REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 33233/2019

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

29 January 2021
....
DATE SIGNATURE

MOHAMED IQBAL ZIAKRIA First Applicant

HANG CUANE Second Applicant

and

THE UNLAWFUL OCCUPIERS OF [….] First Respondent

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Second Respondent

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J U D G M E N T

The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 29 January 2021.

TEFFO, J:

[1] The applicants, Mr Mohamed Iqbal Ziakria (the first applicant) and Ms Hang Cuane (the second applicant), seek an order for the eviction of the first respondents (the unlawful occupiers of the property and all those occupying the property through or under them from the immovable property known as [….] Gauteng ("*the property*").

[2] The application was also served on the second respondent, the City of Tshwane Metropolitan Municipality.

[3] The application is only opposed by the first respondents.

[4] The applicants allege that the first respondents and the persons who occupy the property through or under them are residing on the property without any right in law. They are the unlawful occupiers of the property in terms of the Prevention of the Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1988 ("*the PIE Act*"). The applicants assert that they are the lawful owners of the property. The first respondents deny the allegations. Although they concede that they reside on the property, they deny that they have occupied the property unlawfully. Mr Ndlovu, who deposed to an answering affidavit on behalf of the first respondents, claims that he and his family are in lawful occupation of the property by virtue of the sale agreement that he and his wife have concluded with the first applicant in 2013 and that the applicants are aware that he and his family reside on the property. On the face of it, therefore, a dispute of fact has been created.

DISPUTES OF FACT AND THE APPLICABLE LEGAL PRINCIPLES

[5] In dealing with disputes of fact in motion proceedings, Conradie J in *Cullen v Haupt*[1] said:

> "*I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, 'particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop'. The next of better known cases on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (O) at 597, where Horwitz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop.*"

[6] In *National Director of Public Prosecutions v Zuma*[2] Harms DP observed that motion proceedings were really designed for the resolution of legal disputes based on common cause facts. In most applications, however, disputes of fact, whether minor or more substantial, arise. As a result, rules have been developed to determine the facts upon which matters must be decided where disputes of fact have arisen and the parties do not want a referral to oral evidence or trial.

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[1] 1988 (4) SA 39 (C) at p 40F-H
[2] 2009 (2) SA 277 (SCA) para 26

[7] In proceedings for final relief the approach to determine the facts was authoritatively set out by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] as follows:

> "*It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts 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 power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … 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 … 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 … 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 …*"

[3] 1984 (3) SA 623 (A) at 634H-635C

[8] In *Wightman t/a JW Constructions v Headfour (Pty) Ltd & Another*[4], Heher JA dealt with how courts should decide on the adequacy of the respondent's denial in motion proceedings for determining whether a real, genuine or *bona fide* dispute of fact had been raised. He stated:

> "*[11] 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. If one is to take the respondent's answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so, he concluded that many of the disputes were not real, genuine or bona fide …*
>
> *[12] Recognising that the truth almost always lies beyond mere linguistic determination, the 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 …*
>
> *[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a*

[4] 2008 (3) SA 371 (SCA) paras 11-13

bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

BACKGROUND

[9] The applicants assert that the property was registered in their names on 17 August 1994.

[10] During 1995 they leased the property to one Mr Phillip Botha. Mr Botha occupied the property for approximately 9 (nine) years and vacated during 2004.

[11] The applicants reside in Johannesburg. They occasionally visit the property. In October 2018, they visited the property. They found that the garden on the property was neglected and the property was in a state of disrepair.

[12] On 31 March 2019, the applicants again visited the property. To their surprise the garden was tidied-up, the property was decorated with new furniture, old carpets were replaced with wooden floors and more renovations were undergoing. There was a Mercedes Benz motor vehicle parked in the driveway. They met a certain Mr Louis Baloyi who advised them that he was employed by Mr Ndlovu to make renovations on the property. Mr Ndlovu was not available to meet with them. They immediately proceeded to Brooklyn Police Station and opened a case of trespassing against the first respondents. The police could not assist them without a court order.

[13] On 1 April 2019 the first applicant consulted with his attorneys, Patel Incorporated and instructed them to proceed with an application for the eviction of the first respondents.

[14] On 2 April 2019 Patel Incorporated served the first respondents with a letter through the Sheriff demanding that they vacate the property within 20

days from date thereof. A letter and affidavit was also served on the same day upon the second respondent.

[15] On 29 April 2019 another correspondence was sent to the first respondents. The first respondents were once again requested to vacate the property and also cease all renovations on the property.

[16] Mr Ndlovu admits that the property was registered in the names of the applicants on 17 August 1994. He contends that he has no knowledge of the lease of the property to one Mr Botha. He also admits that the applicants reside in Johannesburg although at the time he entered into the sale agreement with the first applicant, he was told that the applicants resided in Mozambique. He claims that he only came to know afterwards that the applicants resided in Johannesburg.

DISPUTES OF FACT

[17] The sale agreement allegedly entered into between Iqbal Ziakria Mohamed (the first applicant) and Hlupeka David Ndlovu and Nongedi Fanny Klaas (the first respondents) reads as follows: (Quotated Verbatim)

> "*The parties hereby agree as follows:*
>
> 1. *That the property with full description [….] is registered in the name of Mahomed Iqbal Ziakria.*
>
> 2. *The selling amount of the said property is R1 200 000,00 (one million two hundred thousand) that the abovementioned property is not financed by any institution. Payment of the amount is as*

follows: R600 000,00 (six thousand rand) is paid in cash on signature as a deposit and the remaining balance will be paid in terms as follows, R25 000,00 (twenty-five thousand) per month for 2 years.

3. *The abovementioned property will be ceded to Hlupheka David Ndlovu and Nongedi Fanny Klaas with all the liability and assets and he will be responsible for renovations as the property is vandalised and the yard needs attention. The parties agreed that Hlupheka David Ndlovu and Nongedi Fanny Klaas will take over possession of the property upon payment of the deposit.*

4. *The parties agreed that until final payment of the balance is paid in full the title deed will not be changed into the purchasers' names and that the property ownership will remain in the name of the seller (Mahomed Iqbal Ziakria). In the event of any default in making payment in respect of the balance the party may be entitled to cancel the agreement forthwith to take the possession of the property.*

5. *The agreement constitutes the entire contract between the parties and any variation, amendment or consensual cancellation thereof shall not be of any force and effect unless reduced to writing and signed by the parties or their authorized in writing.*

6. *Should any party mentioned in the agreement breach or fail to comply with the terms of the agreement the without prejudice to any*

other right the other party shall be entitled to cancel this agreement and take possession of the property.

7. *The parties choose the abovementioned addresses as their respective citandi et executandi for all purposes arising of this agreement.*

8. *Should Mahomed Iqbal Ziakria want the property back in his name, he will have to buy it in the current prevailing market from the buyer.*

Dated and signed at Pretoria on this the 10th day of October 2013.

[18] Mr Ndlovu contends that he was introduced to the property by the first applicant's brother in 2011, and in 2013 after he had inspected the property, he was taken to Segida Attorneys to conclude the sale agreement as well as to arrange the mode of payment. The sale agreement was concluded on 10 October 2013 whereof the first applicant signed it and the second applicant signed as a witness. Mr Ndlovu and his wife also signed the agreement. He further contends that the parties agreed that the purchase price of the property is the amount of R1 200 000,00 (one million two hundred thousand rand). He paid the deposit of R600 000,00 (six hundred thousand rand) on 9 October 2013 and on 28 November 2013 he made another payment of R100 000,00 (one hundred thousand) to the applicant's attorneys of record in the presence of the applicants. Further amounts of R150 000,00 and R50 000,00 were paid to the applicant's attorney of record respectively on 14 January 2014 and 24 March 2014. He has attached copies of the receipts of payments that were issued by Segida Attorneys. He claims to have paid the

balance of R300 000,00 in cash to the first applicant directly but has failed to attach the proof of payment.

[19] Mr Ndlovu further denies that the renovations on the property were still on in 2019 as alleged by the applicants. He contends that he started renovating the property in 2013 after the conclusion of the sale agreement. He spent about R700 000,00 on the renovations. According to him, the renovations were long completed in 2019. He also denies that the property was in a state of disrepair and the garden was neglected in October 2018. He contends that he and his family occupied the property from 2017.

[20] The applicants deny the allegations in the replying affidavit. The first applicant denies that his brother is a South African citizen and/or that he resides in South Africa. He claims that he has one brother who has never taken up residence nor established a business in South Africa as alluded to by the first respondents.

[21] He further denies that he concluded a contract of sale in respect of the property with Mr Ndlovu and his wife. He claims that he has no knowledge of Segida Attorneys who are alleged to have been his attorneys of record at the time. He asserts that on 25 July 2019, his current attorneys of record contacted the Legal Practice Council ("*the LPC*") and enquired about Segida Attorneys. They were advised that the firm was in practice from 2009 to 2016. Mr Lawrence Segida, who was the director of the firm, was struck from the roll of attorneys in 2017.

[22] The files of Segida Attorneys were as a consequence thereof placed under the control of the curator's department of the LPC in Pretoria.

[23] The applicants' attorneys made enquiries with the LPC as to whether the sale was ever recorded in Segida Attorneys' database and the LPC confirmed that the alleged sale is non-existent. The first applicant's name could not be located on Segida Attorneys' database as a client as alleged by Mr Ndlovu. Instead a file for H D Ndlovu was located on Segida Attorneys' database and a requisition of the file was submitted to the LPC. The matter was allocated to another firm of attorneys, namely SSB Attorneys and Conveyancers ("*SSB*"). The applicants' attorneys have been in contact with SSB to ascertain whether the file of H D Ndlovu related to the alleged sale. The file has not been located but from the electronic data captured on the LPC records, the file does not relate to the alleged sale.

[24] An email correspondence from SSB to the applicants' attorneys attached to the replying affidavit dated 5 August 2019 confirms the above averments that SSB contacted the LPC regarding the file that relates to the sale of property. SSB checked their records. The records do not show that they have the file. A certain Lebo from the LPC also checked the list of the files that was provided to SSB. She could not find the file. SSB confirmed having been in possession of a file with H D Ndlovu as a client, but H D Ndlovu is the seller and not the purchaser. The file does not in any way relate to the current matter.

[25] An agreement of sale allegedly concluded by the first applicant and the first respondents has been attached to the opposing papers. It is contended that the reason why the first respondents are in occupation of the property is because they purchased the property from the first applicant in terms of the

alleged agreement of sale. They continued to renovate the property after the conclusion of the alleged agreement and subsequently occupied it. It appears from the papers that a municipal account for the property which has been previously registered in the names of the applicant has now been registered in the names of Mr Ndlovu.

[26] The applicants while they deny that first applicant concluded the alleged agreement, continued to challenge the validity of the agreement to prove that the disputes of fact that arise from the papers are not genuine and bona fide.

[27] In my view all the above-mentioned disputes of fact cannot be ignored. I find them to be genuine and bona fide disputes of fact which are clearly not capable of resolution on affidavits. The first respondents have denied material allegations made in the founding affidavit and further produced positive evidence to the contrary in the answering affidavit. They have admitted the facts and evidence in the applicants' founding affidavit, however, they have alleged additional facts and evidence that the applicants dispute. It can therefore not be argued that the first respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[28] The disputed issues raised in this application ought to be properly ventilated in a trial. It was argued on behalf of the first respondents that the applicants should have foreseen when launching the application that material disputes of fact were bound to develop in that from the applicants' version

they were aware of significant developments on the property. Further that the full purchase price has been paid. The applicants submitted that there is no evidence to show that they knew who the first respondents were prior to the launching of the application. The allegations relating to the payment of the purchase price have been denied as discussed above. I do not find merit in this argument. However, having regard to the applicants' version relating to the renovations that were made on the property, I agree that the applicants should have foreseen when launching the application that material disputes of fact were bound to develop irrespective of whether they knew who the first respondents were prior to launching the application. In view of the importance of the application to the parties, the amount involved and the fact that the application relates to a sale agreement allegedly concluded in 2013, dismissing the application will be unfair.

ORDER

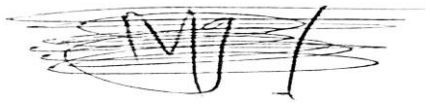
[29] Accordingly, the following order is made:

1. The application is referred to trial.

2. The notice of motion and the founding affidavit shall stand as combined summons. The answering affidavit shall stand as the defendant's plea and the replying affidavit shall stand as a replication.

3. The provisions of the Uniform Rules of Court shall then apply.

4. Costs are reserved.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicants	S Swiegers
Instructed by	Patel Incorporated Attorneys
For the first respondents	M C Mavunda
Instructed by	Ngomane Attorneys
Heard on	20 October 2010
Handed down on	29 January 2021