

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 58478/2021**

**REPORTABLE: NO**

**OF INTEREST TO OTHER JUDGES: NO**

**REVISED: YES**

**3 February 2023**

**In the matter between:**

**TAKE SHAPE PROP 112 (PTY) LIMITED  
[Registration Number: 2015/056106/17]**

**APPLICANT**

**And**

**KGOROYABOHLE TRADING CC  
[Registration Number: 2010/158222/23]**

**FIRST RESPONDENT**

**MOLOKO PATIENCE MPAI  
Identity Number: [....]**

**SECOND RESPONDENT**

**MADIBENG LOCAL MUNICIPALITY**

**THIRD RESPONDENT**

**CITY OF TSHWANE METROPOLITAN  
MUNICIPALITY**

**FOURTH RESPONDENT**

**JUDGMENT**

**ALLY AJ****INTRODUCTION**

[1] This is an opposed application for the eviction of the First and Second Respondents and any person holding or occupying through them, from the property described as Erf [....] P [....] Extension 16 and also known as [....] B [....] V [....] V [....] 1, P [....] Estate, hereinafter referred to as 'the property'.

[2] The Applicant alleges that the application has been launched in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act,<sup>1</sup> hereinafter referred to as 'the Act'. It is further submitted that 'the Act' only has application in respect of the Second Respondent, the First Respondent being a legal entity.

[3] The Applicant was represented by Adv. J. Vorster and the First and Second Respondents by Adv. T.C. Phaleng at the hearing, Adv. M.M. Aphone having drafted the Heads of Argument of the First and Second Respondents and hereinafter referred to as 'the Respondents' for the sake of convenience. As is customary in these matters, there was no appearance on behalf of the Third and Fourth Respondents.

[4] At the beginning of the hearing of the application, the Court was informed that Counsel for 'the Respondents' only had instructions to move an application for postponement. Counsel for the Applicant indicated that the Applicant's legal representatives informed 'the Respondents' legal representatives that should a postponement be sought, a substantive application would have to be launched.

[5] Counsel for 'the Respondents' submitted that she had been briefed at the last minute to only move for a postponement and there was no substantive application for postponement.

---

<sup>1</sup> 19 of 1998

[6] The Court then heard submissions from both Counsel and ruled that the application for a postponement was denied.

[7] The Court then only heard submissions from Counsel for the Applicant but indicated that although there were no oral submissions from Counsel for 'the Respondents', the Heads of Argument of 'the Respondents' will still be considered as read with the opposing papers.

[8] Counsel for the Applicant did not deal with the application for condonation of the late filing of the Replying affidavit. However, the Applicant's replying affidavit deals with the circumstances around the late filing of the affidavit. I am of the view that it is interest of justice to allow the replying affidavit. In the circumstances, condonation for the late filing of the replying affidavit is granted.

[9] It is common cause that the Applicant and 'the Respondents' entered into an instalment sale agreement for the purchase of 'the property'.

[10] It is also common cause that the Applicant is the owner of 'the property'.

[11] The Applicant has relied on clause 14 of the instalment sale agreement<sup>2</sup> which provides for relief in the event of a breach of contract.

[12] At this point it should be mentioned that this is an opposed application and that the principles in relation to motion proceedings apply. In this regard it is important to highlight what was stated in what has become known as the Plascon-Evans Rule<sup>3</sup>. The gist of this rule is that where there are disputes of fact and the matter cannot be resolved on the papers then and in that event the case may be dismissed by the Court where an Applicant has not requested a referral to oral evidence.

---

<sup>2</sup> Caselines: 03-67 – 03-68

<sup>3</sup> Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623

[13] The correspondence between the parties as annexed to the Founding papers and those annexed to the Answering papers clearly shows a difference as to what the parties were engaged in regarding monies owed as well as cancellation, and needs resolution. In my view, such resolution, is the referral to oral evidence.

[14] Once one finds a dispute of fact relating to cancellation of the instalment agreement one cannot but refuse eviction at this juncture because the cancellation, in my view, is closely linked to the eviction of 'the Respondents'.

[15] In my view this matter is replete with factual disputes regarding the instalment sale agreement and the so-called Annexure "A".

[16] The Applicant argues that the issue that this Court must decide is on the simple issue of the cancellation of the said agreement and once the Court has upheld such cancellation then the Applicant is entitled to an eviction order as owner of 'the property'.

[17] In my view, however, the issues are not that simple. Large amounts of money have exchanged hands in this matter and in the interests of justice the issues regarding the instalment sale agreement must be thoroughly investigated.

[18] The question then becomes, whether a Court can *mero motu* refer a matter for oral evidence without any of the parties requesting same. This question, in my view, must be answered in the affirmative<sup>4</sup>.

[19] Having found that there are material disputes of fact, relating to the instalment sale agreement, as appears in the papers, I am of the view that the said disputes can only be resolved by the referral of the matter for oral evidence, as indicated above.

---

<sup>4</sup> Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) @ 1165

Oertel NO v Pieterse & Others 1954 (3) SA 364 (O) @ 368

[20] Accordingly, for the reasons set out above, this matter is referred to oral evidence regarding the terms of the instalment sale agreement and the cancellation of the said agreement.

[21] In respect of the costs of this matter, I am of the view that where the Court has *mero motu* referred the matter for oral evidence, then it would be in the interests of justice for costs to be costs in the cause and that same be determined by the Court hearing the oral evidence.

[22] Accordingly, the following Order shall issue:

a). this matter is referred for oral evidence in respect of:

- (i). the terms of the instalment sale agreement; and
- (ii). the cancellation of the instalment sale agreement;

b). The costs of this application shall be costs in the cause.

**G ALLY**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**  
*Electronically submitted therefore unsigned*

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **3 February 2023**.

**Appearances:**

Attorneys for the Applicant:

**J M ROODT INC**

[mike@jmroodt.co.za](mailto:mike@jmroodt.co.za)

Counsel for the Applicant:

**Adv. J. Vorster**

Attorneys for 1<sup>st</sup> and 2<sup>nd</sup> Respondent:

**Ms Mphai [in person]**

Counsel for the Respondent:

**Adv. M M Aphane**