



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

02/11/2012

CASE NUMBER 73939/09

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

2/11/2012
DATE


SIGNATURE

MMAKAU ALBERT MOKGOHLOA
AND ANOTHER

APPLICANTS

and

MING PAM XUE
DRED MARIA XUE
BELA-BELA MUNICIPALITY
HERMAN OBERHOLZER ATTORNEYS

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

JUDGMENT

MABENA AJ:

[1] The applicants brought this application seeking the following orders:

- (i) That the sale entered into by and between the Applicants and First and Second Respondents be cancelled or declared null and void;
- (ii) That the First and Second Respondent or the agent be ordered to restore the possession of property known as No NEW SUNVALLEY STAND NO 2147 EXTENSION 2 BELA-BELA to the Applicants;
- (iii) That the Fourth Respondent be ordered to refund the First and Second Respondents money they have paid for the sale of property mentioned in paragraph (i) and (ii) above paid into the trust account of the Fourth Respondent;
- (iv) The costs of the application to be paid by any the opposing party.
- (v) The Third and Fourth Respondents have neither filed any notice of intention to oppose nor any answering affidavit.

[2] The aforesaid orders sought by the Plaintiff are based on the agreement that was concluded by the Applicants and the First and the Second Respondents on the 23rd of October 2006 the lease agreement and details the sale agreement in regard to the

property described as NEW SUNVALLEY STAND NO 2147
EXTENSION 2 BELA-BELA together with the business that was
operated from the premises.

The selling price of the aforesaid immovable property and
business was R305 000-00.

[3] The First and Second Applicants entered into an agreement with
the First and Second Respondents in terms whereof:

3.1 First and Second Applicants sold a business (a going
concern) to the First and Second Respondents for R305
000-00 (Three Hundred and Five Thousand Rand).

3.2 The immovable property, which was registered in the name
of the Municipality will be transferred into the name of the
Applicants and subsequently in the names of the First and
Second Respondents.

3.3 That the First and Second Applicants will transfer the liquor
licence in respect of that business to the First and Second
Respondents.

3.4 The Respondent complied with this part of the agreement in
that the amount of R305 000-00 (Three Hundred and Five
Thousand Rand) was paid to the trust account of the
Applicants attorney of record.

[4] Facts in dispute alleged by the Applicants are the following:

- a) That the sale agreement has since been cancelled by the Applicants by virtue of the letter dated 4 May 2007, annexed to the Applicants founding affidavit and marked "MAM3";
- b) That the Applicants accordingly, are entitled to evict the First and Second Respondents consequent upon the alleged cancellation of the sale agreement;
- c) That the agreement has lapsed as a result of the non-fulfilment of the suspensive condition in the agreement, which states:

"4.1 The coming into operation of this agreement it is subject to the following suspensive conditions to be fulfilled and or complied with on or before a date not later than six months from the signature date [or such later date as the parties may agree to in writing] namely that :-

4.2 If any of the conditions in clause 4.1 are not fulfilled by the date stipulated therefore, then this agreement shall not come into operation. It shall be null and

void and the parties shall restore each other to the status quo ante".

[5] The purchase price was paid into the trust account of Herman & Oberholzer Attorneys as per agreement. This purchase price was payable to the Applicants upon transfer of the immovable property into the names of the First and Second Respondents. This is stipulated in the agreement.

However, to date hereof, the property still remains registered in the names of the Bela-Bela Municipality (Municipality).

[6] The Applicants contend, in their founding affidavit that the fact that the property is still registered in the name of the Municipality, the Applicants are not in a position to transfer same into the names of the First and Second Respondents pursuant to the agreement. These are the reasons that prompted the present application.

[7] The First and Second Respondents, in their answering affidavit made the following averments:-

- (i) That the agreement allowed the occupation of the property and possession of it on the effective date been the date of signature;

- (ii) That the attempt by the Applicants to cancel the agreement by way annexure "MAM3", a letter dated the 4th of May 2007 was not accepted by the Respondents;
- (iii) That an allegation that the occupation of the property is "illegal" cannot be accepted in view of the valid agreement of sale entered between the parties;
- (iv) That the Applicants do not have a locus standi to bring the application for eviction seeing that they are not owners of the property in question.

[8] There is merit on these contentions. The First and Second Respondents gained occupation of the property in question following a valid agreement. The Applicants also lacks locus standi to bring eviction proceedings based on ownership of the property since the registered owner is the Bela-Bela Municipality.

In the light of the aforesaid, and on this issue only, Applicants are not entitled to the relief prayed for in the notice of motion.

[9] The Applicants, in their replying affidavit introduced a new relief which relates to a non-fulfilment of a suspensive condition. The Applicants aver that the suspensive condition as contained in paragraph 4.1 and 4.2 of the sale agreement, which is quoted in

paragraph 3.4 above, have not been fulfilled and as such, agreement has lapsed by virtue of the fact that six months has since lapsed from the date of signature.

[10] The First and Second Respondents aver that the Applicants are the sole cause of failure to comply with the transfer of the property and the liquor licence. It is an averment that the Applicants prevented the condition from being fulfilled and cannot afterwards rely on the suspensive condition whilst they were the cause of the unfulfilment of the condition. It was submitted that this condition was clearly for the benefit of the First and Second Respondents. Therefore Applicants failure to cooperate in passing transfer of the property and the liquor licence was calculated at attaining cancellation of the agreement. There also seems to be merit in this contention.

[11] It is apparent that no steps were taken by the First and Second Applicants to have the property in question registered into their own names so as to enable further transfer of the property from the names of the First and Second Applicants to the names of the First and Second Respondents. The First and Second Applicants founding affidavit omits details regarding any endeavours on their part to have the immovable property transferred from the ownership of the Municipality into theirs.

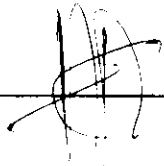
Also dubious is the fact that the issue of "compliance with the suspensive condition within a period of 6 months", as raised by the First and Second Applicants in their replying affidavit, seems to be an afterthought. The First and Second Applicants council described the issue of a suspensive condition as central in the whole application, but it strikes one as odd and peculiar in that it only surfaced in the replying affidavit, ostensibly prompted by the First and Second Respondents revelation in their answering affidavit that the primary reason for failure on the part of the First and Second Applicants to effect transfer of the premises in question to the First and Second Respondents is due to the former inaction.

Had they expeditiously facilitated transfer of the ownership into their names, that would have resulted in the First and Second Applicants being able to transfer the ownership of the property to the First and Second Respondents.

Failure on the part of the First and Second Applicants to effect transfer of the immovable property as aforesaid is causally connected to the non-fulfilment of the suspensive condition relied upon by the First and Second Applicants.

**See: *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd*
2001 (3) SA 196.**

[12] In the premises, the Applicants application is dismissed with costs.

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**MH MABENA
ACTING JUDGE OF THE
NORTH GAUTENG HIGH COURT**

Delivered on 2 NOVEMBER 2012

For Applicants: Mr Matloba
Matloba Attorneys
Pretoria

For Respondents: Advocate G J Scheepers
Barnard & Patel Attorneys
Pretoria