IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 39747/19

DATE: 14 January 2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED:

In the matter between:

KUKI BELLA HLATSWAYO	Applicant
and	
NOMSA NDLOVU	First Respondent
THE JOHANNESBURG METROPOLITAN COUNCIL	Second Respondent

Coram: Ternent AJ

Heard on: 7 November 2022

Digitally submitted by uploading on Caselines and emailing to the parties

Delivered: 15 January 2023

JUDGMENT

TERNENT, AJ:

[1] In an order which was granted by Moorcraft AJ, on 14 June 2021, he ordered that the application should not be enrolled again until an affidavit had been obtained from the applicant's attorney to explain why there was no appearance by the applicant after the matter was stood down before him on 14 June 2021. It is not apparent to me whether or not that affidavit was ever filed. I enquired from the applicant's counsel who his instructing attorney was whereupon he informed me that a new attorney Mr N G Mokhaeukhi, had been appointed. As such it was clear to me that he would have no knowledge of the events before Moorcraft AJ and would be unable to deliver an affidavit. Needless to say, the application had been allocated to me and the matter proceeded on my opposed roll.

[2] The applicant seeks the eviction of the first respondent and all of the persons holding occupation through her from the property Erf [....], J[....] Extension 1 Township, Gauteng Province (*"the property"*) in terms of section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (*"the PIE Act"*). Orders are also sought directing the Sheriff or his Deputy to evict the first respondent and any occupiers and ordering the first and second respondents to pay the costs.

[3] In support of the application, the applicant furnished a title deed, [....], from which it is apparent that the estate of the late Nomvula Flora Moloi ("the deceased"), the owner of the property, sold it to her on 9 June 2017 and which registration of transfer was effected in the Deeds Office in Pretoria on 11 January 2018. The applicant alleges that the property was sold to her by Emma Nkabinde ("Nkabinde"),

the deceased's niece. It appears that Nkabinde's mother namely, Nakusa Lesia Nkabinde, who is also deceased, and the deceased were sisters,. The written offer to purchase reflects that Nkabinde, acting on behalf of the estate of her deceased aunt, sold the property to the applicant for a purchase price of R22 000,00 and that the agreement was concluded during September 2016.

[4] The applicant alleges that the deceased had let the property to Maria also known as Nombuyiselo Ndlovu and that she had occupied the property since 2001. She too is deceased. Her daughter, the first respondent, now occupies the property.

[5] The applicant avers that the first respondent's occupation is unlawful more particularly because she is the owner of the property. The allegation is made that Nkabinde told the first respondent, in the applicant's presence, that the transfer process was underway and that on registration of transfer she would have to vacate the property to which the first respondent agreed. Subsequent the transfer, however, the first respondent refused to vacate the property.

[6] As a consequence, the applicant states that it is reasonable, in the circumstances, for an order for the eviction of the first respondent and any other occupiers in the property to be granted.

[7] Insofar as the justness and equitability of the order is concerned, the applicant simply alleges that the first respondent is an adult, she is capable of obtaining employment and she is capable of earning sufficient income to provide for herself and her family and pay for accommodation. None of these allegations are underpinned by any facts. That is the sum total of the affidavit.

[8] At the outset, there was no report furnished to the Court from the second respondent. The Court must, if it finds that the eviction order is appropriate comply with section 4(7) of the Act which provides that:

> *"7.If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so,*

after considering all the relevant circumstances, including, except where the land is sold in a sale execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other organ of State or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[9] The first respondent denies that she is in unlawful occupation of the property and says that her late mother, Ndlovu, purchased the property from Nkabinde's late mother for R15 000,00 during May 2001, on her retirement. She informs the Court that the deceased was the twin sister of Nkabinda's mother. She alleges that if the property was sold to the applicant by Nkabinde, she committed a fraud as she had already sold the property to Ndlovu in 2001. The first respondent and her siblings allegedly inherited the property on the mother's death. She together with her siblings (albeit that their number and names are not mentioned) and her son occupy the property. She avers that the property is her primary residence and that she has been staying in the property since 2008 after joining her late mother and sisters, about which no detail is given, in Johannesburg.

[10] She avers that it would not be just and equitable to evict her as she will be rendered homeless as she has no other property to go to.

[11] In confirmation of these allegations she attaches two affidavits. The first is signed under oath at the Jabulani SAPS' offices, by Nkabinde's mother, dated 4 October 2003. She attests to the fact that she is the twin sister of the deceased and when she died the deceased's husband one James Moloi's death certificate and marriage certificate and other documents went missing. It also bears the SAPS' date stamp of 18 October 2003. The second is signed under oath at the SAPS' Johannesburg Central and dated 23 August 2001. Nkabinde confirms under oath that the first respondent's mother purchased the house from her on 30 May 2001 and that she was paid what appears to be R11 000,00 with a balance of R4 000,00 still due and which was to be paid by the end of July. The first respondent avers that the property was purchased for R15 000,00 but does not inform the Court whether or not the balance was paid to Nkabinde.

[12] A deed of transfer reflecting that the deceased was the owner of the property is also attached under Deed [....]. The deceased's death certificate and the abridged death certificate from the Home Affairs office, dated 2 February 2015, is also furnished. The first respondent by way of a blanket denial baldly denies that she agreed to vacate the property but does not provide the Court with any further information as to whether or not this event occurred.

[13] In reply, the applicant does not dispute that this sale may have occurred but pointedly affirms that if so, this sale self- evidently is not in compliance with the Alienation of Land Act 1981, in respect of which it is trite that in order for immovable property to be sold, the agreement of sale needs to be reduced to writing and signed by both of the parties. As a consequence, the applicant says that this purported sale was void *ab initio.*

[14] The applicant's counsel relied exclusively on the title deed which he submitted affirms the applicant's title to and ownership of the property and that the first respondent ought to be evicted. A title deed is the best evidence of ownership[1].

[15] I requested the applicant's counsel to address me on the failure of the second respondent to provide a report. His response was unhelpful as he submitted that the respondent was supposed to be in Court and it was an error if they were not but in the circumstances the order should be granted and costs should be awarded against the first respondent.

[16] The first respondent's counsel did not pursue any points under section 4(2) of the Act and in her supplementary heads as well focussed on the issue of whether or not it was just and equitable for the eviction of the first respondent, her siblings and children. This was well-advised given that there had been compliance with section 4(2) and the first respondent had received proper notice of the eviction proceedings having not only been served with the main application but also with a section 4(2) notice, on 8 June 2021, when it was personally served upon her.

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[1] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1992 ZASCA 186; 1993(1) SA 77(A) at paragraph [82} and R v Nhlanhla 1960(3) SA 568 (T)

[17] Instead, she submitted, perhaps accepting in the face of the applicant's ownership of the property, that it would not be just and equitable to evict the first respondent. She said that this Court had a duty to direct the second respondent to provide a report about the eviction of the first respondent and any other occupiers of the property as she had no alternative accommodation. She sought an order that costs be costs in the cause.

[18] The first respondent's counsel affirmed to the Court that no counter-application had been launched by the first respondent and no steps had been taken against Nkabinde.

[19] The applicant's counsel asserted that the applicant is entitled to her property and has to stay in alternative accommodation because of the first respondent's unlawful occupation. He submitted that if the Court was inclined to grant an eviction order, it should operate from 31 December 2022. Because the applicant had been kept out of her home for an unduly long time, this would be a fair and reasonable eviction date. In the alternative, and to the extent that the second respondent reared its head, and provided alternative accommodation to the first respondent, the eviction order should operate from 8 February 2023.

[20] It is clear that the applicant has provided incontrovertible evidential proof of her ownership of the property. To the extent that Nkabinde had sold the property to the first respondent's late mother, the formalities for the sale of land have not been complied with and that is the end of the matter. The purported sale is *void ab initio*. Accordingly, the first respondent would have a claim against Nkabinde for repayment of any monies paid towards the purchase price, as contended.

[21] It is clear that the first respondent, her siblings and son are unlawful occupiers of the property as they have no legal right to occupy the property and do so without the consent of the applicant. The first respondent, her siblings and son have been in unlawful occupation of the property for some four years.

[22] It is trite that the applicant has no obligation to provide alternative accommodation to the first respondent under the common law. As such she should

be entitled to evict the first respondent.

[23] The Constitution of the Republic of South Africa, 1996, has impacted on the common law so that Section 26(3) provides that *:*

> *'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.'*

[24] In the matter of *Pheko and Others v Ekurhuleni Metropolitan Municipality)*[2]*,* the Constitutional Court affirmed that Section 26(3) does not permit legislation authorizing evictions without a court order. The PIE Act reinforced this by providing that a court may not grant an eviction order unless the eviction would be just and equitable in the circumstances. The court has to have regard to a number of factors including but not limited to :

(a) whether the occupants include vulnerable categories of persons (the elderly, children and female-headed households);

(b) the duration of occupation and

(c)the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternative accommodation for themselves.

[25] Another principle that has crystalised is that municipalities must be joined where the eviction is likely to result in homelessness. The reason is that the eviction may trigger constitutional obligations on the part of a municipality, envisaged in section 26 of the Constitution, to provide alternative accommodation in the event the evictees are unable to obtain it themselves. The duty to provide alternative accommodation applies not only when an organ of state evicts people from their land but also when a private landowner applies for the eviction of unlawful occupiers. It is

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[2] *2015 (5) SA 600 (CC) (7 May 2015)*

not enough to only join the municipality. The landowner must ensure that there is a report before court from the municipality dealing with provision by the municipality for alternative accommodation as is required by the Constitution.

[26] In the matter of *ABSA Bank v Murray and Another*[3], the court held that :

> "*in (its) view, the failure by municipalities to discharge the role implicitly envisaged for them by statute, that is, to report to the Court in respect of any of the factors affecting and accommodation availability and the basic health and amenities consequences of an eviction, especially on the most vulnerable such as children, the disabled and the elderly not only renders the service of the section 4(2) notice superfluous and an unnecessarily costly exercise for the applicants but more importantly, it frustrates an important objective of the legislation. It will often hamper the Court's ability to make decisions which are truly just and equitable. If PIE is to be properly implemented and administered, reports by municipalities in the context of eviction proceedings instituted in terms of the old statute should be the norm and not the exception."*

[27] The applicant made no effort to obtain the report from the second respondent. I pertinently raised it with the applicant's counsel. The second respondent has, as has come to be expected, done nothing at all. The first respondent has also done very little to place information before this court which I would have expected her to do, in the face of a possible eviction.

[28] As set out in *Standard Bank of South Africa v Dhlamini*[4] the onus to determine relevant circumstances is dependent on the circumstances of each case. The problem, as also experienced here, is this Court is given very little assistance to make this decision due to the paucity of evidence from the applicant and the first respondent as to the possibility of homelessness. It is clear to this Court that it is premature to evict the first respondent and her family when there is no suggestion

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[3] 2004 (2) SA 14 (C) at paragraphs [41] and [42]

[4] 2013 JDR 0973 (GNP) at paragraph [36]

that the first respondent is employed and that she will be able to find alternative accommodation. In order for this Court to assess whether it would be just and equitable to evict a female headed household where the first respondent has a son and appears to have siblings, possibly sisters, also female, it is necessary that they have alternative accommodation.

[29] As such and although I am of the view that the first respondent has no defence to the eviction application, I am unable to grant an order for eviction because I cannot determine whether it would be just and equitable to do so. Any order made now, as submitted to me, by the first respondent's counsel, will render the first respondent and the family members homeless.[5]

[30] *"Most glaring, to grant the eviction as requested by the applicants without having considered all the circumstances would offend our Bill of Rights".*[6]

[31] In the premises, the following order is made:

ORDER

31.1 The application is postponed sine die;

31.2 The second respondent is ordered to deliver within 20 days of service of this order upon it a report to this Court on the exact conditions of the first respondent's occupancy, detailing her and her siblings personal details, the family structure, whether or not she and her siblings are vulnerable persons, how many children are in the family, their needs, special or otherwise, sources of income, and if they would be rendered homeless such that temporal accommodation will be needed and how soon it can be made available;

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[5] ***Port Elizabeth Municipality v Various Occupiers*** 2005 (1) SA 217 (CC) at paragraph 28; ***The Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Mark Lewis Steele*** 2010 (9) BCLR 911 (SCA)

[6] ***Pillay and 2 others v Ramazan and 2 others*****,** unreported case no: 9757/2020 dated 26 April 2022

31.3 The costs of the application are to be costs in the cause.

P V TERNENT

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Appearances

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