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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 29 AUGUST 2006
CASE NO: 4945/2006

UNREPORTABLE

IN THE MATTER BETWEEN:

ARTHUR WILLIAM CREIGHTON APPLICANT

AND

TALITA VAN HEERDEN RESPONDENT

JUDGMENT

PATEL, J

[1] This is Part B of the application, in terms of section 4 of the Prevention Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 for the eviction of the respondent from the applicant's premises. The application relates to a person unlawfully occupying the premises.

[2] The applicant seeks, in the alternative, cancellation of the agreement and prays for an order in prayer 2 in part B of the notice of motion, in the following terms:

“(a) An order declaring that the agreement of sale dated 8 July 2004 between the applicant and the respondent relating to the sale of Erf 911, Warmbaths Extension 5, Limpopo Province has been validity cancelled by the applicant.

(b) An order declaring the applicant is entitled to the relief consequent upon such cancellation, being:

i) that the respondent is no longer entitled to occupy the premises known as Erf 911, Warmbaths Extention 5, Limpopo Province.

ii) That the applicant is entitled to immediately again take possession of Erf 991, Warmbaths Extension 5 Limpopo Province, and the respondent has no lien or any other claims against the applicant in this regard.

iii) That the respondent and all persons occupying the said property with her permission shall immediately vacate the property concerned; and

iv) That the applicant is entitled to retain all amounts that have been paid to him by the respondent as liquidated damages.”

- [3] The applicant also seeks costs of this application.
- [4] The applicant has complied with the provisions of section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act .
- [5] In *Chetty v Naidoo* 1974 (3) SA 13 (A), at 20B, Jansen JA stated:
- “The owner in instituting a *rei vindicatio* need therefore do not more than allege and prove that he is the owner that the defendant is holding the *res* - the *onus* on the defendant to allege and establish any right to continue holding against the owner .”
- [6] This principle was endorsed by Harms JA in *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA), a matter pertaining to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, at paragraph [19]:
- “Another material consideration is that of the evidential *onus*. Provides the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances

relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction.”

[7] This application is based on the *rei vindicato*. The applicant and has to proof that he is the registered owner of the property and that the respondent is presently occupying of the property. These averments are not disputed by the respondent. Under the circumstances, the applicant has made out a *prima facie case* for the eviction of the respondent from the property.

[8] However, the applicant is entitled to an eviction order unless the respondent discloses circumstances relevant to the eviction. The respondent opposes the application first on the basis of the *exception non adimpleti contractus* and secondly that the applicant’s cancellation of the agreement of sale is not valid.

[9] The respondent attempts to rely on an agreement of sale of land in order to justify her continued occupation of the premises. She bears the *onus* pertaining to the defence. The agreement was conditional upon the successful transfer of portion 78 of the Farm Bospoort 450 into applicant’s name and simultaneously Erf 991, Warmbath, Extention 5 was to be transferred into the respondent’s

name. Both transfers had to take place by no later than 31 May 2005.(Clause 17.1)

- [10] If the provisions of clause 17.1 were not complied with strictly and the properties were not transferred by 31 May 2005, the applicant was entitled to cancel the agreement summarily and without any further notice to the respondent. (Clause 17.2)
- [11] Further, in the event of the respondent failing to comply with any other obligation in terms of the agreement then the applicant would be entitled to demand that the respondent must give effect to the agreement within a period not less than seven days from date of the despatch of a notice by pre-paid registered post to the respondent at her chosen *domicilium citandi et executandi*. However, if the respondent failed to comply with the demand within the stipulated time period, then the applicant would be entitled to cancel the agreement and obtain immediately recovery of the property as well as to retain all amounts that have been paid to him as “*roukoop*”. Under such circumstances, the respondent would be obliged to immediately vacate the property. (Clauses 12.2 and 12.4).

[12] Furthermore, in terms of Clause 15 no concession or accommodation shown by one party to another would prejudice the party making the concession or accommodation, nor would it constitute a waiver or a novation of such party's rights in terms of the agreement.

[13] The respondent's chosen *domicilium citandi et executandi* 15 Huilbos Avenue, Warmbaths. (Clause 11.1 read with the respondent's address on page 1 of the agreement.)

[14] It is common cause that the property Portion 79 of the Farm Bospoort 450 was not transferred simultaneously with Erf 991 Warmbaths Extention 5 to the parties before or on 31 May 2005. The respondent failed to make payment of the balance of the purchase price in the amount of R900 000.00 to the applicant by no later than 8 January 2006 as provided for in the agreement. Consequently, in terms of the agreement the right to cancel accrued to the applicant. Thus, the applicant demanded of the respondent to comply with her obligation to pay the balance of the purchase price to the applicant. Notwithstanding demand, the respondent failed to make payment and to rectify her default.

- [15] However, Mr Arnoldi SC submitted that the respondent's issuing of a guarantee for the balance of the purchase price against registration, was a proper response to a demand for payment. First, it did not put her at risk of losing the money should the transfer was not effected. Secondly, it prevented the applicant from retaining the amount of R900 000.00 in addition to the R200 000.00 which was already been paid by cancellation in terms of clause 17.2, that was (after payment of the balance of R900 000.00.
- [16] The respondent's reliance on the agreement of sale entitling her to continue to occupy the property is misplaced since simultaneous transfer of the properties did not take place by 31 May 2005. Mr Wagener rightly submitted that the agreement of sale no longer serves as a valid *causa* for future occupation of the property, because there was no transfer of the properties as contemplated by the agreement. The respondents failed to show any circumstances pertinent to her continued occupation of the property.
- [17] There is a factual dispute regarding the cancellation of the agreement of sale on 25 January 2006 and what is also in dispute is whether the applicant is entitled to retain all amounts paid to him by the respondent as liquidated damages. There is indeed a *bona*

fide dispute of fact on there material issues. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 – 4) which cannot simply be resolved on the papers. Mr Wagener submitted that these aspects needs to referred to trial.

[18] The respondent has not established any right to continue occupying the property against the applicant and has not disclosed any circumstances pertinent to the eviction order.

[19] Accordingly, the following order is made:

[19.1] An order evicting the respondent and all persons occupying the applicant's property at Erf 911 Warmbath Extention 5 is issued and they are to vacate the said property on or before 30 September 2006.

[19.2] The respondent is ordered to pay the applicant's taxed costs of the argument for the eviction order sought in prayer 1 of Part B

[19.3] That the issues whether the agreement was validly cancelled by the applicant on 25 January 2006 and whether he is entitled to retain the amount of R900 000.00 in addition to R200 000.00 paid to him by the respondent as liquidated damages is referred to trial.

E M PATEL
JUDGE OF THE HIGH COURT

FOR THE APPLICANTS: ADV S.D WAGENER
INSTRUCTED BY: SNYMAN DE JAGER PROKUREURS
FOR THE RESPONDENTS: A.F ARNOLDI(SC)
INSTRUCTED BY: COUZYN HERZOG & HORAK ATTORNEYS
DATE OF JUDGMENT: 29 AUGUST 2006
HEARD ON: 10 AUGUST 2006