

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE : YES/ NO	/
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. REVISED	
27/9/16	
DATE	SIGNATURE
GAUTENG DIVISION, PRETORIA	

29/9/16
CASE NO.: 74442/2015

In the matter between:

LOUCAT INVESTMENTS (PTY) LTD

Plaintiff

and

ROSE MARY SHATZ AND TWO OTHERS

First Defendant

UNLAWFUL OCCUPIERS OF ERF 249

Second Defendant

NELSVILLE TOWNSHIP

Third Defendant

MBOMBELA LOCAL MUNICIPALITY

JUDGMENT

HUGHES J:

- [1] This is an application in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act). The applicant seeks the eviction of the first and second respondents.
- [2] From the outset both parties' counsel Adv Van der Merwe for the applicant and Adv Riley for the first respondent advised this court that by agreement the issues pertaining to representation and authority to depose to the affidavits on hand, would no longer be pursued and the parties are properly represented in this application.
- [3] It is not in dispute that the applicant is the registered lawful owner of the property described as ERF 249 Nelsville, Mbombela, being, 6 Francis Street, Nelsville, Nelspruit, situated in Mbombela, measuring 379 square metres (three hundred and seventy nine) in extent and held by Deed of Transfer T10109/2012 subject to all the existing conditions of title and servitude as will appear more fully in the existing Title Deeds of the Property. It is further not disputed that the first respondent is occupying the aforesaid property of the applicant.
- [4] The applicant contends that the first respondent has no right, legal or otherwise to occupy the property. On the papers before me the first report states that the first respondent has occupied the premises since 1981, this was since the death of her father, as head of household, that being some 30 years until she sold the property on 1 April 2012 to Ms Candice Smit (nee Hittler). Ms Smit in turn sold the property to the applicant on 29 November 2013 and transfer to the applicant took place on 27 March 2014.

- [5] The applicant contends that the first respondent is occupying the property without any right in law, without an agreement with the applicant and is not the lawful owner of the property. Even so, the first respondent refuses to vacate the property and remains in occupation without the express, implied or tacit consent of the applicant.
- [6] The first respondent contends that her right of occupancy of the residential property arises from a lease agreement. This lease agreement was concluded on 1 July 2012 between Rubigenix (Pty) Ltd and RZT Zelpy 5241(Pty) Ltd (RZT Zelpy).
- [7] Adv Riley for the respondent argues that according to the lease agreement the first respondent occupies the property on the say so of RZT Zelpy. As per clause 6(e) of the lease agreement the lessee would use the property only for residential purposes, with occupancy of no more than three people. Further, in terms of the purchase and sale agreement concluded by Ms Smit and the applicant. At clause 20 it is recorded that "any lease agreements relating to the property will remain in full force and effect..." Thus the applicant as purchaser would become the landlord on transfer. She submitted that in terms of clause 7 of this agreement the risks and benefits of ownership passed upon the applicant at registration of transfer.
- [8] Adv Van der Merwe submits that the first respondent's reliance on the lease agreement must fail as the lessee who has rights emanating from that agreement is RZT Zelpy and not the first respondent. Further, the first respondent on the papers does not demonstrate that she obtained a right from RZT Zelpy to occupy the premises. The applicant argues that this lease agreement is denied and amounts to a simulated transaction and nothing more.

[9] On my examination of the lease agreement it is noted that the parties or companies who contracted were represented by Ms Candice Hittler (now Smit). The period of the lease agreement runs from 1 August 2012 to 3 July 2017. From clause 6(d) of the lease agreement sub-letting in whole or part is prohibited without the "written consent of the Lessor". It is also notable that the first respondent does not make mention of how she came to occupy the property whilst RZT Zelpy was the lessee. All she states is that "the first respondent has at all times had the right to live on the property," found at paragraph 32.4 of the answering affidavit.

[10] The first respondent does not take this court into her confidence and explain how she attained a right to occupy without having any right enforceable against the owner, being the applicant. *See Chetty v Naidoo 1974 (3) SA at 20 B-D:*

"It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right)"

[11] The applicant's contention that the lease agreement amounts to a simulated transaction is dealt with as follows:

[11.1] The first respondent alleges that she sold the property to Ms Smit in 2012 and the property was sold on the premise that she would be afforded the opportunity to enjoy uninterrupted occupancy of the property.

[11.2] The first respondent sold the property "in an effort to alleviate her personal financial difficulties..."

- [11.3] Ms Smit, the owner of the property entered into a verbal lease agreement during July 2012 with Rubigenix (Pty) Ltd, which incidentally is owned by Ms Smit.
- [11.4] On 1 July 2012, Rubigenix (Pty) Ltd leases the same property to RZT Zelpy 5241 (Pty) Ltd by way of the written lease agreement mentioned in this judgment.
- [12] On the facts in the preceding paragraph, mention must be made that the applicant denies that they were aware of any lease agreement over the property prior to and during the sale of the property. Much was made by the first respondent that Rubigenix and RZT Zelpy have been receiving and paying the municipal services such as water and electricity for the property. The applicant does not dispute this but contends that in any event the risk associated therewith lies at the applicant's doorstep and they are not indemnified therefrom.
- [13] Mention is also made by the first respondent in her papers before this court that the sale of the property to the applicant by Ms Smit was "subject to Corwil Investments Holding (Pty) Ltd purchasing all the shares in the applicant..." Corwil is managed by the first respondent in her capacity as chief executive officer. The contention is that the first respondent would not be liable to pay rental as Corwil would ultimately become the owner of the property through the purchase of the shares in the applicant.
- [14] I am in agreement with Adv Riley when she states that the sale of the property is indicative that simulation has not taken place and that's where my agreement ends. However, I see the lease agreement as formulated in this case to have been constructed as such to entrench a right to occupy that can only exist side by side with the lease agreement. I say so because if indeed

the first respondent always had this right to occupy, from the time she sold the property to Ms Smit, then this would have been incorporated in the lease agreement as a special condition as the signatory to the lease as lessor and lessee was the same Ms Smit who confirms that the first respondent had the right to occupy the property.

- [15] I am guided by the dictum in *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC 2014 (4) SA 319 at 334 F-G*:

"The position remains that the court examines the transaction as a whole including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated."

- [16] Similarly in this case on an examination of all the surrounding circumstances mentioned above it is clear that the introduction of the lease agreement as regards the property was a way to secure a right of occupation for the first respondent as pre-existing lease agreements are catered for in the purchase and sale agreement at clause 20. The applicant would then be bound to enforce the lease agreement. As stated above, if this lease agreement was indeed such a valid lease agreement, then an undertaking for the first respondent to occupy the property would have, in my view, been expressed in the lease agreement.

- [17] Thus it is my conclusion that the lease agreement is merely a simulated agreement to try and create a right for the first respondent to remain in occupation of the property.

[18] Turning to section 26 of the Constitution, the first respondent is the only person in occupation of the property, she has indicated her intention to purchase the property thus she is financially secure to obtain alternative accommodation and will not be prejudiced by the eviction order.

[19] The costs in this matter are to follow the result and from the provision in the purchase and sale agreement no specific scale is mentioned. In the circumstances the scale of costs allowed would be on a party and party scale.

[20] Consequently the following order is granted:

[20.1] That the first and second respondents and all other occupants, if any, who occupy the premises described as Erf 249 Nelsville Township, Registration Division J.U, Province of Mpumalanga better known as 6 Francis Street, Nelsville, Nelspruit ("the property") by virtue of the first and/or second respondents occupation be evicted from the property within 30 days from the date of this order.

[20.2] In the event of the first and/or second respondent and all those who occupy the property, under and by virtue of the first and/or second respondents occupation, fail or refuse to vacate the property on the date so ordered by this Honourable Court as contemplated in 20.1 above, that the Sheriff or his deputy be authorised to enter upon the property to evict the first and/or second respondents and all those who occupy the premises under or by virtue of their occupancy.

[20.3] That the first respondent pay the costs of this application on a party and party scale.

A handwritten signature in black ink, appearing to be 'W. Hughes', is written over a horizontal line.

W. Hughes

Judge of the High Court

Appearances:

For the Applicant:

Adv B Van der Merwe

Instructed by:

Shickerling, Bowen and Hesselink Inc

For the 1st Respondent:

Adv M Riley

Instructed by:

Pule Incorporated Attorneys