act 1996
12 Section 38 of the Republic of South Africa Constitution Act 1996 [its provisions do not appear to be applicable in the facts of the case under discussion]

to be observed by the practitioners or parties acting personally. There can be no prejudice to the party who is guilty of failure to observe the Rules of the Court because in the event of the dismissal of the action or application for that reason alone, a litigant can institute fresh proceedings and no plea of *res judicata* can be successfully raised by the defendant or respondent as the case may be.

[31] In conclusion it would perhaps be appropriate to quote the following *dictum* in ***Bayat v Hansa***[13] at ***553 C-E***:

> 'An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits) still less a new case in his replying affidavits.'

[32] Having said the above, I am of the view that although the applicant's founding affidavit does not comply with the relevant Rule, it is still within my discretion to condone the applicant's conduct. This is so for the reasons, *inter alia*, that the affidavit by the applicant's attorney filed in support of the application for joinder as well as the other facts contained in the papers do indicate that applicant does have *locus standi in judicio* in these proceedings. I am therefore prepared to reluctantly use my discretion towards condoning the non-compliance with the relevant rules of the Court. In so doing I am by no means encouraging practitioners to ignore compliance with the Rules of this Court.

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13 1955 (3) SA 547 (N) at 553 C-E

E) TERMS AND CONDITIONS OF THE CONTRACT

[33] When one has regard to the terms and conditions of the contract as well as remedies upon breach herein there is no indication that eviction of the first respondent is one of the remedies available to the applicant upon cancellation of the contract by the latter. Paragraph 8 of the applicant's founding affidavit deals specifically with the terms of the contract including the remedies available in the event of any breach. Eviction of the first respondent and his family is not one of those remedies that have been specified in the written contract which applicant could resort to in the event of cancellation of the contract flowing from the breach of a material term by first respondent.

[34] I must say though that, in order to be valid, the cancellation of the contract has to be communicated to the guilty party. In the light of the denial by first respondent that he received or was aware of the contents of the letter cancelling the contract, the only document which effectively communicated to him the cancellation thereof is the notice of motion together with its contents which, according to the return of service, was received by first respondent on the 4 March 2010 when the papers herein were served on him. There can be no dispute that the present proceedings clearly informed the first respondent of the applicant's cancellation of the contract and I therefore conclude that the contract was cancelled on the 4 March 2010. It is important to mention that the applicant's affidavit does not mention how and in what manner the applicant complied with the contract provisions in paragraph 8.6 of the contract agreement and neither does the founding affidavit deal specifically

with how the first respondent complied with clause 8.5 of the agreement. In every contract the terms thereof are the promise agreed upon by the parties which, together, make up the contract. Applicant's founding affidavit does not appear to disclose all the material facts upon which it could rely to obtain the order sought.

[35] It is trite law that an application not only takes the place of a declaration in an action but also of essential evidence to be led at the trial. An application must include facts necessary for determination of the issue in the applicant's favour[14]. Similarly in ***Hart v Pinetown Drive-In-Cinema (Pty) Ltd***[15] dealing with a similar issue, Miller J pointed out and remarked as follows:

> 'Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition , be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief is sound.'

[36] I wish to emphasize that the terms of a contract are the provisions which set out the nature and details of the performance due by the parties under the contract. This includes the nature and description of the commodities or services to be rendered, the manner, time and place of performance as well as the remedies for failure to comply with such terms. In the present case the only relevant clause which would then have to be

14 Bezuidenhout v Otto 1996 (3) SA 339 (W)
15 1972 (1) SA 464 (D) at 469 C-E

associated with eviction is that ownership of the property will remain vested in the applicant until the contract price is paid in full. However, where a contract has been put into writing by the parties, it becomes necessary to read the language used in order to ascertain their intention from the language used by the parties[16].

[37] In ***Cape Provincial Administration v Clifford Harris (Pty) Ltd***[17] Zulman JA held as follows:

> 'It is trite law that when dealing with written contracts the golden rule of interpretation is to ascertain and give effect to the intention of the parties. The intention must be gathered from the language used by the parties. The words in which they have recorded their contract should normally be given their ordinary grammatical meaning within their contextual setting with the proviso that in construing the language of a provision, any special definition of particular words by the parties must obviously be given effect to, provided of course, that such definition is not inconsistent with the context of the clause being interpreted.'

[38] In my view, the fact that it is specifically stated in the agreement that applicant shall remain the owner of the property until the price is paid in full may not necessarily be interpreted to mean that in the event of any breach followed by the cancellation of the contract by the applicant the latter is entitled to the eviction of the first respondent from the property in issue. This is so because the remedies available to the applicant are specifically and unequivocally stated in the contract itself. The fact that this could result in

16 See *Wille's Principles of South African Law, 9th ed* p 800
17 1997 (1) SA 439 (A) at 445 F-H

unfairness of the contract terms to applicant does not assist it in anyway[18].

[39] Applicant is therefore legally bound to apply those remedies which are available to it in terms of the contract.

[40] It is trite law that, when the other party to the contract (the guilty party) breaches a material term of the contract the innocent party is entitled to cancel the contract. Ordinarily, unless the contract specifies to the contrary, upon cancellation he or she may, *inter alia*, sue for damages. Such damages mean that he or she should be put in the position he or she would have been had the contract been properly performed. In ***Trotman v Edwick***[19] Van den Heerver JA held as follows at page 449 B-C:

> 'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and in kind.'

[41] Where it is obvious that the parties should have thought about a term or remedy of the contract and should consequently have included it in the written agreement, the courts should be loath to impute such a term and/or remedy into the written agreement even though the parties have excluded it.

[42] Where express stipulations, conditions and/or remedies upon breach are set out in a contract a court should not, by any implication, construe them as justifying their extension. The presumption is that having expressed same, the parties to the contract expressed all the conditions by which they intend to be bound under the contract[20]. This is expressed by the maxim

18 Haynes v King Williams Town Municipality 1951 (2) SA 371 (A)
19 1951 (1) SA 443 (A)
20 Lessing v Steyn 1953 (4) SA 193 (O) at 202

expressio unius est exclusio alterius. The contract can thus not be altered if there is no agreement to do so after it is executed without fraud or wrong[21].

[43] Most authorities on this point suggest that a court has no right to imply in a written contract any stipulation or term, unless, on considering the terms of the contract in reasonable and in businesslike manner an implication necessary arises that the parties must have intended that the suggested stipulation or terms should exist[22]. A court has a right to presume that a particular term of a contract was agreed to (that is impliedly) only where it is capable of a reasonable interpretation in the particular circumstances[23].

[44] In the present case the question is whether the court can by implication impute into the contract of the parties the term that upon cancellation of the contract by applicant, as a consequence of the material breach thereof by first respondent, eviction of the first respondent was intended by the parties and therefore should be imputed therein. This should not be easily resorted to especially in a written contract where the terms are clearly stated in the written agreement[24]. I say so having in mind that the general rule is that the terms as expressed by the parties in their written contract must be given effect to for the reason that they have expressed all the conditions by which they intend to be bound under the contract.

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21 Glendale Sugar Millers (Pty) Ltd v SA Sugar Association 1986 (3) SA 815 (N)
22 EA Kellaway on Principles of Legal Interpretation (Statutes, Contracts & Wills) 1995 ed at page 495. See also Richard Ellis (SA) (Pty) Ltd v Miller 1990 (1) SA 453 (T) at 463 C-E
23 Van Der Merwe v Viljoen 1953 (1) SA 60 (A) at 65
24 Voges v Wilkens 1992 (4) SA 764 (T)

[45] It must be observed that both parties may have had knowledge of a certain relevant and associated fact, and such knowledge may be imputed, but it may not be on its own to found a tacit term of a contract, the intention of the parties is the determining factor as to whether or not the contract contained a tacit term[25].

[46] An implied term, condition or stipulation, however, is an unexpressed term, condition or stipulation of the contract that arises from the common intention of the parties which can be determined from the express terms of the agreement and the surrounding circumstances when the parties contract. It could be a term which the parties thought of at the time of the conclusion of the contract but failed to write it into the agreement, or one with which they would have dealt with, had their minds been directed to it[26]. In ***Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration*** *supra* at page 582 Corbett JA stated as follows:

> 'The concept of the common intention of the parties comprehends not only the actual intention but also an imputed intention ie the court implied not only terms which the parties must actually have had in mind but did not trouble to express, but also terms which the parties, whether or not they actually had in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention.'

[47] It is trite law that a term should not be implied unless it is absolutely necessary to imply it in order to carry into effect the intention of the parties. Whether a term could be imputed to the parties must be determined from the express terms of the contract and/or the surrounding circumstances that led to

25 Administrator (Transvaal) v Industrial and Commercial Timber and Supply Co 1932 AD 33
26 Alfred Mc Alphine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531

the conclusion of the contract[27].

[48] In the present case the fact that the parties have agreed that the ownership of the property shall vest in the applicant until the price is paid in full creates an irresistible inference that the parties contemplated that in the event of the failure by first respondent to pay, applicant would resort to the eviction of the first respondent as a remedy. This, in my view, is a term which could reasonably be implied in the circumstances failing which the registration of the property in the name of the applicant whilst the property is in possession of the first respondent would not make sense and would render the whole agreement nugatory and senseless. Such a result could never have been contemplated by the parties.

[49] In the result, I see no reason why such term ie 'eviction of the first respondent in the event of cancellation of the contract by applicant flowing from the material breach of contract by first respondent' could not be implied as a term of the contract which was contemplated by the parties at the time of the agreement.

[50] Be that as it may, this is not the only consideration in this case. The court has to further determine whether or not the first respondent is in unlawful occupation of the property and therefore liable to be evicted.

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27 Alfred Mc Alphine & Son (Pty) Ltd v Transvaal Provincial Administration *supra,* Van Den Berg v Tenner 1975 (2) SA 268 (A) at 276

[51] The applicant's intended eviction of the respondents and their family members is based on the fact that they are in unlawful occupation of house no 76 Cern Street, NU 5, Motherwell in Port Elizabeth. It is the house which both respondents use as their primary residence. It is trite law that everyone is protected by the provisions of section 26 of the Constitution[28] against eviction. Section 26 of the Constitution provides:

> 'Housing
>
> 1) Everyone has the right to have access to adequate housing.
> 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
> 3) **No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions**.' (my emphasis)

[52] Section 26 above has resulted in the enactment of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[29] (hereinafter referred to as PIE). Pie provides some legislative texture to guide the courts in determining the approach to eviction now required by section 26 (3) of the Constitution. Relative to the case *in casu* section 4 (7) of the PIE Act provides that in all eviction proceedings where the unlawful occupier has occupied the land in question for more than six months 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 the rights and needs of the elderly, children, disabled persons and households headed by women. Section 6 of PIE refers to eviction at the instance of an organ of state and provides:

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28 Republic of South Africa Constitution, 1996
29 Act 19 of 1998

'An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale in execution pursuant to a mortgage, and the Court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if –

a) the consent of that organ of State is required for the erection of a building or the occupation of the land, and the unlawful occupier is occupying a building or structure such consent having been obtained; or
b) it is in the public interest to grant such order.

2) For the purpose of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.

3) In deciding whether it is just and equitable to grant an order of eviction, the Court must have regard to –
   a) the circumstances under which the unlawful occupier occupied the land and evicted the building or structure.
   b) The period the unlawful occupier and his or her family have resided on the land in question; and
   c) The availability to the unlawful occupier of suitable alternative accommodation or land.

[53] In terms of the contract of the parties the owner of the house in issue is the applicant which is an organ of state. Applicant was created in terms of section 2 of Legal Succession To The South African Transport Services Act[30]. Section 2 (2) of the above Act provides that the State is the only member and shareholder of Transnet Limited. The house in respect of which applicant seeks to evict respondents was obtained by first respondent by way of a work scheme whilst first respondent was the employee of applicant.

30 Act 9 of 1989

[54] It appears from the provisions of the PIE Act[31] that the jurisdictional fact which should trigger the lawful eviction of the occupier of land is that such person must be an unlawful occupier. In the present case the respondents can only be regarded as unlawful occupiers if the Court finds that the version of the applicant in these proceedings is accepted. Even if the respondents are declared to be unlawful occupiers, before the Court can authorise their eviction it must be shown that it is just and equitable for them to be evicted.

[55] It is common cause that the respondents are elderly pensioners whose only income is derived from the old age pension. In the house in question they reside with their children who are 23 and 24 years old as well as their granddaughter who is only six years old. Their children are not employed. It is further common cause that the respondents have no other alternative accommodation in which they can stay if evicted from the said premises. There is no indication from the circumstances of this case that they can be able to secure alternative accommodation should they be evicted from the said premises.

[56] In addition, before the applicant came to Court for an order of eviction no attempts were made by it to establish whether the amount owed by the first respondent could be recovered by resorting to other methods eg by selling the movables of the respondents. There was no such attempt although it has now transpired that respondents are at present not wealthy people.

[57] Having said the above the main issue at this stage is whether the

31 Sections 4 and 6 of the PIE Act 19 of 1998

respondents are in unlawful occupation of the property in question. The Court, having accepted the version of the respondents in view of the decision in ***Plascon Evans*** case above the Court cannot therefore conclude that the respondents are unlawful occupiers of the said property. I say so because on the version of the respondents the debt was paid in full by first respondent.

[58] Even if I am wrong in my conclusion that the respondents are not unlawful occupiers, given the circumstances of the case their lack of means to secure alternative accommodation and that in the house in issue respondents live with their children and grandchild who is young. Respondents have been staying in this house with their family since 1989 a period of more than twenty years. For about ten (10) years applicant has given the respondents the impression that there is no amount they owe applicant in respect of the house. This is so in view of the applicant's failure to claim the alleged balance of the debt for such a long period. Applicant's silence for such a long time has created an expectation, legitimate in my view, that there is no longer any amount owed by the first respondent to the applicant.

[59] Most of all the applicant has not been able to convince the Court how it has arrived at the total amount which it alleges is owed by the first respondent. I am not in a position to say how the applicant arrived at the amount claimed. The case of the applicant lacks averments which are necessary to assist the Court to come to a just decision. In ***Port Elizabeth Municipality v Various Occupiers***[32] Sachs J, dealing with the same issue,

32 2005 (1) SA 217 CC at 237 para 36-38. See also Government of the Republic of SA and Others v

held as follows at page 237 para 36-38:

> 'The Court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.
>
> Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.
>
> The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The Judiciary cannot, of itself, correct all the systemic unfairness to be found in our society. Yet it can, at least, soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails…'

[60] The provisions of section 26 of the Constitution are couched in such

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Grootboom and others 2000 (11) BCLR 1169 (CC)

terms so as to ensure that before a Court can grant an order of eviction of the occupier of the home it has to take into account all the relevant factors. And if circumstances for and against the eviction are balanced such that the Court would have difficulty in finding in favour of either side the Court should refuse to grant the order of eviction. This is so in view of the fact that the applicant would have failed to establish that he or she is entitled to evict the respondent. The provisions of section 4 of the PIE Act was designed to give effect to the provisions of section 26 of the Constitution hence in given circumstances the Courts can only authorise eviction of the occupier when its just and equitable to do so.

[61] The majority of South Africans embrace and practice the notion of *Ubuntu* which literally means humaneness or obliging towards others. In my view *Ubuntu* notion emanates from the African communalism where people would share everything they had. This way of living evolved to be what today is practised where communities feel obliged to help and give to those who are poor what they need and do not have. They do so without expecting anything in return. It may therefore be regarded as inhumane and against the notion of *Ubuntu* to chase away the needy and poor people with no other alternative accommodation from their place of residence in which they have lived for a period in excess of twenty years and in the circumstances prevailing in this case. I say this having in mind the provisions of section 26 and those of the PIE Act. I am also mindful of the universal right to ownership. Most of all I also consider the peculiar facts of this case. In the circumstances of this case, there is, in my view, no reason why the applicant, and/or the State

cannot treat this case in the same manner as provided for in the Conversion of Certain Rights into Leasehold or Ownership Act[33]. The circumstances prevailing in this case and those in respect of which the above act applied are similar. Section 4 (1)(b) of the above Act reads:

> '4 Granting of Leasehold or Ownership
>
> (1) The Director-General shall upon the expiry of the period specified for appeal under section 3 (1) or, in the case of such appeal, on the confirmation, variation or substitution of the determination referred to in section 2 (4), in the prescribed manner declare the person concerned to have been granted-
>
> (a) …
>
> (b) in the case where the affected site is situate in a formalized township for which a township register has been opened, ownership in respect of the affected site concerned.'

[62] In the present case respondents regard the house in question as their home yet the applicant regards itself the owner of the property. The Court has to balance between the interests of the owner and those of the occupier who has for more than twenty years regarded the property as his primary residence. The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26 of the Constitution. The same section requires that the legislative and other measures adopted by the state are reasonable.

[63] In the present case, ordinarily, if respondents are evicted the state would be expected to assume its obligation to provide the respondents and their children with adequate accommodation. This includes the provisions of

33 Act 81 of 1988 especially sections 2, 4 and 5 of the Act

a shelter for the six year old child. Obviously if the parent of the child acquires accommodation that would be sufficient for the child to acquire shelter where she would stay with her mother.

[64] Though the applicant is not the government by virtue of it being an organ of state or a parastatal, however, in terms of section 2 (3) and sections 3 and 4 of the Legal Succession To The South African Transport Services Act 9 of 1989, as amended, the State is the only shareholder of the applicant. This, in my view, makes the state responsible for the budget of the applicant and should under normal circumstances provide for the applicant's yearly budget.

[65] Having narrated the above relevant circumstances of the respondents, can it be said that the applicant or the state can be impoverished if the respondents are allowed to remain the occupants of the property, and therefore could it be just and equitable for this Court to grant an order of eviction in the circumstances of this case. If one has regard to the state's obligation to provide adequate shelter for respondents and their family as well as other circumstances of the respondents already explained above it would not be unjust and inequitable if the respondents would remain in the property in question. In terms of the contract annexure (JVS I) first respondent was required to pay a sum of R47 407.78 for the property. The instalments commenced in 1989 and until the year 1999 when the first respondent was dismissed. Although the circumstances of the first respondent's dismissal are not disclosed there is an irresistible suspicion, as gathered from the facts of

other similar cases, that the first respondent was in fact dismissed on operational requirements and applicant deducted the first respondent's full pension fund to reduce the balance of the purchase price of the house in issue.

[66] During argument Mr Pretrorius submitted that the interests of the owner of the property should be paramount and that the respondents should be evicted. He relied on the judgment of ***Jackpersad NO and others v Mitha and others***[34]. The two cases cannot be comparable. They are completely distinguishable. In the ***Jackpersad*** case applicants were sellers and purchasers of immovable property who joined ranks to seek eviction of the tenants (respondents) from the building on the property in terms of section 4 (6) of the PIE. The property was adjacent to a hospital. It is common cause that the purchaser whished to demolish the building on the property to enable extentions to be made to the hospital. The extentions were urgently needed to extend the hospital wards. It is clear that the interest of the applicants included the creation of jobs for the general public thus creating both temporary and permanent jobs and that there was an alternative land available for the respondents. The facts of the present case are different.

[67] Mr Naidu for the respondent has attacked the applicant's failure to justify how it arrived at the amount it has indicated as the balance owed by first respondent. Mr Naidu correctly argued that it would be just and equitable for the Court to refuse the application more so when one has regard to the

34 2008 (4) ALL SA 522 (DCLD)

circumstances of this case.

[68] Having considered all the relevant factors in this case I am unable to agree with Mr Pretorius. The plight and circumstances of the respondents paint a miserable picture of the respondents' plight, not to say this is the only consideration, but it touches one's sense of justice to evict a person who has been staying in the house for more then 20 years in circumstances where, even if you accept the applicant's version, it is clear that the initial price has been paid almost in full excluding interest and the state is the only shareholder of the owner of the property in issue. It would have been undesirable for the applicant to take and use all the pension money of the first respondent towards the purchase price when in fact at the end of the day the applicant could sell the property and not refund the first respondent the money he has already paid. I can think of no other reasons for the applicant's eviction of the respondents and their family other than to sell the property. I say this fully aware that the owner has the right to dispose of its property as it pleases. At the end of the day, as already alluded to above, though the applicant is the organ of state, the state remains the only body to suffer prejudice, if any, if the application is refused (it being the only shareholder of the applicant). In my view, any such prejudice is far outweighed by the pressing need for the application of the provisions of section 26 of the Constitution in this case.

[69] I therefore come to the following conclusion:

[69.1] That from the facts accepted in this case it has not been established by

the applicant that the respondents are unlawful occupiers of the said property. Even if they are unlawful occupiers:

[69.1.1]For the reasons already alluded to *supra* it would not be just and equitable for this court to evict the respondents from the property.

[70] Therefore, the application is hereby dismissed with costs.

_____
P.W. TSHIKI
JUDGE OF THE HIGH COURT

Date signed: _____
Representative of parties:

For the applicant:	Adv. B. Pretorius
Instructed by:	Greyvensteins St Georges House 104 Park Drive Port Elizabeth
For the respondents: (1st and 3rd)	Mr. V. Naidu
Instructed by:	PE Justice Centre 1st Floor, President Centre 564 Govan Mbeki Avenue North End Port Elizabeth