

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

Case No. 2419/19

In the matter between:

K[...] E[....] S[....] as the

Executor of the Estate Late K[...] P[...]

APPLICANT

and

N[...] C[....] X[....]

FIRST RESPONDENT

PORT ST JOHAN'S LOCAL MUNICIPALITY

SECOND RESPONDENT

JUDGEMENT

DUKADA AJ:

[1] The Applicant, in her representative capacity as the Executrix of the Estate of the late K[...] P[...], is seeking an order for the First Respondent to vacate certain

premises referred to as Erf 560230 situate at Madakeni Location, Gomolo Administrative Area, Port St Johns. She also seeks ancillary orders for the Sheriff and the police to assist in the execution of the order for vacation of the premises in question by the First Respondent. The application is opposed by the First Respondent. No relief is sought by the Applicant against the Second Respondent except that the Second Respondent should assist the First Respondent with accommodation in the event of being evicted from the premises. The application is in terms of the provisions of Act No. 19 of 1998.

[2] It is common cause that the Applicant is a daughter of the late K[...] P[...] who was married to N[...] N[...] T[...]. After the death of K[...] P[...] ("P[...]"), the Applicant sought and obtained a letter of authority from the Master of this Honourable Court in terms of the provisions of section 18(3) of the Administration of Estates Act (No. 66 of 1965). It is on this basis that the Applicant is claiming her *locus standi* to apply to this Honourable Court for the eviction of the First Respondent from the premises in question.

[3] In substantiating the claim for the property in question, the Applicant claims:

"12.

Whilst Mr. P[...] was with his wife N[...] the third wife, he was given a piece of land being Erf no 560230 situated at Madakeni Location, Gomolo Administrative Area in the district of Port St John's and he built his own homestead in the said land and

such is the homestead that is in dispute in these proceedings.

13.

The said piece of land was not registered to any deeds office which is the custom in the rural areas but the headman of the locality is tasked to give people land and such be witnesses by the community members. MR. JOJWENI THOZAMILE MKABA was present when the said piece of land was given to my father the deceased as the witness representing the P[...] family."

[4] The Applicant claims that the First Respondent was not a lawful wife of the deceased but a mere girlfriend. Conversely, the First Respondent valiantly contends that at all material times she was married to the deceased. In paragraph 6 of her answering affidavit, the First Respondent further states:

"6.

In the unlikely event of this special plea being dismissed I crave leave of this Honourable Court to give this background.

6.1 It was in **1986** when I got married to the late **K[...] P[...]** which marriage is disputed by the Applicant as was the case in the Domestic Violence Case no. 154/2012 held in **PORT ST JOHNS**, which was argued and oral evidence was led, as well in the Eviction application

made in before the Magistrate Port St Johns under case number 31/2016.

6.2 *Before I got married to the deceased I had a homestead of my own at MAGCAKINI LOCALITY PORT ST JOHNS upon which we were staying as lovers up until deceased proposed marriage to me to which I agreed.*

6.3 *In tum deceased through his father sent his kinsmen to my family for lobola negotiations amongst whom there was **M[...]** **X[...]** representing the **K[...]** **P[...]**, and as such lobola was paid, as a result three beasts in monetary value were paid."*

[5] The First Respondent further states that the deceased was bed ridden for sixteen years before his death, as he was sickly, he had fits that often attacked him leaving him dump for weeks and months after every attack, this was the case even before she got married to him. The First Respondent contends that all this was known by the Applicant even during the Domestic Violence case 154/2012 and the Eviction case at Magistrate's Court under case number: 31/2016. Accordingly, the Applicant should not have proceeded by way of application in this Honourable Court because she definitely anticipated a dispute of fact. At paragraph 11 of her answering affidavit, the First Respondent, *inter alia*, states:

*"I re-iterate that the site was allocated to me by the sub headman known as **M[...]***

X[...] and during the allocation one M[...] X[...] was present, the said allocation was later confirmed by the late CHIEF NGUBEZULU JACKSON NDAMASE."

[6] The First Respondent also claims that she had been in occupation of the premises since February 1986 for a period in excess of thirty-two years. In paragraph 28 of her answering affidavit, she, *inter alia*, states:

"I have openly continuously without force and as an owner occupied these premises".

[7] It is important to mention that prior to the institution of these proceedings the Applicant brought eviction proceedings against the First Respondent in the Magistrate's Court, Port St Johns. The application was dismissed on the basis that she failed to satisfy the requirements of Act No. 19 of 1998 and also failed to include the other beneficiaries in the application. Thereafter the Applicant instituted review proceedings in this Honourable Court under case number: 2681/2017 and it is common cause that these proceedings are still pending.

[8] The First Respondent has raised the following point *in limine*, namely:

(a) *Lis alibi pendens;*

(b) The identity of the person who owns the land in question.

[9] The First Respondent opposes these proceedings on the ground that the same relief sought by the Applicant in these proceedings is identical to the one already claimed by the Applicant in the review proceedings which are pending before this Honourable Court. Mr Ngumle, counsel for the First Respondent has referred this court to the decision of the Supreme Court of Appeal in **Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others**¹ the Supreme Court of Appeal held:

" As its name indicates, a plea of /is alibi pendens is based on the proposition that the dispute (/is) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The Policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years."

[10] In **Aon South Africa (Pty) Ltd v Van den Heever NO and Others**² the Supreme Court of Appeal, dealing with the same argument *albeit* in the context of *res judicata* plea. Held :

¹ 2013 (6) SA 499 (SCA) at para [2].

"It is correct that there is a technical distinction between the plaintiffs in the present action and the plaintiffs in the previous action, but that is a matter of form not substance. The liquidators of Protector are the persons who sought and obtained the liquidation of Financial Services and they did so on the basis of the judgment they obtained in the previous action. As matters stand at present they are the only creditor of Financial Services. The sole purpose of the litigation is to recover the amount of R50 million, in order that it can be distributed to Protector on the winding up of Financial Services. To all intents and purposes the liquidators of Financial Services are merely surrogates for the liquidators of Protector. The fact that the liquidators of both companies are employees of the same firm of professional liquidators lends emphasis to this point."

[11] The Supreme Court further stated in paragraph [26]:

"..... In those circumstances it seems to me that there was a complete identity of interests between them and it would be artificial to say that findings against or in favour of Financial Services in the previous case would not be binding upon Glenrand."

[12] The contention by the Applicant is that before the Magistrate's Court, Port St

² 2018 (6) SA 38 (SCA) at paras (25), (26) and [27].

Johns, she was litigating against the First Respondent in her personal capacity whereas in this court she is suing the First Respondent in her representative capacity as the executrix of the estate of her late father, K[...] P[...]. I agree with counsel for the First Respondent that the distinction made by the Applicant is artificial and more of form than substance. In these proceedings as well as the review proceedings already pending in this court the Applicant is suing the First Respondent for an identical relief i.e to evict the First Respondent from the premises in question. I accordingly uphold the point *in limine* raised on behalf of the First Respondent and the application should be dismissed solely on this ground.

[13] The First Respondent has also raised an issue with the manner in which the Applicant presented her cause of action in the Magistrate's Court, Port St Johns and in this court. In the Magistrate's Court, the Applicant sued the First Respondent for eviction on the ground that the property in question belonged to her late grandfather whereas in these proceedings she claims the property to be belonging to her late father. According to the First Respondent, the Applicant has no *locus standi* as the executrix of the estate of her late father because the property in question was not owned by her late father. It is the contention of the First Respondent that for the Applicant to succeed in terms of the provisions of section 4(1) of Act No. 19 of 1998 she must prove that her late father was the owner or in control of the premises in question. Counsel for the First Respondent drew to the attention of the court the contradictory manner in which the Applicant pleaded her case before the Magistrate's Court, Port St Johns and in this court. Counsel further contended that the contradiction of the cause of action in the Magistrate's Court, Port St Johns and

the present case is material and goes to the root of the entire case presented by the Applicant before this court.

[14] I do not find the contradiction made by the Applicant as material to the extent of affecting her entire case. Assuming that the property belonged to the Applicant's late grandfather, the Applicant is entitled as the executrix of the estate of her late father because in all probabilities the latter assumed either ownership or control of the property after the death of the grandfather.

[15] Whether the First Respondent was married to K[...] P[...] is a serious dispute of facts in these proceedings. I have already showed this dispute of facts in the abovementioned paragraphs. Therefore, the version of the First Respondent should prevail in these motion proceedings as set out in the well-known case of **Plascon-Evans Paint (Ltd) v Van Riebeeck Paint (Pty) Ltd**³ This court must assume that at the time K[...] P[...] died he was married to the First Respondent. If the latter was married to K[...] P [...], she cannot be regarded as having occupied the property unlawfully, more especially when she claims to have been in occupation of the property for a period of thirty-two years. Accordingly, the Applicant has failed to prove that the First Respondent is in unlawful occupation of the land in question and such occupation is hit by the provisions of section 4 of Act No.19 of 1998.

[16] Accordingly, the application is dismissed. There is a dispute between the parties as to whether the Applicant should pay costs in her personal capacity or

³ 1984 (3) SA 620 (AD) AT 634E - 635C.

such costs should be recovered from the estate. I am of the view that costs should be recovered from the estate because there is no basis for this court to order the Applicant to pay costs in her personal capacity.

Acting Judge of the High Court

N Dukada

Date of argument 26 June 2020

Date judgment delivered 21 July 2020

For Applicant Mr Manitshana

Instructed by Manitshana Tshozi Inc.

For Respondent Mr Ngumle

Instructed by FT Tayi & Co.