IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

20/4/2016.

Case Number: 20933/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

20/4/2016 .....
DATE SIGNATURE

In the matter between:

GCOBISA SIBANGO and Sixteen Others — 1st APPLICANT

and

PPM PLUMBING (PTY) previously known as PRETORIA PROPERTY MAINTENANCE CC OR (PTY) LTD — 1st RESPONDENT

SCENIC ROUTE TRADING 502 CC t/a DEVCO GROUP — 2nd RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] The respondent's in this application have been embroiled in litigation over an extended period of time in respect of the properties owned by the applicants, amongst others.

[2] This urgent application is instituted by the applicant's, as owners of the properties, which properties are presently in the possession of the first respondent. The applicant's seek an order that the first respondent vacate their properties.

[3] The applicant's bought property in a residential development in Westbrook, Midrand. The applicant's concluded a building contract with the second respondent to construct their homes on the properties purchased.

[4] The second respondent sub-contracted the aforesaid contract to the first respondent. As a result of the said sub-contract the first respondent contends that the second respondent owes millions in respect of payments and has failed to pay. The second respondent denies these allegations. As a result a deadlock has resulted between the two respondents'.

[5] In a number of spoliation applications between the respondent's, to which the applicants were never a party, the first respondent has been the victor in retaining possession of the applicant's properties.

[6] In the circumstances the first respondent has retained possession of the applicant's properties whilst it battles in court the issue of the second respondent indebtedness. The building on the applicant's properties has come to a halt and the applicants are being held ransom over their own property which is currently in the hands of the first respondent.

[7] The applicant's contend that they are the lawful owners of the property and seek to take possession of their properties as owners of the properties. This is a *rei vindicatio.*

URGENCY

[8] The first respondent argued that this application was not urgent and as such should be struck off the roll with costs. The first respondent confirms that the

properties are in its possession however that the urgency claimed by the applicants is 'meagre and unspecified and unsubstantiated and does not warrant the extent of departure from the Rule of Court'.

[9] The applicants contend that the matter is urgent as they will not be able to obtain substantial redress in due course for the levies that are being paid to the Westbrook home owners association for homes that they are not living in, for rentals that they are paying in other facilities as their home are not complete, for interest on the monies not yet disbursed and the possibility of their mortgage bonds being withdrawn by their respective banks which will leave the applicants with no funds to continue with their prospective building projects.

[10] The applicant's concede that they were aware of the dispute between the respondent's as far back as November 2015. However, they add that they were advised by the second respondent that it was seeking legal advice and exploring different avenues on the matter. The second respondent undertook to endeavour to resolve the impasse that prevailed.

[11] On 3 March 2016 after all the legal measures taken by the second respondent it became apparent to the applicant's that the second respondent was unsuccessful in bring an end to the impasse that prevailed, so their argument goes. They then sought legal representation on 13 March 2016.

[12] It was argued for the applicant's that they are being held ransom in a situation where there is no prospect of settlement in the near future between the respondents and they have no input in the resolution of the dispute between the respondents. They have no control over their own properties and the possibility arises that they will lose their properties if this situation is left to perpetuate. They are paying expenses for property they cannot use. This, it was argued, is akin to vindication of possession from a spoliator and as such is urgent.

[13] I find nothing unreasonable in the applicant's conduct or in the fact that they relied upon the second respondent's word to resolve the impasse. The second respondent's undertaking to address the issue on a legal basis is borne out by the many court battles involving the respondent's. As the applicants were never a party

to these court proceedings, to my mind, they had to give the second respondent the benefit of the doubt. However, when it became apparent that the second respondent was unsuccessful at every challenge the applicants had to take control of their own destiny.

[14] On my examination of the submissions advanced by the applicant's as to why this court must entertain this matter on an urgent basis what I find that is born out is the right to obtaining their home built on their property. This in my view falls under section 26 of the Constitution, the right to housing. These applicants are well within their rights to seek the relief sought, the vindication of possession from the possessor, the first respondent, on an urgent basis.

[15] In the result the matter will be dealt with on an urgent basis and the applicant's failure to comply with the prescribed provisions for service of process is condoned.

THE LAW

[16] The applicant's argued that in a *rei vindicatio* they need only allege and prove that they are the owners, by title, and that the first respondent is in possession of the property so owned.

[17] It is trite that ownership was essential and the proof thereof had to be adequate in a vindicatory claim. See *Rusken NO v Thiergen1962 (3) SA 737 (A) at 744A-B; Goudini Chrome (PTY) LTD v MCC Contracts (PTY) LTD 1993 (1) SA 77(A) at 82.*

OWNERSHIP

[18] The applicants submitted that each owner, or at least one of the owners where there is co-ownership, have put up a confirmatory affidavit in support of the allegations made by the first applicant. In addition each applicant has put up a copy of the Windeed search report to substantiate their proof of ownership.

[19] Adv. Ellis SC representing the applicant's argued that this Windeed document search report was sufficient proof of ownership. He further argued that the mere denial of ownership by the first respondent does not create a factual dispute which disentitles the applicant's from the relief they seek.

[20] On the other hand Adv. Pelser SC for the first respondent argued that applicants have not proven that they are the owners of the properties by way of the Windeed's put up. The argument is developed that Windeed has a disclaimer as regards the information gathered, in addition they make use of suppliers for such information gathered and indemnify themselves from that attained by their suppliers. The second leg of the argument is that the information obtained is hearsay as the person responsible for extracting the information has not put up affidavits. There is only an affidavit from the attorney instructed in this matter who states that his offices executed the search. Thus this information is hearsay and the applicants have not stated that they could only provide the information on their ownership as a result of urgency of the matter.

[21] It is settled law that the best evidences of ownership of immovable property is a titled deed. See *Goudini Chrome* supra at pg. 82.

[22] The argument raised by the Adv. Pelser SC is technical in nature and is easily overcome by the production of the original title deed. However, does the production of the Windeed in this urgent application not suffice as proof of ownership?

[23] In the founding papers of the applicants mention was made that the document attached was a 'copy of a deeds office printout', which is the Windeed. On the Windeed under General Information it is recorded that the deeds office concerned is that of Pretoria, the date information was requested being '14/03/2016' and the 'Information source' being the 'Deeds Office'.

[24] To claims made of ownership by the applicant's in the founding affidavit the first respondent denied that the applicants were the registered owners. As regards the documents put up to prove their ownership the first respondent in its answering

affidavit states 'Annexure ''FA2"is not a copy of a Deeds Office printout and does not prove ownership.'

[25] I find the aforesaid strange of the first respondent as in the same affidavit it acknowledges all the applicant's as homeowners having transmitted correspondence to each one of them on two occasions and the said applicants, one time or the other, having attended one or all of the two meetings held by the first respondents with the homeowners of Westbrook. See paragraphs 29.3, 29.4 and 29.5 of the first respondent's answering affidavit.

[26] It was also pointed out by Adv. Ellis SC that in terms of the contract between the respondents at paragraph 3.3.2 the first respondent would not be instructed by the second respondent, if, the property was not registered in the name of the second respondent or the owner of the works to be constructed.

[27] In the face of that set out in the preceding paragraphs supra it is, in my view, disingenuous of the first respondent to now deny that property is owned by the applicants.

[28] Even so, has the applicant's provided sufficient proof to assert ownership as is required?

[29] In the replying affidavit of the applicants the only reply to the allegations made regarding the denial of the applicant's ownership is just a denial from the applicants.

[30] In dealing with the Windeed document as proof of ownership it is noted that the source of the information is the Deeds Office Pretoria. I also take heed of the fact that on the document it is clearly indicated that there is an endorsement by a financial institution I find stands to reason that the original title deeds of the property would be in possession of the financial institutions.

[31] In the circumstances of this specific case there is the first respondent's affirmation in the agreement between it and the second respondent that work would not commence unless the owner is confirmed and there is the admission of the

applicants as homeowners by virtue of the correspondence sent to them and their attendances as owners at the meetings called by the first respondent. Both these facts were extracted from the first respondent's own answering affidavit. This together with the Windeed, the source thereof being the Deeds Office Pretoria is sufficient to hold out that in the circumstances this is the best evidence that could be adduced, as in any event a copy of the title deed would have had to be put up as the properties of the applicants are all endorsed. Lastly, here is the affidavit of the attorney for the applicant from whose office the search was conducted. See *Goudini Chrome* at 82 and 83; Gemeenskapapsontwikkelingsraad v Williams and others (1) 1977 (2) SA 692 (W) at 697.

[32] In the result I accordingly allow the evidence submitted as having proven the ownership of the applicant's to the properties concerned.

LIEN

[33] The first respondent when arguing the matter before me abandoned the defence raised of a lien and as such I do not intend to deal with this issue.

COSTS

[34] The general rule of the costs is that costs following the result. However, mention must be made of the fact that this application was heard over two days. Adv. Ellis SC rightfully conceded that the applicants only sort cost for one day as the second day was occasioned through a delay on the part of the applicants. That being the case, which party will be responsible for the costs occasioned by the first respondent for the second day in court? In all fairness I am of the view that the applicants will have to be responsible for the first respondent's costs of the second day as this came about due to the fault of the applicants.

[35] The second respondent filed an answering affidavit in support of the applicants and did not oppose the applicant's application.

[36] Consequently the following order is made:

[36.1] It is ordered that the matter is to be dealt with as urgent and that the applicant's failure to comply with the prescribed provisions for service is are condoned;

[36.2] The first respondent is ordered forthwith to vacate the following properties: Stands: 2397, 2403,2404,2405,2407,2408,2417,2418,2419,2424,2426,2429 and 2394 Noordkwyk Extension 63, City of Johannesburg, situated in the Westbrook Estate, Midrand, Gauteng;

[36.3] The first respondent is ordered to pay the costs of this application, which shall include the costs consequent upon the employment of senior counsel. The costs for the hearing of the application being limited to one day only being the 29 March 2016;

[36.4] The applicants are ordered to pay the costs of the first respondent's attendance at court for the 31 March 2016 such costs are to include the costs of senior counsel.

W. Hughes
Judge of the High Court Gauteng, Pretoria.

Delivered: 20 April 2016

For the applicants: MANLEY INC.

Telephone: 012-346 3388

Counsel: Adv. Ellis SC

For the First Respondent: JURGENS BEKKER ATTORNEYS

Telephone: 011-622 5472/5445

Counsel for the First Respondent: Adv. Pelser SC