**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG LOCAL DIVISION,**
**JOHANNESBURG**

**CASE NO:41976/2012**

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

_____ _____
DATE SIGNATURE

In the matter between:

**THEKISO: AZARIEL** Applicant

And

**NXUMALO: MPHIWA ALFRED** First Respondent

**HLANGOTI: MILLISCENT KANYISILE** Second Respondent

**CITY OF JOHANNESBURG** Third respondent

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**JUDGMENT**

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**OPPERMAN AJ**

**INTRODUCTION**

[1] The applicant seeks the eviction of the first and second respondents from the premises situate at erf 1352 Lawley Extension 1, Gauteng **('the property'**).

[2] The applicant brings the application on the basis that:

2.1. he is the owner of the property;

2.2. the first and second respondents are in occupation of the property.

[3] The applicant approached the matter on the basis that he bore the onus to show, on a balance of probabilities, that he was the owner of the property and that the first and second respondents were in occupation thereof. In this regard, the applicant relied heavily on the judgments of *Graham v Ridley*, 1931 TPD 476 and *Chetty v Naidoo* 1974 (3) SA 13 (A).

**APPLICANT'S FOUNDING AFFIDAVIT**

[4] In his very short affidavit, the applicant contended that he was the lawful and registered owner of the property. He explained that it had been registered in his name on 14 January 2010 and that the first and second respondents were in occupation at that time. He stated that despite demand, the respondents have refused to vacate. He then added that the occupation of the property was without his "express, implied or tacit consent". He alleged that their occupation was unlawful.

[5] He continued that because the respondents had been in occupation for longer than six months, section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("**PIE**") was applicable. He summarised the gist of section 4(7) of PIE and recorded: "….*the court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances."*

[6] The only relevant circumstance relied upon by the applicant to satisfy s 4(7) of PIE, is that which is recorded in paragraph 25 of his founding affidavit and reads as follows:

> *"25. I submit that I have rights in terms of the constitution to have use and enjoyment of the property and the rights provided by the First Respondent under the Act do not abolish the Applicant's inherent right to legal protection of its ownership rights."*

[7] Having made that one averment only, he concludes in the very next paragraph that it would be just and equitable to grant an eviction order.

**RESPONDENTS' ANSWERING AFFIDAVIT**

[8] The respondents explained that they have been in occupation of the property from 1 March 1997.

[9] On 14 August 2009 they attended a sale in execution in respect of the property.

[10] The applicant, who was also present, purchased the property.

[11] The first and second respondents approached the applicant and indicated to him that they would want to purchase the property from him.

[12] The applicant agreed to sell the property to them for a purchase consideration of R230 000.

[13] As a result of such agreement, the applicant caused the first respondent to sign an Acknowledgement of Debt for the purchase consideration of the property.

[14] The applicant advised that when the purchase price had been paid in full, he would transfer the property into the name of the respondents.

[15] Their alleged entitlement to remain in occupation is contained in paragraph 9.3.11 of the affidavit of the first respondent, which reads as follows:

> *"9.3.11 Therefore my continued stay in the property was as a result of the sale of the property to me by applicant and acknowledgement of debt."*

[16] The respondents contend that they made several payments towards the purchase price of the property and annex as proof of such payments, some 16 deposit slips reflecting various payments totalling R185 650. I discuss the calculation later.

**APPLICANT'S RESPONSE CONTAINED IN THE REPLYING AFFIDAVIT**

[17] Confronted by the detail of the answering affidavit and in reply, the applicant explains that he had met the first respondent at the auction and, knowing him from church, had been approached and requested to assist with the purchase of the property.

[18] The applicant accordingly purchased the property and on conclusion of the sale in execution, a verbal agreement was concluded with respondents, the terms of which were as follows:

18.1. The respondents were to pay a deposit of R20 000;

18.2. Over and above the R20 000 the respondents would pay the applicant a purchase consideration of R230 000 which would be payable by the respondents within two years of the conclusion of the verbal agreement;

18.3. a lump sum payment of R100 000 would be made which would first be set off against whatever amount was owing to the City of Johannesburg for rates and taxes in order to reduce the applicant's liability when obtaining the rates clearance certificate at a later stage, to transfer the property to the respondents;

18.4. the balance of the purchase price would be paid by making monthly payments to the applicant which would be no less than R2500;

18.5. the respondents would pay the rates and taxes account monthly;

18.6. after payment of the entire purchase price, the verbal agreement would be reduced to writing and the property would be transferred into the name of the respondents.

[19] The applicant explains that prior to the conclusion of the verbal agreement, the respondents had signed an offer to purchase which was conditional upon a financial institution granting a loan to the

respondents against the security of a bond being registered over the property. Although the applicant had accepted the offer, the respondents' application for a home loan had been unsuccessful, rendering the offer to purchase of no force and effect.

[20] The applicant then explains that as the respondents were able to pay R100 000 and R20 000 respectively on demand, he was under the impression that the full amount would be paid within two years as agreed although he had requested that the respondents pay a minimum of R2 500 monthly to enable the applicant in turn to service the bond he had registered over the property.

[21] The applicant explains that the expiry of the two-year period calculated from the first payment of February 2010 (the applicant elsewhere in the replying affidavit stated that the first payment was received in January 2010) was, according to the applicant, January 2012.

[22] The applicant states that as at January 2012, the respondents had only made payment in respect of the purchase price in the amount of R43 450. He accordingly requested the respondents to vacate the property.

[23] He says that during 2012 the respondents had made irregular monthly payments and that he had accordingly decided not to sell the property to the respondents. He explained that he had tried in vain to contact them, but that what he had wanted to communicate to them was that he would start allocating the payments to rental for the occupation of the property.

[24] He then arranged a meeting through the estate agent to meet with the respondents, during which meeting he explained that they should vacate the property and that he would not accept any offer to purchase from them.

[25] The first respondent tried to physically attack him and that was the last time they spoke.

[26] Applicant further denies that he caused the respondents to sign an Acknowledgement of Debt (which document is annexed to the respondents' answering papers) and further denies the content of the Acknowledgement of Debt. The Acknowledgment of Debt records that the first respondent is indebted to the Applicant for the balance of the purchase price in respect of the property and records an offer to the applicant to pay the sum in 35 instalments commencing on 1 March 2010 and thereafter each successive month until full and final payment has been made.

[27] The applicant admits that all the payments reflected in the deposit slips annexed to the respondents' answering affidavit were received by him.

**APPLICANT'S APPROACH**

[28] The applicant's counsel submitted that the alleged verbal agreement concluded between the parties is at best an agreement to agree and does not constitute an enforceable agreement. She relied on the judgment of *Van Zyl v Government of the Republic of South Africa*,

2008 (3) SA 294 at para [75] in which it was stated that: "*A promise to contract is not a contract."*

[29] She further argued that the verbal agreement concluded between the parties is one for the purchase or sale of immovable property and accordingly must be governed by the provisions of the Alienation of Land Act, 68 of 1981, as amended **('the Alienation of Land Act**') which contains in section 2 that any agreement relating to the alienation of land should be reduced to writing, failing which such agreement will be of no force or effect.

[30] Applicant argued that the PIE Act had been complied with.

[31] Clauses 4(7) and (8) of the PIE Act provide as follows:

> *"(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*
>
> *(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-*
>
> *(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
>
> *(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."*

[32] Applicant's counsel argued that it was trite law that the onus is on the respondents to raise 'relevant circumstances' pertaining to why they should not be evicted. I think not, but more about that later.

[33] Applicant's counsel argued that circumstances are almost always exclusively within the knowledge of the occupier and that the owner could not be expected to negative in advance facts not known to him and not in issue between the parties. In this regard applicant's counsel relied on the authority of *FHP Management (Pty) Ltd v Theron N.O*. 2004 (3) SA 392 (C) at 401G-I and 404I-405B.

**LEGAL POSITION IN REGARD TO THE ONUS**

[34] In *Ndlovu v Ngcobo: Bekker and Another v Jika* [2002] 4 ALL SA 384 (SCA) Harms JA held as follows:

> *"[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense. … A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons. …*
>
> *[19] Another material consideration is that of the evidential onus. Provided 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. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot*

*be expected of an owner to negative in advance facts not known to him and not in issue between the parties.* ***Whether the ultimate onus will be on the owner or the occupier we need not now decide****."* (my emphasis)

[35] In *City of Johannesburg v Changing Tides* 74, 2012 (6) SA 294 (SCA) at 294 Wallis JA at 311F summarised the relationship between ss 4(7) and (8) as follows:

*"A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. … "*

[36] The City of Johannesburg had raised in that matter a similar argument in respect of onus. Wallis JA deals with it as follows at p 313:

*"[28] The City submitted that it is the duty of the occupiers to place any necessary relevant information before the court. It contended that the common-law position, that an owner can rely simply on its ownership of the property and the occupation of the occupiers against its will, is applicable to applications governed by s 4(7) of PIE. It relied on the cases where it has been held that the landowner may allege only its ownership of the property and the fact of occupation in order to make out a case for an eviction order, to which the occupiers must respond and establish a right of occupation if they wish to prevent an order from being made. It*

*argued that the only effect of PIE was to overlay the common-law position with certain procedural requirements.*

*[29]* *This is not an issue that has been resolved in the cases and to some extent it has been obscured by cases in which a less conventional approach to the function of the court has been espoused. The enquiry into what is just and equitable requires the court to make a value judgment on the basis of all relevant facts. It can cause further evidence to be submitted where 'the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain'. That may mean that 'technical questions relating to onus of proof should not play an unduly significant role'. However, I do not think that means that the onus of proof can be disregarded. After all what is being sought from the court is an order that can be granted only if the court is satisfied that it is just and equitable that such an order be made. If, at the end of the day, it is left in doubt on that issue it must refuse an order. There is nothing in PIE that warrants the court maintaining litigation on foot until it feels itself able to resolve the conflicting interests of the landowner and the unlawful occupiers in a just and equitable manner.*

*[30]* *The implication of this is that, in the first instance,* ***it is for the applicant to secure that the information placed before the court is sufficient****, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order.* ***Whilst in some cases it may suffice for an applicant to say that it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not.*** *One cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression. In a situation governed by s 4(7) of PIE, the applicant must show that it has complied with the notice requirements under s 4 and that the occupiers of the property are in unlawful occupation.* ***On ordinary principles governing onus it also has to demonstrate that the circumstances render it just and equitable to grant the order it seeks.*** *I see no reason to depart from this. There is nothing*

> *unusual in such an onus having to be discharged. … (my emphasis)*

**APPLICATION TO THE FACTS *IN CASU***

[37] An analysis of the invoices (which was not undertaken by the parties) reveals that R185 650 was paid by the respondents to the applicant over a period of some 3 ½ years, from 5 December 2009 to 7 June 2013. It is common cause that these amounts were received.

[38] What appears from the replying affidavit is that the applicant contends that R230 000 was payable to which should be added the deposit of R20 000 and some R60 000 in respect of rates and taxes, a total liability of R310 000.

[39] In this regard it is instructive that the applicant had in his replying affidavit deposed to during September 2013 :

> *"I do not have copies of the said account, however I will do my best to obtain same form the City of Johannesburg to hand same up at the hearing of this matter."*

No account was tendered at the hearing of this matter.

[40] On the papers, the respondents contend that R230 000 was payable of which they have paid R185 650. The applicant contends that R310 000 was payable, of which R185 650 has been paid. Applying the *Plascon Evans* principle,[1] I must accept the version advanced by the respondents and find that the purchase price was agreed at R 230 000 of which R185 650 had already been paid, i.e. more than ¾ of the price.

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[1] Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 AD

[41] The applicant requests this court to order that the respondents be evicted from the property under circumstances where the respondents have paid more than three quarters of the purchase price. The effect of the order would be that the applicant retains both property and purchase price (or most of it). Without any further evidence such a situation is patently unjust and inequitable as required by s 4(7) of PIE. It is true that the respondents have not paid for their occupation of the property but what amount does one attribute to the value of such occupation? Have they effected improvements? If so, what value is one to attribute to it? The Court does not know.

[42] This court's sense of injustice and inequity at the consequences of an invalid verbal agreement relating to land has long been recognised by the legislator when Section 28 of the Alienation of Land Act was enacted.

[43] Section 28 of the Alienation of Land Act provides:

> *28* ***Consequences of deeds of alienation which are void or are terminated***
>
> *(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2 (1), or a contract which has been declared void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-*
>
> *(a) the alienee may in addition recover from the alienator-*
>
> *(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;*
>
> *(ii) a reasonable compensation for-*

*(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or*

*(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and*

*(b) the alienator may in addition recover from the alienee-*

*(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;*

*(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.*

*(2) Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee."*

[44] Returning to the facts of this matter. It is common cause that the respondents have partially performed in terms of the verbal agreement which is evidently of no force or effect. In terms of the respondents' version, of the R230 000 owing, R185 650 has been paid.

[45] The entire issue relating to the verbal agreement was within the knowledge of the applicant. He elected not to refer to it at all in his founding papers.

[46] In my view, he was obliged to do so and should have gone further.

[47] In this regard I would have thought that the applicant should have provided evidence:

47.1. as to what a reasonable amount of rental might have been for the period of occupation by the respondents;

47.2. as to what a reasonable compensation might have been for any improvements which had enhanced the market value of the property, if any;

47.3. as to whether or not he had given his express or implied consent for the improvements, if any;

47.4. of a proper accounting of the amounts he had received;

47.5. the sum of R60000 that he had allocated to rates and taxes and proof thereof;

47.6. an offer for the return of a portion of the purchase consideration paid by the respondents once the aforesaid accounting had been done;

47.7. as to why, if the application was commenced during November 2012, the respondents continued to make payments for seven months thereafter and applicant accepted them.

[48] I am not suggesting that the aforementioned list is exhaustive nor that providing such information in each case would be peremptory or sufficient.

[49] In this instance, the applicant has not referred to the facts relating to the verbal agreement in its founding affidavit at all.

[50] On the meagre facts placed before me and as set out herein, I do not consider it just and equitable that the respondents be evicted until such time as the proprietal aspects relating to the unenforceable and

invalid verbal agreement have been dealt with. A trial action would appear better suited to that enquiry.

[51] I find some support for my approach in the matter of Balduzzi v Rajah [2008] 4 ALL SA 183 (W) in which matter, in response to the plaintiff's claim for the eviction of the defendant, the defendant had filed a defence to which the plaintiff had raised an exception. It was contended that the plea failed to sustain a defence. Defendant contended that the plaintiff, as the owner of the property, had sold the property to the defendant's husband who was deceased. Due to racially based laws in existence at the time, the defendant's husband could not register ownership of the property into his name. The property remained registered in the plaintiff's name, but the deceased paid the purchase price in full and lived there as owner with the defendant. Although section 28 of the Alienation of Land Act was neither discussed nor applied, the court found that the transaction between the plaintiff and the defendant's deceased husband is no longer regarded as illegal or criminal. All of this was relevant to the legal question whether it would be just and equitable to order the defendant's eviction. Berger AJ held at par [26] that the trial court could, quite properly, dismiss the plaintiff's action on the ground that it would be just and equitable in terms of section 4(7) of PIE to evict the defendant from the property.

[52] I find that the applicant has failed to discharge the onus resting upon him and the application is accordingly dismissed with costs.

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I OPPERMAN

Acting Judge of the High Court

Heard: 5th March 2014

Judgment delivered: 3 April 2014

Appearances:

For Applicant: Adv Lisa Oken

Attorneys: Matojane Malungana Inc

For First and Second Respondent: Mr Phafo

Attorneys: Pukwana Inc