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**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 43953/2019**

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

.....  
DATE

.....  
SIGNATURE

In the matter between:

**DU TOIT, GERHARD**

Applicant

and

**TSUBANE, MPHO**

Respondent

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**JUDGMENT**

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**MAKUME J:**

[1] The Applicant seeks an order against the Respondent in the following terms:

- i) That he be restored to possession of the house situated at [...] G. Street, Brackendowns Alberton (the Property).
- ii) That the Respondent be interdicted and restrained from entering the property pending finalisation of a PIE application launched by the Respondent out of the Magistrate Court Palm ridge under case number 9094/19.
- iii) That the Respondent be interdicted from interfering with the Applicant's possession of the property.
- iv) That the Respondent be ordered to restore the Applicant's peaceful and undisturbed possession of the property.
- v) That the Respondent replace all steel gates, garage gates and palisade fencing leading to the home on the property.

[2] There is a very convoluted history about this matter as will appear from the chronology of events hereunder. At the commencement of the hearing I enquired from both legal representatives who between the Applicant and the Respondent was presently in occupation of the property. Applicant's counsel said that his client is in occupation so did the Respondent's counsel. Applicant maintains that Respondent in person is not on the property except that he has erected a shack on the property wherein he has allowed a group of what he

terms “cronies” and vagrants to occupy. The Respondent maintains that the Respondent packed his belongings on Friday the 13<sup>th</sup> December 2019 and is no longer in occupation.

[3] The explanation by the parties as to the current state of affairs sharply brought to the fore the issue of credibility. This matter is about broken agreements and undertakings. The Respondent finds himself at the centre of a dispute between the Applicant and his ex-wife.

#### FACTUAL BACKGROUND

[4] The following facts are common cause or are not seriously disputed

- i) The Applicant and his wife Marlize Du Toit to whom he was married out of community of property divorced on the 11<sup>th</sup> March 2016.
- ii) On the 24<sup>th</sup> May 2018 the Sheriff of the Magistrate Court, Palm ridge was appointed as a receiver and liquidator of the joint assets of the Applicant and his ex-wife.
- iii) The property was amongst others an asset in the estate and in terms of their divorce settlement had to be sold.
- iv) The Sheriff of Palm ridge was appointed to sign transfer

documents of the property after its sale because the Applicant had refused or failed to sign same.

- v) On the 16<sup>th</sup> April 2019 the Sheriff of the Magistrate Court, Palm ridge in his presentative capacity together with the Applicant's ex-wife sold the property to the Respondent Mpho Tsubane for an amount of R900 000. 00 (Nine Hundred Thousand Rands).
- vi) The property was transferred into the name of Mpho Tsubane the Respondent on the 2<sup>nd</sup> October 2019. The Deed of Transfer No T000035236/2019 is attached to the Respondent's Answering Affidavit.
- vii) On the 14<sup>th</sup> October 2019 at Brackendowns Police Station the Applicant deposed to an affidavit before Captain BE Nqukwelo in which he undertook to vacate the property on the 8<sup>th</sup> November 2019. Significantly his elderly father who seemingly lived with him on the property also deposed to an affidavit agreeing to vacate the property on the 8<sup>th</sup> November 2019 and give the Respondent occupation. I was told that the affidavits are in the handwriting of the deponents.
- viii) On the 8<sup>th</sup> November 2019 the Applicant arrived at the premises with a truck full of his belongings with the intention to take

occupation as per the agreement and the undertaking dated the 14<sup>th</sup> October 2019.

- ix) On his arrival the Applicant refused to vacate instead he approached this court on an urgent basis seeking an order to prevent the Respondent from taking occupation. That application was struck off the roll for lack of urgency.
- x) The Respondent as he had nowhere to go erected a shack on the property and put all his belongings in there. He is presently living in that shack with his family members as the house is locked.
- xi) On the 13<sup>th</sup> December 2019 the Applicant packed his belongings except a few and left the property. Attached to the answering affidavit are pictures indicating the Applicant and another white male on the trailer outside the premises. The trailer is loaded with various items of furniture. On one of the pictures the Applicant can be seen carrying a box also on picture C8 is a picture of one of the empty rooms on the property.
- xii) On the 12<sup>th</sup> December 2019 prior to vacating the property the Applicant launched this application seeking the order as I have set out above.

[5] It is against this background that I am now called up to decide firstly if the Applicant has made out any case on urgency and secondly on the merits. Frankly speaking I could have struck this matter from the roll for lack of urgency however, and in view of the history of broken undertakings by the Applicant I allowed the parties to address me on the merits.

[6] The real question to be answered is whether the Applicant has been spoliated of the property by the action of the Respondent. The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided.

[7] Our courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are in the opinion of the court not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (**Plascon Evans Paints vs Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 A**).

[8] It is trite law that an applicant cannot make out his or her case in reply. It is surprising that the Applicant in his Founding Affidavit says nothing about the visit to the Brackendowns Police Station on the 14<sup>th</sup> October 2019 shortly after the property had been transferred. It is only after the Respondent's alluded to that visit to the Police Station that suddenly the Applicant remember that the visit to the Police Station was prompted by the Respondent and

Lerato arriving on the property with taxis filled with people threatening and intimidating them. For the first time in the reply and also through his counsel's submission does he say that he signed the affidavit at the police station to vacate under duress.

[9] A party relying on duress to resile from an agreement must prove the causal connection between the duress and the making of the contract (**BOE Bank Bpk vs Van Zyl 2002 (5) SA 165 C) 180-1**. The evidence before this court does not prove that. What this court knows is that the Applicant and his father drove themselves to the police station. They do not say that the taxi filled with threatening people followed them to the police station. Secondly how come that when they arrive at the police station and having experienced the threats and intimidation they chose to say nothing to the police. If the applicant had told the police about the crowd of intimidation the police would have acted.

[10] I do not for a moment believe that there was any duress exerted on the Applicant to waive his right of occupation to the property on the 14<sup>th</sup> October 2019.

[11] The 14<sup>th</sup> October 2019 is a day shortly after date of transfer. The Respondent says as he had done in the past he visited the Applicant to make arrangements about taking occupation. I see no reason why he now would have taken a group of people with him.

[12] I am not persuaded that the Applicant has raised a real and genuine dispute of facts regarding the agreement to vacate. The Applicant has dismally failed to address the facts said to be disputed. I have come to the conclusion that on the 14<sup>th</sup> October 2019 he in the presence of the police at Brackendowns voluntarily agreed to vacate the property and place the Respondent in occupation.

[13] What is of further significance is that despite the Respondent attaching pictures indicating empty rooms and a trailer full of the Applicant's belongings, Applicant still maintain that he still lives on the property. I am mindful of the fact that he says this only in reply he never filed a Supplementary Affidavit before the Respondent's answering affidavit explaining the events of 13<sup>th</sup> December 2019.

[14] This application must also fail on merits and I make the following order:

- a) The application is dismissed with costs.

DATED at JOHANNESBURG on this the 20<sup>th</sup> day of November 2019.

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**M A MAKUME**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING : 18 DECEMBER 2019



DATE OF JUDGMENT : 20 DECEMBER 2019  
FOR APPLICANT : ATT IAN THEO ALLIS  
INSTRUCTED BY : Allis Attorney, Orange Grove  
FOR RESPONDENT : ATT RAKHUBA  
INSTRUCTED BY : Kagiso Rakhuba Attorneys