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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

CASE NO: 38988/2015
DATE: 27 MAY 2016

In the matter between:

M.S KOTZE

[I.D. NO: ...]

FIRST APPLICANT

J. A. KOTZE

[ID NO: ...]

SECOND APPLICANT

S.J.M KOTZE

[ID NO: ...]

THIRD APPLICANT

D. A. KOTZE

[ID NO: ...]

FOURTH APPLICANT

A. DE BEER

[ID NO:]

FIFTH APPLICANT

A. M. BAUER

[ID NO:]

SIXTH APPLICANT

and

BJ GROBLER

[ID NO:..]

FIRST RESPONDENT

THE UNLAWFUL OCUPERS OF PORTION

[..]OF THE FARM BOSCHKRANS [..], REGISTRATION

DIVISION I.S MPUMALANGA PROVINCE, REMAINING

EXTENT OF THE FARM ELANDSFONTEIN [...], REGISTRATION

DIVISION 1.S MPUMALANGA PROVINCE AND PORTION 5 OF

THE FARM CALLED FLORIDA OF THE FARM ELANDSFONTEIN

75REGISTRATION DIVISION 0.S. MPUMALANGA PROVINCE SECOND RESPONDENT

JJ MALAN

THIRD RESPONDENT

GOVAN MBEKI LOCAL MUNICIPALITY

FOURTH RESPONDENT

JUDGMENT

KOOVERJIE AJ:

A. APPLICATI ON:

[1] The applicants seek the eviction of the first respondent (Mr Grabler) from the property defined as Portion 11 of the farm Boschkrans, Remaining Extent of the farm Elandsfontein 75 and Portion 5 of the farm named Florida (referred to as "*the Property*"). The Property includes a home with 4 bedrooms, a

bathroom and two living rooms. The applicant seeks relief in terms of the PIE Act (the Prevention of Illegal Eviction from and Unlawful Occupiers of the Act, 19 of 1998), alternatively eviction in terms of the common law premised on the *rei vindicatio*.

B. COUNTER APPLICATION

[2] The first respondent had filed a counter application wherein he sought *inter alia* the following relief:

- (1) that the applicants be ordered to forthwith sign all the documents as submitted by Messrs Cronje & Van der Walt to effect transport of the properties;
- (2) if any of the applicants fail to sign the aforesaid documents, the Sheriff is ordered to do so in their stead;
- (3) costs of the application.

[3] However at the hearing the first respondent requested that the counter application be postponed *sine die* on the basis that the first respondent had not effected service on all interested parties.D .

BACKGROUND

[4] The salient facts of this matter concern the sale of property. The property had been sold twice, firstly in terms of the first deed of sale and shortly thereafter in terms of the second deed of sale.

First Deed of Sale

[5] On 9 July 2009 the applicants concluded a sale agreement with the third respondent (Mr Malan) for a purchase consideration of R3,5 million.

[6] The salient terms of the agreement *inter alia* were:

6.1 Mr Malan would pay the purchase amounts in cash against the registration of transfer of the premises into the name of Mr Malan, with the purchase considerations Mr Malan had to guarantee by virtue of an acceptable bank guarantee by no later than 31 August 2010.

6.2 Mr Malan could take occupation of the premises pursuant to an existing rental agreement which would expire by 31 August 2010 and the parties would endeavour to ensure that registration of transfer of the premises of Mr Malan be effected before the expiration of the lease agreement.

[8] At all times Cohen, Cronje and Van Der Walt, a firm of attorneys in Bethal were appointed as the transfer attorneys.

Second Sale

[9] The registration did not materialise since Mr Malan had entered into a written deed of sale with Mr Grabler in respect of the Property on the 29th of October 2009. On the first respondent's version, the salient terms of this agreement were premised on the following basis:

- 9.1 Mr Malan declared that he was the owner of the property;
- 9.2 He sold the Property for an amount of R6 million;
- 9.3 Mr Malan was in occupation of the property in terms of the lease agreement he had with the applicants (in respect of the first sale) and which would expire by 31 August 2010.
- 9.4 Mr Malan and Mr Grabler would endeavour to ensure that the registration of the Property would be in the name of Mr Grabler by or

before the 31st of August 2010.

[10] At some point Mr Malan emigrated and left the property in Mr Groblers hands and does not feature as a deponent in this application.

[11] Between October 2009 to June 2014, Mr Grabler undertook to have the property registered in his name. However, due to numerous obstacles, the transfer could not be effected.

[12] Around June 2014, the applicant decided not to proceed with the sale by raising prescription. Four and half years had lapsed since the applicants signed the first deed of sale; causing the first sale to become prescribed in terms of S11 of the Prescription Act. As a result the second sale is a nullity. Hence, the essence of the dispute between the parties concerns the enforceability and validity of the first deed of sale.

D. POINT IN LIM/NE

[13] Before this court attempts to proceed on the merits, it is obliged to deal with a point of non-joinder raised on the part of the first respondent (Mr Grabler). This aspect had been dealt with in the respondent's affidavit.

[14] Counsel for the first respondent emphasized that the non-joinder of the two owners of the property is a fatal irregularity and on this basis alone, this application should be dismissed.

[15] In terms of the Will and Testament of Mr and Mrs Malan (the mutual owners of the property), the property was bequeathed to their three daughters Anna, Maria Elizabeth Du Toit, Mona Sara Kotze and Cecila Johanna Bauer and

their offsprings, upon their death, The daughter were the recipients of a fideicommissum in terms of the will.

[16] Stephanus Jacobus Van der Westhuizen ("*Van der Westhuizen*") was an offspring of one of the daughters. As a fiduciary heir, he received his ownership right from the fiduciary heir.

[17] In respect of the first deed of sale Van der Westhuizen was a signatory to such deed of sale and did so in his capacity as joint owner. However in this application he was not cited as an applicant.

[18] Furthermore, Anna Elizabeth Bauer also a fiduciary heir was cited as the sixth respondent in this application, however her confirmatory affidavit was lacking in this application.

[19] The applicants submitted the following argument in respect of the non-joinder namely:

19.1 In respect of Van der Westhuizen; he had "disappeared" and most his family members have had no contact with him for over three decades;

19.2 In respect of Anna Maria Elizabeth Bauer; their argument essentially was she could neither read nor write and she would not have been in a position to make a contribution to this application.

[20] It was brought to this court's attention that Mr Malan's brother had managed to locate and obtain Van der Westhuizen's signature when it was required for the transfer process in respect of the sale between Malan and Grobler. Therefore their excuse was a lame one.

[21] Counsel for the respondents argued that no satisfactory explanation was presented by the applicants indicating if any attempts have been made to locate Van der Westhuizen.

[22] It is trite law that all parties who have substantial legal interest in the litigation must be before the Court. The objection of non-joinder may be raised where the point is taken that a party who should be before the court has not been joined or given judicial notice of the proceedings

[23] The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.¹

[24] Moreover it is settled law that the right of the defendant (in the case of the respondent) to demand joinder of another party is specifically entertained by

our court in instances where the parties are joint owners or parties and in instances where such party has a direct and substantial interest in the litigation.

[24] In such instances joinder is necessary.²

5] Having considered the papers and the argument of Counsel for both parties I am of the view that it would be highly irregular to proceed with the merits of this matter if all interested parties are not before the Court and are not aware of the litigation between the parties and the effect that a court order would have on them

[26] Both parties have a substantial and legal interest as co-owners of the said property. They should be made aware of the litigation and at least file confirmatory affidavits, alternatively a comprehensive affidavit indicating their portion in this matter.

[27] The two aforesaid joint owners have no knowledge that a fatal irregularity is before court and the submissions of the applicants are inexcusable.

[28] During argument counsel for the applicant requested that this matter should be postponed and be heard with simultaneously with the counter application

which the court was requested to postpone, in light of the non-joinder being persisted upon by the

¹ Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 SCA at para 21.malgamated Engineering Union v Minister of Labour 1949 (3) SA 637 A..

² BHT Water Treatment (Pty) Ltd v Leslie 1993 1 SA 47 W at 50 – 60 [See also Herbstein and van Winsen, Civil Procedure of the High Court of South Africa, Fifth Edition. Juta at p238-240]

respondent. However the Court cannot come to the assistance of the applicants at the last hour.

Consequently this application cannot proceed on the merits as the non-joinder of the two co-owners constitutes a fatal irregularity.

[28] It must be emphasised that the applicants were aware of the fatal non-joinder from respondents answering papers. At that time they should have been cautioned and appreciate that all co-owners are required to be before court. This principle has become settled law. Their substantial financial and legal interest can be compromised in litigation and they have the right to have knowledge thereof.

[30] In the premises the following order is made:

- (1) The application is dismissed with costs.
- (2) The counter-application is postponed *sine die* with costs to be in the cause.

H Kooverjie

Acting Judge of the High Court

Counsel for the applicants: Adv. J De Beer

Attorney for applicants: Wiekus Du Toit Attorneys

Counsel for the First Respondent: CFJ Brand SC

Attorney for the First Respondent: Christo Smith Attorneys