



IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: YES / NO.**

**(2) OF INTEREST TO OTHER JUDGES: YES / NO.**

**(3) REVISED.**

**DATE**

**SIGNATURE**

CASE NO: 27591/2012

DATE:

IN THE MATTER BETWEEN

S O TAYOB NO

1<sup>ST</sup> APPLICANT

O M TAYOB NO

2<sup>ND</sup> APPLICANT

Z O TAYOB NO

3<sup>RD</sup> APPLICANT

AND

JOHN MAMABOLO

1<sup>ST</sup> RESPONDENT

THE OCCUPIERS OF 66 PAUL KRUGER STREET  
POLOKWANE

2<sup>ND</sup> RESPONDENT

THE POLOKWANE LOCAL MUNICIPALITY

3<sup>RD</sup> RESPONDENT

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**JUDGMENT**

**MOGOTSI, AJ**

**Introduction**

[1] This is an application for eviction of the respondents.

[2] The respondents oppose the application on the basis that:

2.1 an action is pending in respect of the ownership of the property  
(*res litigiosa*);

2.2 the respondent obtained a right to lease the property to a third party in terms of the sale agreement. That sale agreement has not been cancelled and it is therefore valid and binding and subject to the principle of "huur gaat voor koop".

**Background**

Messrs Huang and Mogashoa entered into a sale agreement in respect of the property on 22 February 2001. Mogashoa had started the actual occupation of the property in 1999, this is the date on which according to the sale agreement "the purchaser shall be entitled to all rentals, if any, accruing from the property and shall be liable for all imposts ..."

Mr Huang issued summons in terms of which he claimed cancellation of the aforesaid sale agreement. Mr Mogashoa defended his action and Mr Huang withdrew in November 2011. Mr Huang never asked for the eviction of Mr Mogashoa.

On 1 December 2007 Mr Mogashoa and the first respondent John Mamabolo entered into a lease agreement regarding the same property. The trust bought the property from Mr Huang and transfer took place on or about 13 February 2008.

The trust now contends that the first and second respondents are in unlawful occupation of the property and that it will be just and equitable if they are evicted.

There is a pending action instituted on or about 24 April 2012 (Limpopo case no LP/PLK/RC372/2012) in terms of which Mr Mogashoa *inter alia* seeks an order that the transfer of the property from Mr Huang to the trust be set aside and/or be declared a nullity and that the trust should pass transfer to him.

Mr Molebatse pleads that he signed a lease agreement with Mr Mogashoa on 3 July 2006. Mr Molebatse knows Mr Mogashoa to be the owner of the property. Applicants dispute the validity of that lease agreement.

The matter appeared before the Honourable LEDWABA, J (as he then was) and the following order was made:

1. The application is postponed *sine die* pending the finalization of the action proceedings under case number LP/PLK/RC372/2012 in the regional court of Polokwane.
2. The rental payable in terms of the lease agreement between Mr Mogashoa and the first respondent Mr John Mamabolo is to be paid into the trust

interest bearing account of the first respondent's attorney pending the finalization of the above action proceedings. The first respondent's attorney should not release the rental monies to any party unless so authorised by this court.

3. The occupants of the property should not pay any rental to any person except to deposit the rental monies into the first respondent's attorneys' trust account.
4. The property should not be let to anybody except the present occupiers of the property who cannot be evicted from the property unless there is a valid court order authorizing such eviction.
5. Should the action proceedings not be finalised within a period of six months from the date of this order and/or the first respondent fail and/or the occupants fail to deposit the rental monies into the first respondent's attorneys' trust account in terms of the lease agreement the applicant may set this matter down for hearing.

The matter now appears before me because of the parties' failure to comply with paragraph 5 of the order.

What complicates this matter is the following:

- (a) the matter in Limpopo is not reaching finality;
- (b) in the Limpopo matter the parties are Mr Mogashoa, Mr Huang and the trust. Mr Mamabolo is not cited.

The trust contest the consent to jurisdiction of the magistrate's court. Further that the magistrate's court cannot obtain jurisdiction to declare that a transaction is null and void and set it aside. The same applies to the *ad factum praestandum* order that the trust transfer its property to a third party.

The first applicant avers that an agreement of sale between Mr Huang and Mr Mogashoa got cancelled by Mr Huang and ownership could never have passed to Mr Mogashoa. There is no confirmatory affidavit to that effect. The first applicant further argues that if in fact Mr Mogashoa had complied with his contractual obligations, his claim to demand transfer would have prescribed.

The first respondent disputes that this agreement was cancelled and relies on the fact that an action instituted by Mr Huang for the cancellation of the agreement was withdrawn.

The trust contests the validity of the lease agreement between Mr Mogashoa and Mr Mamabolo as according to them Mr Mogashoa is not the owner of the property. Furthermore the trust is aware of the fact that the property was occupied by other persons not claiming a right of occupation through Mr Molebatse. It is also not clear whether Mr Molebatse and his family have vacated the property or not. There is no confirmatory affidavit to that effect. More detail is required in respect of the first and second respondents more so that it is alleged by applicants

that second respondents are paying rent to Mr Mogashoa and/or Mr Molebatse and that they are in a position to afford alternative accommodation.

First respondent's supplementary heads of argument *inter alia* high lights three difficulties:

- (i) possibility of dispute of fact;
- (ii) citation of correct parties; and
- (iii) failure to seek appropriate relief.

According to *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T) at 1162 a dispute of fact might arise in the following situations:

- where the respondent denies all the material allegations made by the various deponents on behalf of the applicant and furnishes positive evidence by deponents or witnesses to the contrary;
- confessions and avoidance where the respondent admits the allegations (or evidence) in the applicant's founding or supporting affidavit, but raises other facts which in turn are denied by the applicant.

A dispute of fact does not necessarily preclude the court from granting relief on notice of motion. If the real issue is capable of resolution on acceptance of facts which are common cause or indisputable, relief may be ordered without reference to the facts in dispute. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*supra*) lays down the method on which facts should either be accepted or omitted

from consideration in the adjudication of applications on notice of motion where there are material disputes of fact in the affidavits at 634E-635C.

In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 4 SA 234 (C) at 235E-G the general rule was further stated to be:

"... where there is a dispute as to the facts a final interdict should only be granted in notices of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

A further clarification and qualification was made in case no 2241/2006 *National Director of Public Prosecutions v T S P van der Walt and another* (not reportable) that if in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6(5)(g) of the Uniform Rules of Court (cf *Pietersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case, *supra*, at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see *Rikhotso v East Rand Administration Board and another* 1983 4 SA 278 (W) at 283E-H). Moreover there may be exceptions to this general rule, as, for example, where the

allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

The general rule, then, is that where in proceedings on notice of motion *bona fide* disputes of fact have arisen on the affidavits, a final order may be granted if those averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

The nature of factual disputes in this matter is such that the court will not be able to make a finding on the papers.

After I have read all the papers and listen to counsels for both sides I am of the opinion that this matter should be referred to trial and I make the following order:

**Order**

1. The application is referred to trial.
2. The notice of motion shall stand as a simple summons.
3. The answering affidavit shall stand as a notice of intention to defend.
4. A declaration shall be delivered within twenty days of this order.
5. Uniform rules of court thereafter apply.
6. Costs of the application is reserved for the trial court to determine.

**D D MOGOTSI**  
**ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA**