

IN THE CONSITITUTIONAL OF SOUTH AFRICA

CASE NUMBER: CCT 144/2015

In the matter between:

ISAAC RASEPITILE PITJE

Applicant

And

JOSIAH OUPA SHIBAMBO

First Respondent

ESTHER VELEMINAH SHIBAMBO

Second Respondent

CITY OF TSHWANE METROPOLITAN

Third Respondent

MUNICIPALITY

FIRST RESPONDENT'S OPPOSING AFFIDAVIT

I, the undersigned,

JOSIAH OUPA SHIBAMBO

do hereby make oath and state:

1.

- 1.1. I am the First Respondent in this application by the Applicant to the above Honourable Court for leave to appeal to this Honourable Court against the entire judgment made by Justice Legodi in the High Court of South Africa, Gauteng Division-Pretoria, on the 17th of February 2015;
- 1.2. The facts hereinafter fall within my personal knowledge, unless indicated to the contrary, and are to the best of my belief both true and correct;
- 1.3. Where I make submissions of a legal nature, I have been so advised by my legal representatives, whose advice I accept;
- 1.4. I am a major male with identity number 671230 5591 087, residing at 714 Block G, Soshanguve, Gauteng;
- 1.5. The Second Respondent is my wife, namely Esther Veleminah Shibambo, with identity number 671119 0596 086, who resides at 714 Block G, Soshanguve, Gauteng. The Second Respondent supports me in the opposition of the Applicant's application for leave

to appeal to this Honourable Court and her confirmatory affidavit is attached hereto for the Honourable Court's attention as **Annexure "A"**.

2.

I have received the application for leave to appeal to this Honourable Court (the main application) by the Applicant and condonation application for the late filing of the main application. I wish to deal with the allegations contained in the founding affidavit of the main application hereinafter. I am not opposing the condonation application and will abide by any decision made by this Honourable Court in this regard. I do, however, wish to place certain factors before the Court, which are in my view, necessary to enable the Honourable Court to adjudicate upon the condonation application:

2.1. This is not the first condonation application launched by the Applicant in this matter, neither is it the first time that the Applicant has not adhered to the Rules of Court and has failed to file court documents timeously. The following is relevant:

2.1.1. In the application for eviction before the Court *a quo*, the Applicant failed to file his Opposing Affidavit timeously, which

resulted in an eviction order being granted by default against the Applicant on the 29th of August 2011, after a Notice of set-down was served on the Applicant. I attach the said order and Notice of set-down hereto for the Honourable Court's attention as **Annexures "B" and "C"**;

2.1.2. The Applicant launched another application (the rescission application) in the High Court of South Africa, Gauteng Division, Pretoria under case number 77000/10, for the variation of the eviction order and *inter alia* the registration of the immovable property in the name of the Applicant. I attach the Notice of Motion hereto for the Honourable Court as **Annexure "D"**. During argument of that application it was conceded by the advocate appearing for the Applicant that the Applicant could not succeed with the application for variation and would only be seeking a rescission order of the default eviction order. This is evident from the judgement attached by the Applicant to his main application as Annexure "IRP13" and specifically in paragraph 6 thereof;

2.1.3. The Applicant also failed to file Heads of Argument in the rescission application timeously and in accordance with the

Practice Rules of that court. The Court noted its dissatisfaction with this non-compliance with an appropriate order as set out in paragraph 14 of Annexure “IRP13”;

2.1.4. A rescission order was granted by his Honourable Judge Bam J on the 5th of March 2014 and the Applicant filed his Opposing Affidavit in the eviction application in terms of His Honourable Bam’s order;

2.1.5. The matter was set-down by the Respondents attorneys of record, Macrobert Inc, on the opposed roll on 13th October 2014;

2.1.6. The Applicant failed to file any Heads of Argument and on the date of the hearing of the opposed eviction application the Applicant’s wife came to court, indicating that the Applicant was ill and could not attend court. At that stage the Applicant was represented and there existed no reason for the matter not proceeding due to the Applicant’s unavailability. Prior to the court appearance no mention was made or notice received that the matter would not be able to proceed on the said date;

2.1.7. The matter was postponed by the Court order attached to the Applicant's founding affidavit as Annexure "IRP15";

2.1.8. After the Court *a quo* delivered its judgement on the 17th of February 2015 and the leave to appeal application was dismissed the Applicant launched an application for leave to appeal to the Supreme Court of Appeal of South Africa, but did not comply with the Rules of that Court and had to launch a condonation application for the late filing of that application for leave to appeal. I attach that Condonation application hereto for the Honourable Court's attention as **Annexure "E"**;

2.2. From the above it is clear that the Applicant has a total disregard for the Rules of any and all Courts.

Before I deal with the allegations in the Applicant's Founding Affidavit I wish to record the following *in limine* point:

- 3.1. The Applicant's defence against the eviction order is not that he is a lawful occupier, but that he has a right to property and housing and that he has a claim for the transfer of and registration of the immovable property to his name;
- 3.2. Applicant's alleged claim has no bearing on the First and Second Respondents right to their property;
- 3.3. The Respondents are the registered owners of the immovable property and the Respondents did not give the Applicant the right to occupy their property;
- 3.4. From the above it is clear that the Applicant is not a lawful occupier, but in fact illegally occupying the Respondents' immovable property;
- 3.5. Any claim that the Applicant might have in respect of the property only gives him the right to claim in respect of such an alleged right, but it does not grant him lawful occupation nor does it make him a lawful/legal occupier;

Wherefor I pray that the Applicant's application for leave to appeal be dismissed with costs.

4.

For insofar the Honourable Court does not dismiss the application on the grounds as aforesaid I proceed to deal with the allegations contained in the founding affidavit. For insofar I do not deal with each and every allegation, the omission should not be construed as an admission thereof, but rather a denial. It needs to be mentioned that the allegations contained in the Applicant's Founding Affidavit is in most instances verbatim the same as those contained in the Applicant's Application for leave to Appeal to the Supreme Court of Appeal of South Africa.

5.

AD PARAGRAPH 1.1 THEREOF:

This is noted.

6.

AD PARAGRAPH 1.2 THEREO:

This is noted.

7.

AD PARAGRAPH 1.3 THEREOF:

This is denied and will be alluded to more fully hereinafter.

8.

AD PARAGRAPH 1.4 THEREOF:

This is noted.

9.

AD PARAGRAPHS 2.1, 2.2, 3.1 AND 3.2 THEREOF:

This is admitted, except to note that the Applicant is in possession of the Second Respondent's and my Identity numbers.

10.

AD PARAGRAPHS 4.1 AND 4.2 THEREOF:

This is noted.

11.

AD PARAGRAPH 5.1 THEREOF:

This is noted, but I deny that the Applicant is entitled to the relief sought for the reasons more fully set out in this affidavit.

12.

AD PARAGRAPH 5.2 THEREOF:

This is noted.

13.

AD PARAGRAPH 6.1 THEREOF:

This is not an absolute right and must be weighed against the Respondents right to occupy and deal with their immovable property as they as registered owners thereof see fit.

14.

AD PARAGRAPH 6.2 THEREOF:

The Applicant has had effective access to Court. He has been given ample opportunities to state his case and argue his claims. He has been given more than one opportunity to rectify his non-compliance with the Court Rules and the different courts has granted him several indulgences. It cannot be argued that the Applicant has been denied effective access to Court.

15.

AD PARAGRAPHS 6.3 AND 6.4 THEREOF:

This is denied and the Applicant is put to the proof thereof.

16.

AD PARAGRAPHS 6.5 AND 6.6 THEREOF:

This is admitted.

17.

AD PARAGRAPH 6.7 THEREOF:

This is noted. To date hereof I have not received the judgment referred to and the Applicant already alleged in the Application for leave to appeal (deposed to on 1 May 2015) to the Supreme Court of Appeal that he was waiting for the transcription from IAFRICA TRANSCRIPTION (PTY) LTD.

18.

AD PARAGRAPH 6.8 THEREOF:

This is noted.

19.

AD PARAGRAPH 7.1 THEREOF:

This is noted.

20.

AD PARAGRAPHS 7.2, 7.3, 7.4, 7.5, 7.7, 7.8 AND 7.9 THEREOF:

The information contained in these paragraphs did not form part of any of the allegations made by the Applicant in his opposing affidavit to the eviction application in the Court *a quo* and should not be entertained by this Honourable Court. It is necessary to note that most of these allegations are a verbatim repeat of what Applicant stated in his Founding affidavit to the application for leave to appeal to the Supreme Court of Appeal and in my answer to that application I raised the issue that these were new allegations. Notwithstanding, the Applicant chose to include these new allegations in this application without informing the Honourable Court that it did not form part of the application before the Court *a quo* and without giving a single reason why new allegations should be entertained by this Honourable Court.

21.

AD PARAGRAPH 7.6 THEREOF:

This is noted.

22.

AD PARAGRAPH 7.10 THEREOF:

This noted, but in paragraph 15 of the confirmatory affidavit by Mr MH Pitje filed in the eviction application, Mr MH Pitje denies that the Applicant had any claim to the immovable property.

23.

AD PARAGRAPH 7.11 THEREOF:

The information contained in this paragraph did not form part of the allegations made by the Applicant in his opposing affidavit to the application for eviction in the Court *a quo* and should not be entertained by this Honourable Court. It is necessary to note that these allegations are a verbatim repeat of what Applicant stated in his Founding affidavit to the application for leave to appeal to the Supreme Court of Appeal and in my

answer to that application I raised the issue that these were new allegations. Notwithstanding, the Applicant chose to include these new allegations in this application without informing the Honourable Court that it did not form part of the application before the Court *a quo* and without giving a single reason why new allegations should be entertained by this Honourable Court.

24.

AD PARAGRAPH 7.12 THEREOF:

Although the Second Respondent and I did not view the inside of the immovable property we did view the property prior to purchasing same. This is confirmed in paragraph 26 of my replying affidavit in the eviction application. I deny that the Second Respondent and I knew, or alternatively, ought to have known that the Applicant holds any alleged rights to the property in circumstances where the previous registered owner of the property, Mr MH Pitje, vehemently denies that the Applicant had any rights to the property in his Opposing affidavit to the Applicant's rescission application and in his confirmatory affidavit to my Replying Affidavit in the Eviction application (hereinafter fully dealt with and attached).

25.

AD PARAGRAPH 7.13 THEREOF:

This is noted.

26.

AD PARAGRAPH 7.14 THEREOF:

I admit the clause in the Deed of Sale, but deny that this indicates that the Second Respondent and I knew that the Applicant had rights to the immovable property. All that we knew were that the Applicant was not cooperating, that he was making trouble and eliciting arguments with prospective buyers. According to our knowledge the Applicant was an unlawful occupier of the immovable property.

27.

AD PARAGRAPH 7.15 THEREOF:

The Applicant is referring to the Court order which was granted by default against the Applicant in respect of the application for eviction on the 29th of August 2011, due to the following:

- 27.1. The Applicant served a notice of intention to oppose on the 4th of April 2011 and did not file his answering affidavit timeously;
- 27.2. The application was enrolled in the Unopposed Motion Court of the High Court, Gauteng Division, Pretoria and a notice of set-down was duly served on the Applicant's attorneys of record on the 19th of July 2011;
- 27.3. Notwithstanding the aforementioned, the Applicant failed to file his opposing affidavit timeously and therefore an eviction order was granted by default on the 29th of August 2011;
- 27.4. I admit that the default eviction order was set aside;
- 27.5. The application which was heard by His Honourable Mr Justice Legodi in the court *a quo* was an opposed eviction application and the Applicant was properly represented by an attorney of record and an advocate appearing on his behalf.

AD PARAGRAPHS 8.1 TO 8.8 THEREOF:

This is noted.

29.

AD PARAGRAPH 9.1 THEREOF:

This is denied.

30.

AD PARAGRAPHS 9.2, 9.2.1 AND 9.2.2 THEREOF:

This is denied. I record the following:

30.1. On the 26th of August 2010 the immovable property was already sold to the Second Respondent and I, by the Applicant's brother, Mr MH Pitje in terms of the written Purchase Agreement which was signed on the 1st of December 2009. This agreement is attached to the Applicant's application as Annexure "IRP7";

30.2. On the 7th of July 2010 the Registrar of Deeds at Pretoria signed the Deed of Transfer transferring the right and title to the aforesaid property to the Second Respondent and I. I attach a copy of the Deed of Transfer hereto as **Annexure “F”**;

30.3. The letter of 26 August 2010 referred to in this application for leave to appeal does not allege that the Second Respondent and I had knowledge of the cession. The letter simply states:

“Further note that the aforesaid conduct of Mr Pitje is both unlawful and wrongful in law in that Mr MH Pitje has already in 2001 ceded all his rights in respect of the aforesaid property to our client. There is therefore an inference of fraud”.

30.4. The Second Respondent and I therefore could not deny knowledge of the cession as it was not alleged;

30.5. The Second Respondent’s response that the letter was referred to her attorney for his attention is not indicative of any knowledge on the side of the Second Respondent and I of the alleged cession to the Applicant;

30.6. The Second Respondent specifically said “*You shall talk to them concerning its contents*”. The Second Respondent’s response is attached as **Annexure “G”**.

31.

AD PARAGRAPHS 9.2.3 AND 9.2.4 THEREOF:

This is denied. I record the following:

31.1. In the letter of 16 November 2010 the Applicant did not record that the Second Respondent and I had knowledge of the allegation that the Applicant’s brother ceded the property to the Applicant in 2001. It merely stated:

“It appears that your clients know the whereabouts of Mr MH Pitje and that they know that our client is occupying the property based on his claim to some right to do so, by virtue of the fact that our client has at all relevant times been in occupation of the property and has effected extensive improvements to the property, but, has not once seen your clients as prospective buyers who wanted to view the inside of the property prior to allegedly purchasing same”.

- 31.2. It is thus clear that the Applicant's attorney of record does not refer to the Second Respondent and I having knowledge of the alleged cession of rights to the Applicant, but simply that the Second Respondent and I knew that the Applicant was occupying the property based on "*his claim to some right to do so*";
- 31.3. Our attorney's response to this letter recording that: "*We are proceeding with an application for the ejectment of your clients*" is a clear denial of any wrongdoing on our part and the fact that we are entitled to the ejectment of the Applicant based upon the fact that we are the legal registered owners of the immovable property. I attach this response hereto as **Annexure "H"**.

32.

AD PARAGRAPH 9.2.5 THEREOF:

This is denied. I record the following:

- 32.1. It is with respect not the only inference that can be drawn from the fact that the Second Respondent and I had to view the property escorted by Police;
- 32.2. Another plausible and reasonable inference, which was in fact the situation, is that we had no knowledge of any cession or alleged lawful occupation of the property, but had knowledge of the occupation of an unlawful occupier and that the seller, Mr MH Pitje, had to obtain a protection order against the Applicant not to prevent Mr MH Pitje from entering House no. 4157, Block M, Mamelodi West and also not to prevent estate agents from entering the above property. A copy of the protection order was attached to Mr MH Pitje confirmatory affidavit filed in the eviction application and referred to and attached hereinafter;
- 32.3. The Second Respondent and I did not have knowledge of the Applicant's alleged claim to the immovable property;
- 32.4. It is further significant that Mr MH Pitje, in his opposing affidavit, dated 10 September 2012, to the Applicant's rescission application, stated in paragraph 8 thereof that:

“I deny that the Applicant could ever become the lawful owner of the immovable property, as the Applicant, never complied with his obligations in terms of the agreement between the parties.

Further the Applicant was well aware of the fact that ownership never passed to him and that I was intending to sell the immovable property.

The only reason why I stopped taking prospective buyers to the premises of the property when the Applicant was there, was indeed to avoid a constant confrontation with the Applicant as he used to refuse us entry to the premises and when we did go into the premises he would make trouble or elicit arguments with prospective buyers or myself.

The Applicant was merely being difficult, but was well aware of the fact that ownership never passed to him, that he never complied with the suspensive conditions of the agreement or the alleged obligations of the agreement and that the Applicant never once attempted to transfer the immovable property into his name.”

32.5. The Second Respondent and I therefore could not have known about any alleged rights of the Applicant, because the previous owner vehemently denies these rights and therefore did not inform us of the Applicant's non-existing rights.

33.

AD PARAGRAPH 9.2.6 THEREOF:

This is denied. I record the following:

- 33.1. It is clear from the extract of Mr MH Pitje's opposing affidavit referred to above that the Applicant was indeed not cooperating, that he was making trouble and eliciting arguments with prospective buyers;
- 33.2. Mr MH Pitje also refers in his confirmatory affidavit attached to my replying affidavit in the eviction application in the Court *a quo* that he laid a complaint against the Applicant dated 8 June 2010 giving him notice to vacate the property and notifying him of a complaint in respect of intimidation and harassment. I attach this confirmatory affidavit hereto as **Annexure "I"** and refer the Honourable Court to paragraph 6.2 thereof;

- 33.3. Mr MH Pitje also applied for a protection order against the Applicant as referred to above;
- 33.4. That the Applicant was making trouble for Mr MH Pitje and prospective buyers to such an extent that Mr MH Pitje had to take other steps to ensure their safety, is clear, but I deny that the conduct of Mr MH Pitje substantiates the Applicant's claim that we had knowledge of the alleged cession. Throughout the eviction application the alleged knowledge has been denied by the Second Respondent and I and Mr MH Pitje;
- 33.5. It is humbly submitted that the only inference that can be drawn from the term in the Deed of Sale that "*Eviction, if needed, will be done by the seller at the seller's costs*" is that we had knowledge that the property was being occupied by an unlawful occupier.

34.

AD PARAGRAPH 9.2.7 THEREOF:

This is denied. I record the following:

34.1. Transfer of the immovable property into the names of the Second Respondent and I did indeed take place as confirmed by the Deed of Transfer attached as Annexure “F” hereto;

34.2. What is significant is that the Applicant stated in his founding affidavit to the rescission application that:

“The Third Respondent (Mr MH Pitje) had in the past during January 2010 made numerous attempts to sell my residence and on which occasions I made it repeated and abundantly clear to him that he was conducting himself in an unlawful manner, by virtue of the fact that he did no longer had any rights to my residence and as at the 3rd of September 2001”. This is contained in paragraph 8.10 of the Applicant’s founding affidavit in his rescission application which bundle was made available to the Court a quo when adjudication the application for leave to appeal by the Applicant;

34.3. Notwithstanding the Applicant’s knowledge that Mr MH Pitje was attempting to sell the property he did nothing to prevent any such sale and even after he was informed of the fact that the property was registered into the names of the Second Respondent and I he did not

proceed with an application to Court to have the agreement of sale and the transfer of the property reversed. He had knowledge of the transfer of the immovable property into the names of the Second Respondent and I as early as 22nd July 2010.

35.

AD PARAGRAPH 9.2.8 THEREOF:

This is denied. I record the following:

- 35.1. Mr MH Pitje, throughout the eviction application, denied that the Applicant had a legal claim to the immovable property and confirmed that he did not inform the Second Respondent and I of any legitimate claim by the Applicant to the property;
- 35.2. If Mr MH Pitje continually denied that the Applicant had any legal claim to the immovable property and/or is a lawful occupier of the property there is no argument to be made that the Second Respondent and I had knowledge of the contrary. We only dealt with Mr MH Pitje and Mr MH Pitje, at no stage, informed us of any alleged

claim that the Applicant might have had in respect of the immovable property.

36.

AD PARAGRAPH 9.2.9 THEREOF:

This is denied. I record the following:

36.1. The Applicant wants the Honourable Court to come to the conclusion that the Second Respondent and I had knowledge of the Applicant's alleged claim;

36.2. In the opposing affidavit filed by the Applicant in the eviction application the Applicant sets out his high watermark in respect of our alleged knowledge of the cession in that he states in paragraph 12.6 thereof:

"The Applicants (First and Second Respondents in this matter) have known, or alternatively, ought to have known in detail of my claim to right to own my residence flowing from the said Deed of Sale I have duly concluded with my brother Mr MH Pitje".

36.3. It is not disputed that the immovable property was never registered in the Applicant's name and prior to the sale to the Second Respondent and I, it was in fact registered in the name of Mr MH Pitje;

36.4. I humbly submit that a duly diligent reasonable person, investigating the situation, would not have come to any other conclusion than that Mr MH Pitje was the registered legal owner of the immovable property and had the right and title to sell the property to the Second Respondent and I.

37.

AD PARAGRAPH 9.2.10 THEREOF:

This is denied. I record the following:

37.1. In my founding affidavit to the eviction application the necessary allegations were made indicating that the Second Respondent and I are the lawful registered owners of the immovable property and that the Applicant is in unlawful occupation;

- 37.2. In the answering affidavit filed by the Applicant in the eviction application he makes certain allegations in respect of the alleged cession of the immovable property to him by his brother and alleges that the seller could not sell the property to the Second Respondent and I and that the Second Respondent and I ought to have known about his alleged claim;
- 37.3. In reply to these new allegations the Second Respondent and I, in paragraph 26 of the replying affidavit state: "*These allegations are denied and the First Respondent is put to the proof thereof. We did not have knowledge of the alleged claim by the First Respondent to this immovable property*";
- 37.4. I further deny that this property was secretly purchased. Prior to the sale agreement being entered into between us and Mr MH Pitje we went to the property escorted by Police Officials from the Mamelodi West Police Station, together with an estate agent to view the property;
- 37.5. Mr MH Pitje in his confirmatory affidavit to the replying affidavit in the eviction application states: "*Applicants had no knowledge of any*

alleged claim by the First Respondent". This is found in paragraph 14 of the confirmatory affidavit;

37.6. Mr MH Pitje continues to state: "*I deny that the First Respondent has any claim to the immovable property or that I had any legal duty to inform the Applicants of the First Respondent's alleged claim to the immovable property*". This is found in paragraph 15 of the confirmatory affidavit;

37.7. In the premises, there is no factual basis for the Applicant's allegation that the Second Respondent and I had knowledge of his alleged claim that the right and title in the property was ceded to him by Mr MH Pitje.

38.

AD PARAGRAPH 9.3 THEREOF:

This is denied. I record the following:

38.1. The Honourable Judge did not find that the point *in limine* raised by the Second Respondent and I was bad in law;

- 38.2. This legal point was raised in a Rule 6(5)(d)(iii) notice attached as **Annexure “J”** to an application in terms of Rule 30A by the Applicant that the entire contents of paragraphs 11, 12 and 14.6 of the replying affidavit, as well as the confirmatory affidavit of Mr MH Pitje introduced fresh allegations which ought to have been incorporated in the founding affidavit. This Rule 30(A) application was not granted by the court *a quo*. I attach the Rule 30(A) application hereto as **Annexure “K”**;
- 38.3. The Court *a quo* found that the contents of paragraphs 11 and 12 of the replying affidavit were not new facts;
- 38.4. In respect of the contents of paragraph 14.6 dealing with the Applicant’s alternative accommodation the Court *a quo* found that this was a new fact but that in view of the finding regarding the doctrine of notice and *bona fide* purchaser and the Applicant’s failure to set aside the second sale agreement and transfer of the property into the Second Respondent and my names, it was not necessary to deal with the alternative accommodation aspect. This is found in the judgement attached as Annexure “IRP1” to Applicant’s present application;

- 38.5. In respect of the alternative accommodation I humbly submit that it was the Applicant's duty to, in his opposing affidavit to the eviction application address the issue of alternative accommodation should he be evicted, which he elected not to do. The opposing affidavit does not contain one allegation that the Applicant does not have alternative accommodation and will not be in a position to vacate the immovable property should the Honourable Court grant the eviction order;
- 38.6. The allegations that the Applicant is currently under medical treatment, extremely sick and bedridden were not in any affidavit which was before the Court *a quo* as part of the eviction application and did not form part of the documents upon which the Court *a quo* adjudicated this matter. The Applicant cannot expect the Honourable Court to take allegations into account, which the Applicant elected not to include in his answering affidavit. It is necessary to note that these allegations are a verbatim repeat of what Applicant stated in his Founding affidavit to the application for leave to appeal to the Supreme Court of Appeal and in my answer to that application I raised the issue that these were new allegations. Notwithstanding, the Applicant chose to include these new allegations in this application without informing the Honourable Court that it did not form

part of the application before the Court *a quo* and without giving a single reason why new allegations should be entertained by this Honourable Court.

39.

AD PARAGRAPH 9.4 THEREOF:

This is denied. The following is relevant:

- 39.1. Nowhere in the answering affidavit of the Applicant in the application for eviction in the Court *a quo* did he allege that he had an improvements lien over the property;
- 39.2. The Applicant did not give any detail in respect of alleged improvements and/or monies spent in his affidavits before the Court *a quo*;
- 39.3. If the Applicant gave the necessary information and detail in his answering affidavit in this regard the Court *a quo* would have been in a position to adjudicate upon this alleged claim, but the Applicant elected not to give any detail in this regard and cannot now, after the

fact, request that *viva voce* evidence in respect of matters he did not address in his answering affidavit must be heard;

- 39.4. The only allegation in this regard made by the Applicant in his answering affidavit was in paragraph 12.34 that:

“I have further effected substantial improvement and renovations to my residence pursuant and based on the fact that subsequent to saving the same from the sale and execution that was scheduled to take place by the Sheriff of the Honourable Court at the behest of Nedbank Ltd during 2001 and concluding the aforesaid deed of sale with my brother Mr MH Pitje”;

- 39.5. No allegation is made by the Applicant that the Applicant spent huge sums of money to save the property;

- 39.6. It cannot be argued that the Learned Judge erred and misdirected himself in not taking into account allegations that were not even made by the Applicant.

40.

AD PARAGRAPH 9.5 THEREOF:

This is denied. I record the following:

40.1. The present matter is very clearly distinguishable from the mentioned case law;

40.2. In the present matter the previous registered owner transferred his right and title to the property to the Second Respondent and I;

40.3. The previous owner disputes any claim that the Applicant may have in respect of ownership of the property and vehemently denies any fraud on his part, whilst in the mentioned matter the fraudulent acts were not disputed and the purchasers acted fraudulently. The Second Respondent and I are *bona fide* purchasers;

41.

AD PARAGRAPH 9.6 THEREOF:

This is denied. The following is recorded:

41.1. The application that was launched by the Applicant which led to the rescission of the eviction order was not an application by the Applicant to set aside the sale of the immovable property between the Second Respondent and I and Mr MH Pitje and therefore that application does not comply with this requirement.

42.

AD PARAGRAPH 9.7 THEREOF:

This is denied. The Court *a quo* found that the Second Respondent and I are *bona fide* purchasers of the immovable property and that, because the immovable property was transferred to our names first, our right to the property is unassailable. In this regard the Honourable Court is referred to the matters of Harley v Upwards Spiral 1196 CC and Another 2006 (4) SA 597 (D) and Bowring N.O. v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA).

43.

AD PARAGRAPH 9.8 THEREOF:

This is denied. It is clear that the Applicant had knowledge of the fact that this application was on the roll. In fact:

43.1. The purpose of Section 42 notice is to give proper notification of an eviction application to a respondent;

43.2. In this matter it is clear that the Applicant received proper notice and he confirmed in paragraph 13.2 of the opposing affidavit to the eviction application that:

“I confirm that I have received prior service of the application hence I am able to participate in the proceedings as I am doing”;

43.3. In any event, the Applicant was duly represented at Court when the Court *a quo* made its findings.

44.

AD PARAGRAPH 9.9 THEREOF:

44.1. This is denied. When I deposed to my founding affidavit it was commissioned at the South African Police Services and I was under the impression that the Commissioner commissioned the affidavit according to the Rules;

44.2. For insofar as the founding affidavit was not in accordance with the Rules I re-deposed to my founding affidavit and the re-deposed founding affidavit was attached to the replying affidavit as annexure "D".

45.

AD PARAGRAPHS 9.10 AND 9.10.1 THEREOF:

This is denied. I have already dealt with the alternative accommodation *supra* and refer the Honourable Court to what is stated there. It is significant that the allegation that the Applicant passed on the other immovable property

that he had to another person and that this is not confirmed by any documentary proof.

46.

AD PARAGRAPHS 9.10.2 AND 9.10.3 THEREOF:

This note by the Dr C.D Koekemoer was in fact before the Court *a quo* when this matter was adjudicated upon. It needs to be mentioned that the Applicant never requested the Honourable Court for the opportunity to file an additional affidavit in respect of his personal circumstances and he failed to deal with his personal circumstances in his Opposing affidavit.

47.

AD PARAGRAPH 9.11 THEREOF:

This is denied. The Court *a quo* found that there were no material dispute of fact in the eviction application due to its findings based on the Doctrine of Notice and Bona Fide purchasers and therefore the matter could be adjudicated upon by way of application.

48.

AD PARAGRAPH 9.12 THEREOF:

This is denied and the Applicant is put to the proof thereof.

49.

AD PARAGRAPH 9.13 THEREOF:

This paragraph does not contain any ground for leave to appeal.

50.

AD PARAGRAPH 9.14 THEREOF:

This is denied and the Applicant is put to the proof thereof.

51.

AD PARAGRAPH 9.15 THEREOF:

This is denied and Applicant is put to the proof thereof.

52.

AD PARAGRAPH 9.16 THEREOF:

The Second Respondent and I have the right to equality, the right to enjoy our property and all rights in respect thereof. We purchased the property in December 2009, it was transferred to our names in July 2010 and to date hereof we have been unable to occupy our own property and/or to exercise any rights in respect thereof and/or reap any benefits therefrom.

53.

AD PARAGRAPH 9.17 THEREOF:

This is denied. The Applicant was granted ample opportunity and indulgences to place his case properly before court and ventilate all his allegations in the court *a quo*. As is clear from the allegations contained in this affidavit the Applicant chose not to place all the facts before court and chose not to play open cards with the court *a quo*. He cannot now claim

discrimination if he chose not to use the rules and regulations pertaining to applications which was available to him.

54.

AD PARAGRAPH 9.18 THEREOF:

This is denied. Mr MH Pitje denies compliance with the agreement of sale by the Applicant which is clearly set out in the confirmatory affidavit to the eviction application already attached to this affidavit.

55.

AD PARAGRAPHS 9.19 AND 9.20 THEREOF:

This is denied and Applicant is put to the proof thereof.

56.

AD PARAGRAPHS 10.1 TO 10.5 THEREOF:

This is denied. The following is relevant:

- 56.1. These allegations were not contained in any of the previous affidavits deposed to by the Applicant and were not facts which were adjudicated upon by the court *a quo*;
- 56.2. The Applicant gives no explanation why he did not include these allegations in his affidavit opposing the eviction application and gives no reason why this Honourable Court should now take note of these new allegations;
- 56.3. Annexure “IRP14” has no evidentiary value as it is a letter by the Applicant’s attorney of record to the Estate Agency Affairs Board without any confirmatory affidavit from either the attorney or the Estate Agency Board;
- 56.4. The attorney’s clerk in the employ of my attorney of record, a certain Doné van Heerden, telephoned the Estate Agency Board on Friday the 21 August 2015 and spoke to a certain Amu Maluleke. She confirmed that Bluegloo.Com was previously registered as an estate agent but refrained from renewing their Fidelity Fund certificate since 2013 and has since not been registered as an Estate agent. The sale agreement in question was signed in 2009 and not after 2013. In this

regard I attach a confirmatory affidavit of Doné van Heerden hereto as **Annexure “L”** and refer the Honourable Court to the contents thereof;

56.5. I deny any conflict of interest insofar our attorney of record is concerned and the Applicant is put to the proof thereof.

57.

AD PARAGRAPHS 10.6 TO 10.10 THEREOF:

This is denied. The following is relevant:

57.1. These allegations were not contained in any of the previous affidavits deposed to by the Applicant and were not facts which were adjudicated upon by the court *a quo*;

57.2. The Applicant gives no explanation why he did not include these allegations in his affidavit opposing the eviction application and gives no reason why this Honourable Court should now take note of these new allegations;

57.3. The court order granted by another judge in another Court does not provide any grounds for leave to appeal against His Honourable Justice Legodi's judgement and is irrelevant to these proceedings;

57.4. The Applicant has never before complained that all the relevant parties were not cited in the eviction application before the court *a quo*.

58.

AD PARAGRAPHS 11.1, 11.2, 11.3, 11.3 (sic) THEREOF:

This is denied.

59.

AD PARAGRAPH 11.4 THEREOF:

This is denied. This was never raised in the eviction application, was never admitted and was not common cause.

60.

AD PARAGRAPH 11.5 THEREOF:

The Applicant is seeking to further postpone the finalisation of this matter and frustrate the finalisation of this matter. The fact that he has been delaying and frustrating the process is clearly set out *supra* in this affidavit.

61.

AD PARAGRAPHS 12.1 AND 12.2 THEREOF:

This is denied.

62.

AD PARAGRAPH 12.3 THEREOF:

This is denied. The Second Respondent and I have struggled to obtain possession of our immovable property since we purchased same and it was transferred into our names in July 2010. The litigation has been dragging on since December 2010 when the eviction application was launched against the

Applicant and to date hereof this matter has not been finalised. We are entitled to possession of our immovable property and finalisation of this matter.

63.

AD PARAGRAPHS 12.4 AND 12.5 THEREOF:

This is denied.

WHEREFORE I humbly pray that the Applicant's application for leave to appeal to this Honourable Court be dismissed with costs.

DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at _____ on this the _____ day of _____ 2015, the regulations contained in Government Notice No R1258 of 21 July 1972,

as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS