IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 695/2016

Date Heard: 8 September 2016

Date Delivered: 4 October 2016

In the between:

ZEPHAN PROPERTIES PROPRIETARY LIMITED Applicant

and

SABIVERT PROPRIETARY LIMITED Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant is the registered owner of an immovable property known as Nashua House situate on erven 3057, 3058 and 3059 and the remaining in extent of erf 3087, North End, Port Elizabeth. The respondent is currently in occupation of at least portion of the building which is, in turn, rented out to the Nelson Mandela Metropolitan University as student accommodation. The applicant seeks the eviction of the respondent from the property alleging that it has no right to occupy the property.

Background

[2] The relationship between the applicant and the respondent has persisted for some years as will appear more fully below, however, it appears that during or about February 2016 the relationship soured. The respondent launched an application against the applicant and the Nelson Mandela Metropolitan Municipality seeking

certain relief relating primarily to the interruption of the electricity supply and obtained an interim order ex parte. The respondent's application was in due course opposed and dismissed due solely to procedural irregularities. The applicant, however, responded with a counter application, which forms the subject matter of the present litigation. Initially the applicant sought extensive relief, however, during argument before me the applicant sought no more than the eviction of the respondent from the property. Mr *Ronaasen* SC, on behalf of the applicant emphasises that applicant does not seek the eviction of students who occupy under and through the respondent. The relief sought by the respondent in her initial application and the additional relief initially sought by the applicant, which was abandoned at the hearing, are not material to the resolution of the issues which fall to be decided. Extensive papers have been filed on either side, much of which finds no application to the relief now sought. I deal herein with the material contentions.

History

[3] During about December 2012 or January 2013, Nicholas Georgiou, the driving force behind the applicant and the deponent to the founding affidavit, was introduced to Ms Mbeki, who is the driving force behind the respondent and the deponent to the respondent's affidavit. Georgiou states that he was impressed by Mbeki and he perceived her as a vibrant, knowledgeable and highly motivated young lady. At the time Mbeki states that the applicant was allegedly experiencing difficulty in obtaining tenants for certain of his buildings and she advised Georgiou that she was interested in acquiring buildings from the applicant which were either wholly or partially let to government. She expressed the view that she was more likely to secure government lease agreements than the applicant. This Georgiou acknowledged.

[4] Mbeki offered to do business with the applicant and she says that it was agreed that in order to pay for the purchase price of the buildings which she might acquire she would pay the profit on rentals acquired from various tenants in the buildings over time to the applicant in reduction of the purchase price. Mbeki states that it was envisaged that she would acquire the buildings through the respondent or another corporate vehicle with the financial support provided by the applicant.

[5] Against this background their negotiations culminated during May 2013 in the conclusion of an agreement of sale in terms of which the respondent purchased Nashua House from the applicant for a purchase price of R48 million (the first agreement). The first agreement was hotly debated at the Bar and it is the applicant's contention on the papers that the first agreement lapsed by virtue of the non-fulfilment of a suspensive condition.

[6] It is necessary at this stage to set out the material terms upon which the arguments centred. Clause 1 of the first agreement describes the property in a manner which I have set out earlier herein. Clause 2 provides:

> "PURCHASE PRICE
>
> The purchase price is the sum of R48, 000,000 (forty eight million rand) inclusive of VAT at zero rate which is payable by the Purchaser to the Seller free of exchange at Johannesburg on date of registration of transfer of the Property. Should the purchaser require any improvements to be done to the building as a condition to the obtainment of the Lease envisaged by (clause) 24, the Seller shall (provided that the Lease is signed) pay the costs of the improvements which shall be added to the Purchase Price."

[7] Clause 4 and 5 provide:

> "4. TRANSFER
>
> Following compliance of the suspensive conditions referred to in clause 24 below, transfer of the Property shall be given to the Purchaser as soon as possible after payment in terms of 5 hereunder is made, and shall be effected by the Seller's attorneys.
>
> 5. PAYMENT
>
> 5.1 The Purchaser shall be entitled to take occupation of the property on the first day of the commencement of the lease as envisaged by 24.3 hereunder ("the Occupation Date").
>
> 5.2 Transfer of the Property into the name of the Purchaser shall be effected after payment of the Purchase Price has been made in full or guaranteed to the satisfaction of the Seller.
>
> 5.3 Pending payment of the Purchase Price the Purchaser shall pay to the Seller interest calculated at 9% per annum from the Occupation Date monthly in arrears."

[8] The suspensive condition is set out in clause 24 of the first agreement as follows:

> "24.1 This entire agreement is conditional upon the fulfilment of the conditions precedent contained in 24.2 hereunder failing which this Agreement shall lapse in all its parts and be of no further force or effect whatsoever, namely:

24.2 The Purchaser, within 6 (six) months of the signature date or such further time as may be agreed in writing, obtain a Tenant for the premises on a lease for a period of not less than 9 (nine) years and 11 (eleven) months on terms and conditions acceptable to the Purchaser.

24.3 In the event of the condition not being met or fulfilled within the time provided for, or within such further period as the parties may agree in writing, this agreement shall be null and void and of no further force or effect, unless the conditions are so waived in writing by the Purchaser."

[9] Clauses 17 and 18 of the first agreement provide:

"17. VARIATION

No addition to or variation, consensual calculation or novation of this Agreement and no waiver of any right arising from this Agreement or its breach or termination, shall be of any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives.

18. RELAXATION

No latitude, extension of time or other indulgence which may be given or allowed by any/either party to any/other party in respect of the performance of any obligation hereunder and no delay or forbearance in the enforcement of any right of any/either party arising from this Agreement, and no single or partial exercise of any right by/either party under this Agreement, shall in any circumstances be construed to be an implied consent, or election by such party or operate as a waiver of or novation of or otherwise effect any of the party's rights in terms of or arising from this Agreement, or estop or preclude any such party from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term hereof."

[10] It is common cause that the provisions of clause 24 were not strictly complied with. No written extension of time was ever granted nor was a written waiver effected by the respondent. Mbeki states, however, that the Department of Home Affairs was already a tenant of the applicant at the time and that its contract was due to expire. Mbeki secured the renewal of the contract by the Department of Home Affairs which still endures. She further negotiated agreements of lease with the Nelson Mandela Metropolitan University for the remainder of the building to be utilised as student accommodation. She states that the parties were in agreement that the contracts which she did in fact conclude with Home Affairs and with the university, although not strictly complying with the provisions of clause 24, were sufficient to meet the provisions of clause 24. As recorded earlier the portion of the building not let to the Department of Home Affairs was in a dilapidated condition. It required renovation in order to make it suitable for student accommodation. It is common cause that upon respondent securing a contract with the university, the applicant proceeded to renovate the building thereby spending approximately R14 688 000. This Georgiou contends was pursuant to an oral agreement between the parties. Mbeki, however, contends that it was done pursuant to the provisions of clause 2 of the agreement which provides specifically for this obligation.

[11] Mbeki proceeds to state that all amounts due in respect of the sale agreement as and when they became due, have been paid. The rentals received were paid into a bank account which Mbeki states was controlled by Georgiou. Georgiou withdrew such amounts as were due in terms of the first agreement as and when they fell due and, so Mbeki contends, he withdrew additional amounts too. There is a considerable dispute on the papers relating to amounts paid pursuant to the first

agreement, however, it is common cause that the contract has never been cancelled in the manner provided for in the agreement and it is not necessary herein to resolve the disputes relating to the amounts in fact paid. Whilst it is unclear precisely when the respondent was given occupation of the property Georgiou states that an amount of R2 799 865,14 was paid during the period of October 2013 to October 2014 “in terms of the first agreement”.

[12] On 13 December 2013 a further agreement was concluded in similar terms to the first agreement (herein referred to as the second agreement). The second agreement provided for the purchase of approximately 26 properties, including the property subject to the first agreement for a purchase price of R2 768 000 000. Georgiou contends that the second agreement came about because the first agreement had lapsed for non-fulfilment of the suspensive condition. He contends that it too lapsed in due course for the same reasons. Mbeki, however, explains that Georgiou had sought to convince her that it would be appropriate for the respondent to be registered on the Johannesburg Stock Exchange. She gained the impression that whilst the applicant would support her in this endeavour the applicant would also benefit from such a registration on the stock exchange as it would be entitled to shareholding in the company as a result of the financing of the company undertaken by it. Georgiou further convinced her that in order to arrange for such a registration it was necessary to conclude the second agreement which would reflect a substantial portfolio of properties owned by the respondent for the substantial value of R2,768 billion. The transaction, she says, was nothing more than a simulated transaction and it was never the intention that the respondent would acquire the 26 properties from the applicant.

Approach to factual disputes

[13] There are numerous disputes of fact which arise from the papers. The applicant seeks final relief. Where such relief is sought in proceedings on motion and where disputes of fact have arisen on the affidavits, a final order may be granted if those facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. See **Stellenbosch Farmers Winery Limited v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at 235E-G and **Plascon-Evans Paints Ltd V Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H-I. In **Plascon-Evans Paints** *supra* Corbett JA added, however, at 634I-635C:

> "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 respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact … 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 … 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 among those upon which it determines whether the applicant is entitled to the final relief which he seeks."

[14] It is not contended that disputes raised in this case are not real, genuine or *bona fide* disputes and neither party has requested that the matter be referred to oral evidence. On an application of the principle set out in **Plascon-Evans Paints** *supra* the version of Mbeki must prevail.

PIE

[15] *In limine* Ms *Mey* argued that the relief sought by the applicant could not succeed by virtue of the non-compliance with the prevention of illegal eviction from an Unlawful Occupation of Land Act, 19 of 1998 (PIE). I have recorded earlier that the applicant had abandoned most of the relief which it had sought in its Notice of Motion and at the hearing sought only the eviction of the respondent. In particular, Mr *Ronaasen* recorded that he did not seek the eviction of any of the natural persons in occupation in the building and accordingly argued that the provisions of the Act do not find application. Ms *Mey*, correctly, in my view, acknowledged that by virtue of the relief sought during argument the provisions of the Act find no application. In the circumstances I do not refer further to the provisions of PIE.

The second agreement

[16] In the case made on the papers the applicant contended that the second agreement superseded the first agreement before it too lapsed for failure to fulfil a suspensive condition similarly worded to that in the first agreement. In argument before me Mr *Ronaasen* intimated, without abandoning the reliance on the second agreement, that he did not intend to address any argument to me founded on the provisions of the second agreement. I consider that it was prudent to do so.

[17] On the application of the principles set out in **Plascon-Evans** the second agreement falls to be considered on an acceptance of the version set out by Ms Mbeki. These circumstances, it seems to me, *prima facie*, indicate that I would have been obliged to conclude, in any event, that the agreement was a mere simulation and that the parties had no intention thereby to bring about an enforceable

contractual arrangement between them. It is, however, not necessary for me in the circumstances to make a finding in this regard.

The applicant's case

[18] As alluded to earlier the applicant persists only with a prayer for the eviction of the respondent from Nashua House on the basis that it is the rightful owner of the property and that the respondent has no right to occupy. The respondent, as set out earlier, obtained occupation pursuant to the first agreement which the applicant alleges was unenforceable.

[19] The principle at common law is that a seller of an immovable property under an invalid contract of sale has a right to claim possession of the property based only on its ownership and the respondent's occupation (see **Graham v Ridley** 1931 TPD 476; **Chetty v Naidoo** 1974 (3) SA 13 (AD); and **Hartland Implemente (Edms) Beperk v Enal Eiendomme Beperk en andere** 2002 (3) SA 653 (NC)). The respondent then bears the onus to establish a right to continue to hold the property as against the owner. (See **Chetty's** case *supra* at 20A-D.) The enforceability of the first agreement is therefore central to the debate.

Condition precedent

[20] The thrust of the applicant's case on the papers is that the first agreement lapsed for non-fulfilment of the suspensive condition set out in clause 24 thereof. On behalf of the applicant it is argued that the contention that the suspensive conditions were "waived" is untenable in the light of the clear wording of the agreement that any such waiver had to occur in writing. In these circumstances it is contended that the

respondent has no further right of occupation and that the applicant is entitled to an order evicting the respondent from the premises.

[21] Mr *Ronaasen* relied heavily on the provisions of clause 17 and 18 of the first agreement as set out earlier herein. The effect of a non-variation clause as set out in clause 17 was considered in **SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en andere** 1964 (4) SA 760 (A). The Appeal Court (now the Supreme Court of Appeal) held that a non-variation clause of this nature was valid and binding upon the parties. The effect thereof is that any attempt to agree informally on a topic covered by a non-variation clause in order to vary informally a contract containing a non-variation clause must fail (see **Kovacs Investments 724 (Pty) Ltd v Marais** 2009 (6) SA 560 (SCA) at para [23]). Whilst the principle in **Shifren** proved to be somewhat controversial initially it has recently been unequivocally confirmed in **Brisley v Drotsky** 2002 (4) SA 1 (SCA).

[22] Mr *Ronaasen* argues in the circumstances that by virtue thereof that it is common cause that the provisions of the suspensive condition set out in clause 24 of the first agreement have not been specifically met it follows that the agreement lapsed at the conclusion of the time period stipulated in clause 24. No waiver of the provisions of the clause nor any informal agreement on an extension of time could be valid and, so the argument goes, the respondent is bound by the consequences which flow from the non-fulfilment of the condition.

[23] The version of Mbeki relating to this issue is set out earlier under the history of the matter. She contends that the parties agreed that the lease agreements which

she concluded with the Department of Home Affairs on the one hand and the university on the other would be sufficient to meet the provisions of clause 24 even though they did not strictly comply with the written agreement. The facts reveal that the applicant elected to accept the lease agreements with the university and proceeded to affect improvements to the building which were required to give effect to the lease agreement with the university as he was obliged to do in terms of clause 2 of the first agreement. The obligation in clause 2 of the agreement to affect improvements of this nature arises only upon the fulfilment of clause 24 and the costs occasioned by the improvements would then only be added on to the purchase price. This is precisely what did occur.

[24] Mr *Ronaasen* submits that this is no more than an indulgence as envisaged in clause 18 of the agreement and that it accordingly does not assist the respondent. I do not agree. In **Telcordia Technologies Inc v Telkom SA Ltd** 2007 (3) SA 266 (SCA) the Supreme Court of Appeal again confirmed the **Shifren** principle. Harms JA considered that the **Shifren** principle "does not create an unreasonable straight jacket because the general principles of the law of contract still apply, and these may release a party from its workings". One of these principles particularly raised by Harms JA is the rule that a party may not aprobate and reprobate. This, it seems to me, is precisely what the applicant seeks to do in the present matter. It accepted the lease agreements obtained by the respondent as fulfilment of clause 24 and it proceeded with the contract thereby acknowledging the fulfilment of the suspensive condition. It cannot now, some three years later, fall back upon the provisions of clause 17 and 18 of the agreement in order to assert that the agreement never came into existence.

[25] The applicant accepted a lesser performance as sufficient discharge of the obligation placed upon the respondent in the suspensive condition. That, in my view, does not constitute a variation of the agreement nor a waiver of the clause. (Compare **Telcordia Technologies** *supra* at 282E.)

[26] In the circumstances I do not consider that the applicant's main argument cannot succeed.

Validity of the agreement

[27] The matter does not, however, end there. At the conclusion of argument Mr *Ronaasen* requested the opportunity to file supplementary heads. In his supplementary heads Mr *Ronaasen* argues that the first agreement does not contemplate the payment of the purchase price of the property in instalments. If it is accepted, as Ms Mbeki asserts, that the purchase price would be paid over time in instalments derived from periodic rental payments then, it is submitted, that the agreement is null and void by virtue of the provisions of the Alienation of Land Act, 68 of 1981 (the Act).

[28] In response Ms *Mey* contends that the applicant's claim as presented to court on the papers was not premised on any allegation of invalidity of the first agreement but solely on the allegation that the first agreement is null and void *ab initio* for wont of compliance with the suspensive condition contained in clause 24 of the first agreement. The suggestion is that the issue of the original validity of the first agreement is not before me.

[29] The present matter is an application. The papers serve the function of both the pleadings and the evidence. In his founding papers Georgiou states "the applicant is the owner of the property and the respondent has no entitlement or right to occupy the property …". For the reasons set out earlier herein I consider that that is all that it was necessary to say for purposes of the relief which is persisted with in the application. It is for the respondent then to set out facts so as to establish a right to occupation.

[30] The respondent chose to set out in some detail the basis for the right to occupation. It is founded on the first agreement. Mbeki records the events which led to the conclusion of the first agreement and asserts that the parties had discussed and agreed that she would pay the purchase price from profits on rentals acquired from various tenants in the building. She states that such an arrangement was considered to be beneficial to both parties. It is accordingly the respondent's case on the papers that the purchase price was not payable in cash on or before any stipulated date, but that it would be paid over time in undetermined instalments from profit generated out of leases obtained, as and when such money became available. The question of the validity of the first agreement arises fully from the evidence before me and is a question of law which it is necessary to decide.

[31] Section 2(1) of the Act provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by both parties or their agents. Whilst the Act does not define what is required to be in writing it is now well-established that all material terms must be in writing. (Compare **Johnston v Leal**

1980 (3) SA 927 (A); **Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy** 1985 (3) SA 396 (D).) The price is of course an essential term of a contract of sale and the method of payment of the price is a material term. In the circumstances, a contract that leaves the method of payment vague is void and therefore cannot be rectified. (See **Patel v Adam** 1977 (2) SA 653 (A).)

[32] A perusal of the provisions of clause 2, 4 and 5 of the first agreement reveals that the first agreement makes no provision for the manner of payment of the purchase price. It provides merely that payment is to be made on date of registration of transfer. Registration of transfer in terms of clause 5 will occur after payment of the purchase price, or provision of guarantees. No time is stipulated. It is significant that the first agreement does not contain the usual clause for the conveyancing attorney to demand payment of the purchase price or the delivery of guarantees. It is not the respondent's case either that it was intended that the purchase price would be paid in cash upon demand and on respondent's averments any such demand would be contrary to the agreement. It is apparent from the evidence cited earlier that it is the respondent's contention that the manner of the payment of the purchase price was agreed upon orally outside of the written document. Evidence to prove such a contemporaneous agreement is inadmissible (compare **Du Plessis v Van Deventer** 1960 (2) SA 544 (A); and **Kroukamp v Buitendag** 1981 (1) SA 606 (W)). It has been held that the method of payment may be made sufficiently certain by implied terms, provided that they can be implied from the document itself. (See **Ghandi v SMP Properties (Pty) Ltd 1983 (1) SA 1154 (D)**. I have been unable to find any indication in the agreement of sale itself which could give rise to an implied term which accords with the respondent's contention. It has also been held that an

agreement which is deficient in its description of the manor of payment could be saved by a tender of cash. (See for example **Dold v Bester** 1984 (1) SA 365 (W).) This too does not assist the respondent as no tender is made.

[33] Section 6 of the Act provides for the sale of land in instalments. Section 6(1)(g) provides in such a case that the written contract must contain the amount of each instalment payable in reduction of the purchase price and section 6(1)(h) requires that the date or method of determining the date of each instalment must be set out. The first agreement is silent on these issues.

[34] In all the circumstances I am constrained to conclude that the first agreement is indeed void for wont of compliance with the provisions of section 2(1) of the Act. In those circumstances the respondent has failed to discharge the onus placed upon it to establish a right of occupation in the building owned by applicant.

[35] In the result, the application succeeds and the following order is made:

1. The respondent is evicted from the NMMU PORTION of the property known as PE Home Affairs, Nashua House situate on erven 3057, 3058 and 3059 and remaining extent of erf 3087, North End, Reg Div Port Elizabeth RD, Eastern Cape.

2. The respondent is ordered to pay the costs occasioned by the application.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv O Ronaasen SC instructed by Natalie Lubbe & Associates Inc c/o Van Rooyen & Efstratiou, Port Elizabeth

For Respondent: Adv C Mey instructed by Rob McWilliams Attorneys, Port Elizabeth