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SOUTH GAUTENG HIGH COURT

DATE: 30/03/2009

CASE NO: 28081/06

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES NO
(2) OF INTEREST TO OTHER JUDGES	YES NO
(3) REVISED	
<u>DATE</u> 14 MAY 2009	<u>SIGNATURE</u> 

In the matter between

DE FREITAS-DE AGUIAR

Applicant

and

REAL PEOPLE HOUSING (PTY) LIMITED

Respondent

J U D G M E N T

BHANA A J: This is an application for leave to appeal. The initial application for leave, if I may call it that, consisted of a number of grounds. These can be summarised under the following broad categories for convenience: The first is the so-called *locus standi* of the applicant. The second is the contention that the settlement agreement was invalid. The third is the issue of the waiver of a right to demand a

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guarantee and the waiver of the right to cancel the agreement.

After the delivery of the initial application on 19 November 2008, the applicant in the application for leave to appeal, Mr De Aguiar, delivered a notice called "supplementary grounds for leave to appeal". The thrust of the supplementary grounds is the contention by Mr de Aguiar that as a result of the fact that he expended considerable amounts of money in respect of useful and necessary improvements to the property he acquired a lien over the property which entitles him to retain occupation of the property pending compensation by the owner of the property.

At the commencement of the hearing this morning there was a debate with counsel in relation to the effect of the supplementary grounds for leave to appeal as these did not feature in the main application. I deal firstly with the question of such grounds as arise from the supplementary grounds for leave to appeal.

The supplementary grounds depend on an application being made in due course to "lead", as it was called, "further evidence". In the context of this matter, that obviously means the delivery of a supplementary Affidavit.

One would have expected that the applicant in this application, (Mr de Aguiar) would have set out fully the basis on which he contends the evidence which he intends to introduce would be material to an outcome in due course if an appeal were to be heard by another court. One finds however that the Affidavit put up before me dealing with the supplementary grounds for leave to appeal is scant to say the least.

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No allegation is set out by Mr de Aguiar as to when he contends the improvements were made by him, nor does he set out the capacity in which he occupied the property at the relevant time when he made improvements.

In argument there was a reference to the answering Affidavit where one reads that improvements were made by his father at a point obviously when his father was owner of the property. No mention was made in the answering affidavit of any improvements made by him. He however says in the present application that he also made certain improvements. No date is given as to when those improvements were made, nor as I have said, the capacity in which he occupied the property when he made those improvements.

I would have expected that in seeking to persuade me that another court could reasonably find that the applicant has a valid lien, that sufficient evidence would have been placed before me. This was not done.

I therefore find that there is no sufficient basis for me to believe that there is a reasonable possibility that another court will find that the applicant could resist eviction on the basis of his alleged lien arising out of any useful or necessary improvements which he would have made to the property.

Counsel for the respondent in this application also argued that in any event the application for eviction arose out of the self-standing settlement agreement. I have already found such an agreement to be self-standing.

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I am in agreement with the submission. The respondent's (that is Real People Housing (Pty) Limited's) right to seek eviction arises out of the self-standing settlement agreement that was concluded. It was suggested that that agreement was in full and final settlement of all disputes between the parties and this clearly appears to be the case.

Therefore I am of the view that in relation to the application for leave to appeal, which is dependant on the supplementary grounds, that there is, (on the basis of the information placed before me) no reasonable prospect that another court would find that the applicant has a valid lien enabling him to resist the eviction application.

I turn then to deal with the initial grounds for leave to appeal. Firstly on the issue of the *locus standi* I observe that this issue was not pleaded by the present applicant in the answering Affidavit. In any event the relationship between Real People Housing (Pty) Limited and Real Housing Solutions is explained in the replying Affidavit. Furthermore the settlement agreement that was concluded was with the respondent Real People Housing (Pty) Limited, and the applicant himself contends that the tacit lease agreement was concluded with the current respondent.

In argument counsel for applicant suggested that it was really not a *locus standi* point but an authority point. When pressed as to where the authority of the respondent had been challenged in the answering Affidavit counsel for the applicant was not able to point to anything in the answering Affidavit to indicate the challenge to authority on the basis which is now sought to be raised.

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I was also informed by counsel for the applicant this morning that he was not persisting with the ground set out in paragraph 1.6 of the application for leave to appeal. In addition I was informed by him that he did not persist with paragraphs 1.4 or 1.5 of the application for leave to appeal, and that those grounds were abandoned.

I then asked counsel for the applicant what basis was left to seek application for leave to appeal. I was informed by counsel for the applicant that the only basis that would be left would be the suggested lien, in the supplementary grounds. I have already dealt with that issue.

For completeness however, I deal briefly with the other grounds. Insofar as I understood certain of the grounds to apply to the contention that the settlement agreement was invalid, it appears to me that that point was not taken on the papers, nor was it raised in argument when the matter was argued before me. This is not the kind of point which is purely a law point as it is dependant on the facts and the point that Real People Housing (Pty) Limited was not authorised to conclude the agreement on behalf of the owner of the premises.

In any event the annexures to the founding papers suggest that the applicant as co-subsiary was authorised to conclude the settlement agreement. The point was also clarified in reply.

The further ground for leave to appeal was based on the question of a waiver of a right to demand a guarantee, and again this was not explicitly raised on the papers and certainly not proved.

To constitute a waiver obviously the conduct must be explicit and unequivocal. This cannot be found. However, even if it is found that

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there was a waiver of right to receive a guarantee there is no suggestion that Clause 1.4 of the settlement agreement was waived. The same point can be made in regard to the question of waiver of the right to cancel the agreement.

In these circumstances I am not persuaded that any other court could reasonably find that there was merit in any of the grounds raised in the application for leave to appeal and accordingly I dismiss the application with costs.

BHANA A J
Ex tempore