THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Not reportable

CASE NO: 611/05

In the matter between :

DE VILLIERS, ANDRIES NOLTE	Appellant
- and -	
POTGIETER, P J, NO	First respondent
POTGIETER, A C E, NO	Second respondent
POTGIETER, P J, NO	Third respondent

Coram:	**STREICHER, MLAMBO JJA & COMBRINCK AJA**
Heard:	**17 NOVEMBER 2006**
Delivered:	**1 DECEMBER 2006**
Summary:	**Eviction – applicability of doctrine of notice assumed – transfer of property to second purchaser with knowledge of prior sale not a nullity – separate action for setting aside transfer pending – no basis for alleged right to occupy alleged by first purchaser – second purchaser as owner entitled to eviction order – special costs order.**
Neutral citation:	**This judgment may be referred to as *De Villiers v Potgieter* [2006] SCA 170 (RSA)**

J U D G M E N T

MLAMBO JA

MLAMBO JA:

[1] The respondents, acting in their capacities as trustees of the Potgieter Family Trust, instituted motion proceedings in the Northern Cape Division of the High Court for the eviction of the appellant from a certain property known as Portion 1 of the farm Nooitgedacht 278, situated in the district of Vryburg (the property). The appellant opposed the proceedings and also instituted a counter application seeking to set aside a deed of transfer in terms of which the property was registered in the name of 'Die Trustees van tyd tot tyd van die Potgieter Familie Trust'. The matter came before Williams J who granted the eviction and dismissed the counter application. The appellant abandoned the counter application and it plays no further role in these proceedings. With the leave of this court the appellant now appeals against the eviction order.

[2] The disputes between the parties originate from an agreement for the sale of shares concluded on 21 June 2002 by the appellant and one Kevin Grant Keeley (Keeley) in terms of which the latter sold all the issued shares in Bulpan Beeste (Edms) Bpk (Bulpan) to the appellant for R553 680 ('the share agreement'). The share agreement provided that the appellant would take possession of the shares and effective control of Bulpan on 1 July 2002 or on some other date ('of sodanige latere datum') ('the effective date'). Keeley warranted that as at the effective date Bulpan would be the owner of the property. The purchase price of the shares was payable on the effective

date and against payment of the purchase price the share certificates together with blank transfer forms had to be delivered to the appellant. In the event the purchase price was not paid and the shares were not transferred to the appellant. It is, however, common cause that the appellant took occupation of the property on an unspecified date before 6 September 2002 'uit hoofde van die ooreenkoms'. The share agreement does not provide for the taking of occupation of the property by the appellant. The words 'uit hoofde van' can therefore not be interpreted to mean 'in terms of'. They have to be interpreted to mean 'by reason of'. It follows that it is common cause that the appellant took occupation of the property by reason of the fact that the share agreement had been entered into. Support for the interpretation is to be found in the appellant's answer to the allegation by the respondents that they were the owners of the property and that he was not entitled to occupy the property. The appellant said in his answering affidavit:

> 'Soos reeds hierbo vermeld word dit uitdruklik ontken dat die Applikante die eienaar is van die betrokke eiendom, dat die Applikante geregtig is op oordrag, okkupasie en/of besit van die betrokke eiendom en is ek die persoon wat geregtig is uit hoofde van die aandele transaksie dat die maatskappy die eienaar van die eiendom bly en dat dit deur my as aandeelhouer en direkteur namens die maatskappy geokkupeer en besit mag word. Ek is ook regmatig in besit van die eiendom.'

He therefore alleges that the respondents are not the owners of the property, that Bulpan is the owner of the property and that he as shareholder and

director of Bulpan is entitled to occupy and be in possession of the property on behalf of Bulpan. Although he added that he is also lawfully in possession of the property he advanced no basis for the allegation.

[3] Keeley guaranteed in the share agreement that as at the effecive date of the agreement, all debts of Bulpan of whatever nature, including debts for income tax, would have been settled. During August 2002 the appellant discovered that Bulpan was indebted to the Receiver of Revenue in breach of the guarantee in the agreement. When the appellant took up this issue with Keeley the latter stated that he was in no position to pay the debt and proposed that the share agreement be cancelled and that the appellant purchase the property direct from Bulpan. It was thereafter agreed that Keeley's attorney, Abraham Johannes Swanepoel (Swanepoel) would prepare two agreements, one cancelling the share agreement and another for the purchase of the property by the appellant from Bulpan. The appellant was prepared to go along with this suggestion.

[4] On 4 September 2002 Keeley and the appellant went to Swanepoel's offices to sign the cancellation and the sale of property agreements. On their arrival at Swanepoel's offices only the cancellation agreement was ready for signature and Swanepoel requested two hours to prepare the outstanding agreement. On that basis the appellant signed the cancellation agreement and went into town to while away time whilst the sale of property

agreement was being prepared. He was contacted later by Swanepoel's office and informed that Keeley had taken the agreement to his home and that same would be ready for signature the next morning. When appellant went to Keeley's house the next morning to sign the agreement Keeley informed him that he was no longer interested in going ahead with the transaction as he had received a better offer. The appellant expressed his unhappiness at Keeley at this turn of events and informed him that he was not entitled to behave that way.

[5] On 6 September 2002 Keeley, acting on behalf of Bulpan, concluded an agreement with the respondents for the sale of the property for an amount of R681 000. On 21 October 2002 the appellant having heard of this transaction, telephoned the first respondent and, inter alia, informed him that there was a dispute between him and Keeley regarding the share agreement and the circumstances under which he came to sign the cancellation agreement. He told him that he was in the process of taking steps to set aside the cancellation agreement and to enforce compliance by Keeley of his obligations in terms of the share agreement. The first respondent brought the appellant under the impression that no contract had been concluded and told him that he would not proceed with the matter. The appellant's attorney also spoke to the respondent's attorney Swanepoel who was aware of how it came about that the cancellation agreement was concluded. The conversation took place on 6 September 2002, the day upon

which Bulpan sold the property to the respondents in terms of an agreement drafted by Swanepoel and signed by him as a witness. Swanepoel never told the appellant's attorney about this agreement notwithstanding an undertaking by him to advise Keeley to sell the property to the appellant and to keep the appellant's attorney informed of developments. On 5 November 2002 the property was transferred to the respondents. Swanepoel acted as the conveyancer.

[6] In a letter dated 10 September 2002 the appellant's attorney wrote to the respondents' attorneys:

'Onder die omstandighede is ons van mening dat u deur middel van `n bedrieglike wanvoorstelling ons kliënt oorreed het om tot sy nadeel die kansellasieooreenkoms te onderteken in antisipasie dat `n vervangende ooreenkoms tot stand sal kom. Indien ons kliënt bewus was van die ware toedrag van sake sou hy die koopooreenkoms nooit gekanselleer het nie en mnr Keeley by die terme daarvan gehou het. Ons beskou dus die kansellasieooreenkoms as ongeldig en hou u kliënt by die terme en voorwaardes van die aanvanklike ooreenkoms op 21 Junie 2002 onderteken.'

[7] As stated above the property was transferred to 'Die Trustees van tyd tot tyd van die Potgieter Familie Trust'. In his answering affidavit the appellant contended that the description of the transferee was contrary to the provisions of the Deeds Registries Act 47 of 1937, that the transfer was for that reason void and that the respondents consequently never acquired ownership of the property. The appellant contended furthermore in his

answering affidavit that, under the false pretext that the property would be sold to him, he was persuaded to cancel the agreement and that he had instructed his attorney to institute action against Keeley for the cancellation of the agreement of cancellation and for performance of the share agreement. He instructed his attorney at the same time, in the event of the transfer having been a valid transfer conferring a valid title to the property, to claim as against the respondents an order setting aside the transfer of the property to the respondents on the basis of them having been aware of his claim in respect of the property before transfer was effected.

[8] The appellant subsequently abandoned the contention that the transfer of the property to the respondents is void but we were informed from the bar that he did institute an action in the North West High Court against Keeley and the respondents for the relief referred to above. That action is still pending. The appellant therefore decided to have the questions whether he is entitled to cancel the agreement cancelling the share agreement and whether he is entitled to an order cancelling the transfer of the property or an order directing that the property be transferred back to Bulpan decided in another action. Notwithstanding this decision by the appellant and his apparent acceptance of the validity of the transfer until set aside, he submitted in the court below as well as before us that, in terms of the doctrine of notice, the respondents could not claim to have a valid title to the property.

[9] Under the doctrine of notice a personal right in respect of property may prevail against a real right acquired with knowledge of that personal right.[1] The appellant claims that having cancelled the agreement cancelling the share agreement the share agreement was re-instated; that he therefore has a personal right in respect of the shares; that such personal right in respect of the shares is in effect a personal right in respect of the property; and that the personal right in respect of the property should prevail against the respondents' real right in the property as the real right was acquired by the respondents with knowledge of the appellant's personal right.

[10] The court below stated that an action for the cancellation of the cancellation of the share agreement had not been instituted (it must have been instituted subsequently) – and that the matter consequently had to be decided on the basis of the share agreement having been cancelled ie on the basis that the appellant had no rights other than the rights flowing from the cancellation of the share agreement.

[11] The court a quo erred in its apparent assumption that the agreement cancelling the share agreement could only be cancelled by a court. As stated above the appellant's attorney, on 10 September 2001 notified the

[1] G Lubbe 'A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African law' (1997) *Acta Juridica* 246; and *Cussons and Others v Kroon* 2001 (4) SA 833 (SCA) at 839 para [9].

respondents attorneys that he considered the agreement to be invalid and that he held the respondents bound to the terms of the share agreement. If the appellant was entitled to have the agreement cancelling the share agreement avoided by the court he was entitled to do so himself by notifying the respondents accordingly. In the light of the conclusion to which I have come it is not necessary to decide whether the appellant was entitled to cancel the agreement cancelling the share agreement or to decide whether the doctrine of notice is applicable in the circumstances. These are matters that will have to be decided in the action that has now been instituted by the appellant. I shall merely assume without deciding that the agreement has been cancelled, that the share agreement revived and that the doctrine of notice does apply.

[12] If the doctrine of notice does apply the transfer of the property to the respondents is not a nullity. The respondents are the owners of the property and will remain the owners until the transfer to them is cancelled or the property is transferred to another person.[2] As owners the respondents merely had to allege that they were the owners of the property and that the appellant was in occupation thereof, which they did allege. It was then for the appellant to establish his right to be in occupation of the property.[3] As stated above the appellant does allege that his occupation is lawful but he

[2] See *Cussons and Others v Kroon supra*.
[3] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-E.

advances no basis for the contention other than to admit that he took occupation by reason of the share agreement and to state that as shareholder and director of Bulpan he is entitled to possession of the property on behalf of Bulpan. Nowhere is it alleged that he took occupation in terms of an agreement with Bulpan, the owner of the property, or that he acquired a right to occupy on any other basis. It is also not alleged that he ever became the shareholder and director of Bulpan. He was entitled to the transfer of the shares in Bulpan against payment of the purchase price but it is clear from the agreement cancelling the share agreement that the purchase price was never paid and no mention is made in the cancellation agreement or anywhere else of a re-transfer of the shares. In the circumstances the shares were obviously not transferred to the appellant. In any event if ever the appellant became the shareholder and director of Bulpan he clearly was no longer the shareholder or director at the time when the property was transferred to the respondents and when the respondents claimed his eviction from the property.

[13] In the circumstances the appellant as the registered owner of the property is entitled to an eviction order against the appellant who has not established a right to be on the property.

[14] Keeley and Swanepoel were not joined as parties to these proceedings and no affidavit by either of them was filed. The facts stated above are, in

accordance with what can conveniently be referred to as the Plascon-Evans rule, unless stated otherwise, the facts averred in the respondents' affidavits and admitted by the appellant and the facts averred in the appellant's affidavits. These facts may be denied by Keeley and Swanepoel but should they be true they are disturbing especially in as much as they involve an attorney. Should they eventually, in the pending action against the respondents, be found to be true and depending on the complicity of the respondents it may well become appropriate to alter the costs order to which the respondents would otherwise be entitled. For these reasons the appropriate costs order would be one similar to the order made in *Sindani v Van der Merwe and Others* 2002 (2) SA 32 (SCA) at 38D-I.

[15] In the result the following order is made:

(a) The appeal is dismissed with costs. The 7 day period referred to in para 1 of the order of the court a quo will run as from the date of this judgment.

(b) The respondents shall not be entitled to tax the costs of appeal until the proceedings between the parties and Keeley in the North West High Court have been finally determined by judgment or otherwise.

(c) The appellant is granted leave to apply to this court for an order setting aside or altering the order for costs in (a), provided the application for such order is filed with the Registrar of this court within 21 days of the final determination of the proceedings in the High Court by judgment or otherwise.

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D MLAMBO
JUDGE OF APPEAL

COMBRINCK Wnd AR

[16] Ek het die uitspraak van my kollega Mlambo gelees. Ek kan ongelukkig nie daarmee saamstem nie.

[17] Hy sê tereg in para [12] dat volgens die beslissing van *Chetty v Naidoo* (voetnota 3) moet `n geregistreerde eienaar ten einde ‘n bevel van uitsetting te verkry, slegs beweer dat hy die eienaar is en dat die respondent in besit is. Wat die saak verder sê egter, is dat indien die eienaar erken in sy funderende stukke dat die respondent regmatig besit het maar sy reg beëindig is, moet hy daardie feit bewys. Jansen AR het dit so gestel:

‘If he concedes in his particulars of claim that the defendant has an existing right to hold (eg, by conceding a lease or a hire-purchase agreement, without also alleging that it has been terminated: *Boshoff v Union Government*, 1932 TPD 345 at p 351; *Henning v Petra Meubels Beperk*, 1947 (2) SA 407 (T) at p 412) his statement of claim

obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.' (P20F-G)

[18] Respondente het toegegee dat appellant in besit gestel is deur Bulpan. Eerste respondent het by sy funderende verklaring beide die aandeleooreenkoms en die kansellasieooreenkoms aangeheg. Hy het dit gedoen ten einde aan te toon wat die bron was van appellant se besit en hoe dit beëindig is. Soos in paragraaf [2] hierbo gestel is dit gemene saak dat appellant voor 6 September 2002 in besit gestel is van die eiendom. Dit kan slegs wees deur Bulpan en die waarskynlikhede is oorweldigend dat dit was in afwagting van uitvoering van die aandeleooreenkoms. Dat die gevolgtrekking regverdig is word beam deur eerste respondent in sy repliserende verklaring waar hy meld dat Keeley aan hom gesê het dat hy appellant in besit gestel het. Respondent gee nie voor dat appellant onregmatig in besit gestel is nie. Hulle maak staat daarop dat sy regmatige besit beëindig is of onregmatig geword het by sluiting van die kansellasieooreenkoms. Hulle dra die bewyslas om sodanige beëindiging te bewys.

[19] Op die stukke voor ons (ek beklemtoon dit aangesien ek nie die hof wil bind of beinvloed wat die aksie gaan verhoor) was appellant deur ‘n bedrieglike wanvoorstelling oorreed om die kansellasieooreenkoms te teken. Die respondente het nie gepoog om dit te betwis nie. Hulle kon dit maklik gedoen het by wyse van beëdigde verklarings van Keeley en Swanepoel. Appellant het deur sy prokureur in die brief van 10 September 2002 die kansellasieooreenkoms nietig verklaar soos hy geregtig was om te doen. Sodanige nietigverklaring het tot gevolg gehad dat die aandeleooreenkoms herleef het en appellant se besit steeds regmatig was.

[20] Respondente was te alle tye bewus van appellant se besit selfs nog voor hulle die koopooreenkoms aangegaan het. Hulle was op 21 Oktober 2002 deur appellant vertel dat hy Keeley nog hou by die aandeleooreenkoms en dat hy die kansellasieooreenkoms nietig verklaar het. Die eerste respondent het hom toe doelbewus mislei (op eerste respondent se eie weergawe) deur aan hom te kenne te gee dat die Trust nog onderhandel met Keeley en dat geen koopooreenkoms aangegaan is nie. Eerste respondent se flou verskoning dat die koopooreenkoms tussen die Trust en Bulpan niks met appellant te make gehad het nie gaan nie op nie. Dit lyk meer asof appellant opsetlik mislei is ten einde te voorkom dat hy die oordrag by wyse van interdik verbied.

[21] My slotsom is: appellant was in regmatige besit van die eiendom, respondente moes bewys dat sy besitreg beëindig is, hulle het nie die bewyslas gekwyt nie. Oordrag is geneem met die wete van die appellant se persoonlike reg op die aandele en sy besit uit hoofde van die aandele-ooreenkoms.

[22] Na my mening was die respondente nie geregtig op ‘n uitsettingsbevel nie. Die appèl moes slaag en die bevel van die hof *a quo* dienooreenkomstig gewysig word.

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P C COMBRINCK
WNDE APPèLREGTER

STREICHER AR

[23] Ek stem saam met die uitspraak van my kollega Mlambo AR en wens die volgende by te voeg. Dit is natuurlik so dat indien `n eienaar in sy funderende stukke erken dat die persoon in besit van sy eiendom `n reg het om die eiendom te okkupeer en nie ook beweer dat daardie reg om die eiendom te okkupeer beëindig is nie, die eienaar geen skuldoorsaak uitmaak nie. Dit is ook so dat indien die eienaar beweer dat die okkupeerder regmatig in besit van die eiendom gekom het hy ook moet bewys dat die besit beëndig is. Ek stem saam met my kollega Mlambo, vir die redes deur hom genoem, dat die respondente nie beweer het dat die appellant regmatig

in besit van die eiendom gekom het nie. Daar was dus geen bewyslas op die respondente om te bewys dat regmatig verkrygde besit tot `n einde gekom het nie. Soos uitgewys deur Mlambo sê die appellant wel in sy antwoordende verklaring dat hy regmatig in besit is maar verstrek hy geen feitelike basis vir die bewering nie. Die eerste respondent in sy repliserende verklaring sê dat Keeley hom verseker het 'dat die kontrak met De Villiers geldiglik gekanselleer is en (dat hy voorts gesê het) dat hy wel aan De Villiers okkupasie gegee het in die sin dat hy 30 beeste op die betrokke grond laat loop, maar dat hy hom kennis sal gee om die eiendom te ontruim'. Ten beste vir die appellant kan moontlik aan die hand van hierdie bewering geargumenteer word dat dit uit die stukke blyk dat hy regmatiglik `n okkupeerder ter bede geword het. Indien sodanige okkupasie nie deur Bulpan Beeste (Edms) Bpk as eienaar beëindig is nie is dit duidelik dat dit deur die nuwe eienaar beëindig is.

[24] `n Bevel ooreenkomstig die bepalings van para [15] word gevolglik gemaak.

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P E STREICHER
APPèLREGTER