IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

18/07/2013
DATE

SIGNATURE

CASE NO: 6548/2013

In the matter between :

GEOFFRREY SHARMAN — First Applicant

SARAH SHARMAN — Second Applicant

And

MICHAEL NZIMANDE — First Respondent

ALL OTHER OCCUPANTS OF PORTION
2 OF ERF 926, FAIRLAND — Second respondents

JUDGMENT

MBONGWE, AJ :

[1] This is an application in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE ACT) in which the applicants seek an order for the eviction of the first respondent and other persons who may be residing through the

First respondent from Portion 2 of Erf 926 Fairlands, also known as 13 Ohloff Street, Fairlands.

The application is being opposed by the first respondent.

[2] It is common cause between the parties that the applicants entered into a lease agreement with the first respondent on the 15th December 2008 in terms of which the first respondent was to rent the aforementioned property of the applicants for a period of fifteen months ending 1st March 2010 against payment of monthly rental of R12 000-00 (Twelve Thousand Rand) per month. Before this period ended the parties concluded an instalment sale agreement in terms whereof the first respondent was to purchase the rented house from the applicants. It appears that the initial lease agreement ran its full course without incident.

[3] The instalment sale agreement was entered into on the 15th September 2009 with the date of commencement thereof being the 1st April 2010. In terms of the sale agreement the purchase price was the sum of R1 750 000 (One Million Seven Hundred and Fifty Thousand Rand). The first respondent was to pay a deposit of R100 000-00 (One Hundred Thousand Rand) on the 1st April 2010 in addition to a monthly rental of R13 200-00. Thereafter the respondent was to pay the amount of R146 600-00(One Hundred and Forty Six Thousand Six Hundred Rand) per month which included the monthly rental and the residue was towards the reduction of the purchase price and interest. The full purchase price was to be paid over a period of twelve months.

[4] The problems between the parties appear to have started from the 1st April 2010. The applicants allege that the 1st respondent failed to honour the terms of the rental and sale agreement. It is noted that the applicants consider the rental agreement to be separate from the sale agreement. The applicants further aver that, despite the relevant notices to rectify the breaches, the 1st respondent failed to do so leading to the applicants cancelling the

agreements and ultimately instituting these proceedings. On the other hand, the 1st respondent denies the alleged breaches and states that the applicants have not adhered to nor followed the terms of the contract dealing with instances where a breach has occurred. In essence the 1st respondent is challenging the validity of the notices of termination of the agreement by the applicants. He maintains that the agreement has not been terminated. The 1st respondent further raises as a defence the fact that he had sought rectification of the sale agreement in that the written agreement did not properly record the agreement between the parties. The 1st respondent questions the payment of the commission out of the deposit of R100 000-00 – paragraph.....of the answering affidavit.

[5] The issues to be decided, therefore, are whether the applicants were entitled to pay the agent's commission out the deposit amount and whether the agreement(s) have been validly terminated by the applicants.

[6] To arrive at a decision, I deem it necessary to deal with the events in this matter in their chronological order. Firstly in terms of the agreement, the 1st respondent was to pay the deposit of R100 000-00. In terms of Clause 1.1 of the ADDENDUM TO THE SALE AGREEMENT, this deposit would be paid into the trust account of the applicants' " conveyancers pending registration of the recordal against the title deed of the property." Clause 1.2 provides that " ..the conveyancers will invest any monies received by them prior to registration of the recordal of the Agreement in an interest bearing account for the benefit of the purchaser." Clause 1.3 provides that on the registration of the recordal against the title deed of the property, the deposit will be paid to the sellers.

[7] According to Annexure MN4 to the 1st respondent's answering affidavit, he deposit of R100 000-00 was paid on the 24 November 2009 and a further payment of R79 800-00 on the 17th December 2009. It appears from Annexure MN4 that between the 18th and 21st December

2009, these amounts were paid out to the applicants and the agent, respectively.

It is to be noted that, with regard to the agent's commission, paragraph 7.1 of the sale agreement does make provision for the payment of the commission from the first payment made by the 1st respondent and the agreement states that the commission becomes due on conclusion of the agreement. While it is unusual for an agent's commission to be paid by a purchaser, that situation was agreed upon in the agreement in casu, but appears to have been among the issues that caused an impasse between the parties that lead not only to protracted yet never resolved negotiations lasting 18 months and was accompanied by non - payments of the monthly rental and instalments by the 1st respondent. I do not believe, however, that the 1st respondent was entitled to withhold further payments for that reason and for that long. In fact, such conduct by the 1st respondent's cannot be said to be that of a committed tenant and genuine purchaser. That the 1st respondent made the next payment, being in respect of the rental only, in November 2011, is further proof of his dubiety, although such payment was accepted by the applicants amid allegations that the rental agreement had been cancelled during May and again in November 2010.

[8] On the 18thMay 2010 the applicants' attorneys addressed a letter to the 1st respondent which reads, in part, as follows: ' In terms of Clause 8.3 the first instalment in the amount of R146 600-50 was due and payable on the 1st April 2010 into our trust account. We have not received payment of the first instalment in the amount of R146 600-50 which means you are in breach of the terms of this contract.' The letter then refers to Clause 19 of the contract of sale and Clause 2 of the addendum thereto and calls upon the 1strespondent to make payment of the aforementioned amount within seven days, failing which 'our clients' rights are reserved. This letter is defective as a notice in that it does not accord with the provisions of the sale agreement in terms whereof the applicants are to call upon the 1st respondent to remedy a breach within thirty (30) days from the date of the notice nor does it set out expressly the

steps the applicants are likely to follow if the breach is not rectified (see **BEKKER v SCHMIDT**, below. For these reasons, the purported notice dated 18th May 2010 is invalid and stands to be rejected.

[9] The subsequent letter dated 24th May 2010 purporting to terminate the agreement on the basis the defective notice dated 18th May 2010 and stating : 'In our letters we notified you that the breach had to be remedied within seven days from date of each letter. Due to your continued breach and failure to remedy such breach , we are instructed to advise you that the seller has elected to exercise his right to terminate the Contract of Sale (Instalment) and withdraw therefrom.,' is consequently, also invalid, of no force or effect and stands to be rejected. The applicable principle in this regard was aptly laid down in **BEKKER v SCHMIDT BOU ONTWIKKELINGS CC AND OTHERS [2007] 4 All SA 1231 (C),** as follows : ' non – compliance with contractual provisions regulating cancellation results in the contract remaining extant.' Furthermore, **paragraphs 3.3 – 3.3.5** of the sale agreement forbid the seller from terminating this contract , instituting an action unless; the seller has given written notice describing the breach, demanding rectification of such breach within a period not less than 30 days and indicating the steps the seller intends to take if the breach is not rectified within the given 30 day period. The sale agreement between the parties was, consequently, never terminated properly and consequently remained extant.

[10] A further notice dated 8th November 2010 purporting to terminate the lease agreement that was entered into on the 15th December 2008 was addressed to the 1st respondent. This particular agreement had run its course and had been terminated by the affluxion of time on the 31st March 2010. The rental obligations of the 1st respondent were, from the 1st April 2010, founded in the sale agreement and not the lease agreement dated 15th December 2008. Clause 3.1 of the sale agreement reads as follows : ' From the monthly payment of R146 600-00 in terms of the agreement, the purchaser will continue paying the seller monthly rental in

the amount of R13 200-00 (inclusive of the 10% escalation as per lease agreement).' Having already found that the sale agreement was never properly cancelled and remains extant, the rental agreement rooted therein also remains valid. The purported termination of the non – existent rental agreement dated 15 December 2008 is, therefore, rejected.

[11] The pertinent legal position in this case, although not raised by the parties and particularly not relied upon by the applicants, is that the agreement between the parties which commenced on the 1st April 2010 and had a life-span of twelve months, was never renewed or extended in writing as required by the **ALIENATION OF LAND ACT 68 OF 1981, was** terminated on 31st March 2011 due to affluxion of time. In the result, I find that there was no valid rental and sale agreement between the parties post the 31st March 2011.

[12] The subsequent letters, by the applicants' attorneys and by the applicants themselvesto the 1st respondent, both dated 16th January 2013, are, for the reasons stated in the preceding paragraph, redundant and need not be considered for whatever purpose they were intended to serve.

[13] I therefore, find that the agreement between the parties had run its intended course despite the 1st respondent's persistent failure to pay the monthly rental and instalments in breach of the terms and conditions thereof. I further find that the 1st respondent's claim that he is in lawful possession and occupation of the property, particularly in the light of the applicants' demand that he vacates the property, to be lacking legal grounding , extremely absurd and stands to be rejected.

[14] Following the above findings, particularly the circumstances of this case, there is no reason why this court should not grant the eviction order prayed for by the applicants as owners of

the property and in the absence of a plausible and valid justification by the 1st respondent to to continue possession and occupation of the property.

[15] The following order is consequently given:

1. The 1st respondent and all persons occupying through him the property described as **PORTION 2 OF ERF 928 FAIRLANDS, ALSO KNOWN AS NO 13 OHLOFF STREET, FAIRLANDS** , are in unlawful occupation of the said property.
2. The 1st respondent and such persons are ordered to vacate the said property by no later than the 31st August 2013, failing which the Sheriff of this Court is hereby authorised to evict the 1st respondent and such persons and place the applicants in possession thereof.
3. The 1st respondent is ordered to pay the costs of this application.

MBONGWE, AJ

ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT

Date of hearing : 13 June 2013

Date of judgment : 18 July 2013

APPEARANCES

1. For the applicants : Adv E. Coleman

   Instructed by : Steyn Steyn & Partners, Johannesburg.

2. For the 1st respondent : Adv A. Milovanovic

Instructed by : Biccari Bollo Mariano Attorneys, Johannesburg.