REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

PRETORIA CASE **NO: 85341/2014**

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

11/8/14

Date: **WHG VAN DER LINDE**

In the matter between:

Smith, Johnny Samuel — **First Applicant**
Smith, Martha Susanna — **Second Applicant**

and

Patsalosavis, Helen — **First Respondent**

Sieraha, Hendrika Petronella — **Second Respondent**

Judgment

Van der Linde, J:

[1] This application was initially issued in the main seat of this division, being Pretoria. The Judge-President has referred the matter to this court, and the parties have, for reasons of

practicality and convenience, submitted to the jurisdiction of this court. To the extent necessary under s.27 of the Superior Courts Act 10 of 2013, I direct that the matter be transferred from the main seat of this division in Pretoria to the local seat, Johannesburg, of this division. The case number will be retained.

[2] The applicants apply for the eviction of the respondents. The applicants own the residential property on which the respondents also live. The applicants live in the main house, and the respondents in what I will describe for present purposes as "the cottage". The cottage was originally comprised of the garage and the servants' quarters. The applicants and the respondents concluded a written agreement, operative from 1 October 2012, whereby the applicants gave the respondents what the parties described as a "usufruct" in respect of the cottage.

[3] The parties envisaged that the respondents would effect improvements to the cottage, and on the respondents' version, this was completed by end 2012. The problem between the parties arose when it transpired that the local authority was not satisfied that the improvements had been approved by it; and in any event considered that the improvements did not comply with the legislation applicable to the zoning in which the property was located.

[4] The difficulty for the applicants' case is that for so long as the written agreement between the parties subsists, the respondents cannot be evicted. The applicants therefore cannot succeed unless they make out a case for breach, and lawful cancellation following on that breach.

[5] The case for breach was, in argument, mounted exclusively on clause [5] of the agreement. It provides as follows: *"Any buildings or structures, electrical and plumbing will be in accordance with the NHBRC standards."* The case for non-compliance with these standards, and one assumes that "NHBRC" is a reference to the National Building Regulations, was pages 34 and 35 of the founding papers, both dated 6 November 2014. The case for proper

cancellation of the agreement was page 26 of the founding papers. I deal with these propositions in turn.

[6] First, as regards clause [5]: it is not without controversy that this clause merely records that the applicants assure the respondents that the building into which they will be moving, complies with the stated standards. But the clause is vague, and I will accept in favour of the respondents that it means that should the respondents embark on the anticipated improvements, these must be in accordance with those standards.

[7] But, second, has it been proved that the improvements do not comply with those standards? In my view not. The two notices from the local authority at pages 34 and 35 do not actually spell out in which respects the buildings did not comply with the required standards. More importantly, the quality of the evidence contained in those notices is suspect, since they are hearsay evidence and not subject to testing. It follows that in my view no breach, let alone a breach that would warrant cancellation, has been shown.

[8] Finally, on the question whether there has been a lawful cancellation, one refers to page 26, the letter of Hollard Insurance dated 16 October 2014. The breach presaged in this letter is the failure to have obtained the necessary certificates, and to have the plans approved. It demands that the necessary steps be taken within ten days, failing which the applicants would cancel the agreement. But did the respondents fail to take steps within ten days? According to the applicants, the respondents actually appointed a "draftsman/architect" to attend to the building plans, "apparently without success." Indeed, later a Mr Van Rooyen was appointed to attend to the building plans "and all related matters".

[9] This gentleman obtained the signatures of the applicants to the building plans and from the documents it would appear that the plans were examined on 28 May 2014. Queries were raised. But what appeared to have triggered the notice by the applicants' attorney dated 7 November 2014 requiring the respondents to vacate, were the two notices from the local authority referred to above.

[10]The difficulty that I have with this flow of events, is that I cannot discern a clear statement by the applicants to the respondents that in clear, identified, respects, the improvements fall foul of the required standard; nor a clear statement by the applicants to the respondents affording them a reasonable time to comply with those standards, failing which the applicants will elect to cancel the agreement; nor a clear subsequent statement by the applicants to the respondents recording that they had failed to comply with the demand, specifying those respects in which the failure had occurred, and notifying the respondents that the applicants were electing to cancel the agreement for the respondents' specified breach. Certainly no such case has been made out in the founding affidavit.

[11]On the other hand, the applicants' frustration at being harassed by the local authority is understandable. The state of the papers may not be entirely to be laid at the applicants' door. The respondents have had the benefit of residing at the premises without paying any rental or occupational interest. In these circumstances the dismissal of the application may not reflect the true state of the underlying facts.

[12]One takes into account also two additional factors. The first is that both sets of litigants are pensioners, and are scarcely able to afford drawn out litigation. A dismissal of the application with costs will have an unfairly devastating effect on the applicants. Second, the parties belong to the same religious society. It is regretted that they should be engaged in secular disputes when their association initiated from their sacred connections. I have resolved therefore to refer the matter to trial to afford the parties opportunity better to define their disputes, and to perhaps even settle the case along the way.

[13]In the result I make the following order:

(a) The matter is referred to trial, with the notice of motion to stand as a simple summons.

(b) Costs are costs in the cause.

WHG van der Linde
Judge, High Court

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Date argued: 8 August 2017
Date judgment: 11 August 2017