REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

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

18/5/2017
DATE

SIGNATURE

CASE NO: 96124/2016

18/5/2017

In the matter between:

SEAN VAN COLLER	First Applicant
NICOLE ANNA VAN COLLER	Second Applicant

and

KAGISO MACHELE	First Respondent
ZOLEKA ELIZABETH MACHELE	Second Respondent
ALL OCCUPIERS OF NO 27	
2ND ROAD HYDE PARK	
EXTENSION 42, SANDTON	Third Respondent
CITY OF JOHANNESBURG	Fourth Respondent

(ALSO KNOWN AS ERF 256 HYDE PARK EXTENSION 42, SANDTON GAUTENG)

JUDGMENT

MIA, AJ

[1] The applicants seek an order evicting the first second and third respondents from the property situated at 27 2nd Road, Hyde Park, Extension 42, Sandton, also known as Erf 256, Hyde Park, (the property). The applicant seeks that relief in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (the Pie Act). The application is opposed.

[2] The issue for determination is whether the applicant was entitled to bring the application and whether the respondents are unlawful occupiers of the premises. The respondent disputed that they were entitled to do so and denied that they were unlawful occupiers. A further issue raised was whether there was proper notice to the third respondent, a tenant on the above premises where the premises was sold subject to a lease. The court was requested to grant an order for eviction in terms of section 4(1) of the Pie Act. Thus the final issue for determination was whether it was just and equitable to grant an order for eviction in the present matter.

[3] The applicants (the Van Collers), are married to each other in community of property. The first applicant attended an auction at the office of the sheriff of the High Court Sandton South on 29 November 2016 and purchased the property on auction from the Sheriff. The first and second respondents (the Macheles) are married to each other and were the registered owners of the property when the application was launched. The Macheles have a tenant on the property having concluded a lease agreement with one Peter Hudson. The application was served on the third respondent as all those occupiers of the property but not on Peter Hudson specifically. Mr Hudson's occupation of the property was never terminated. Having received no notice personally there was no notice to oppose the application from Mr Hudson.

[4] The application was issued on 12 December 2016 and served on the first and second respondents as well as a third respondent and the fourth respondent.

The Macheles served their notice of intention to oppose on 6 January 2017 and their answering affidavit on 2 February 2017. The Collers filed their replying affidavit on 22 February 2017, which was a few days late, for which they sought condonation which I granted. The Macheles however raised a preliminary point that the Collers lacked *locus standi* to launch the application on 12 December 2016 on the basis that the Collers were not the registered owners of the property when the application was launched. The Macheles were still in occupation of the property when it went on auction. Before the auction, the sheriff indicated the auction was subject to a lease being in place. The first applicant was aware that the property was occupied by the bond holders namely the Macheles and possibly a tenant.

[5] Counsel for the Van Collers, Mr Jacobs, argued that they were entitled to approach this court for the relief sought as they are the persons in charge of the premises. He conceded that they were not the registered owners on the date that the application was launched. He argued however that the Pie Act provided for the "registered owner" or "a person in charge of the premises" to bring the application and the Van Collers fell under the second group of persons in the Pie Act as they were not the registered owners. In support of his submission he argued that the Sheriff had control and possession of the property in a sale in execution and passed same to the successful bidders. He referred to the example of a judgment debtor in a matter of insolvency and argued that the property passed to the Master of the High Court and to the trustee after the latter was appointed and did not remain part of the judgment debtors estate. The control of the property passed to the Master and therewith the interest of all the creditors. Similarly he argued that the control of the property passed to the Sheriff and thus to the Van Collers, putting them in charge of the property.

[6] He argued further that the effect of an attachment of a property by the Sheriff is that it is placed it in the hands of the Sheriff who passed the property to the new owner. In the present case, the Macheles as previous owners had until the

last moment of the actual sale to redeem their property. He, referred to authority where courts regarded the "last moment before actual sale" to be the date when ownership is passed rather than the date of the actual sale in the form of acceptance of the successful bid, signature of acceptance of offer to purchase etc.(*Simpson v Klein NO & Others* 1987(1) SA 405 (W) at 411C-D; *Shalala v Bowmen NO & Others* 1989(4) SA900 (W) at 905E-G). This view would hold in the present matter that the ownership had not passed upon acceptance of the successful bid and it follows then that the applicants were not owners of the property at the time the application for eviction was launched.

[7] Mr Jacobs sought to distinguish the above authorities on the basis that the actual sale in execution marked the point of no return and argued that the principle in the cases referred to above applied only in instances of insolvency where the interests of the judgement creditor was weighed against a *concursus* of creditors and differed from the instance such as the present - a sale in execution where an innocent third party purchased the property at an auction.

[8] Counsel further submitted that it was untenable that the applicants would receive the risk of profit and loss without the benefits of enjoying the fruits of the property. That it was untenable they would be required to insure a property they did not enjoy the benefit of as this would amount to receiving the risk without the profits or fruits of the purchase. He argued that the Macheles' submissions that the Van Collers only received the risk loses sight of the fact that the Van Collers received control over the property when the sheriff passed it to them at the sale in execution. In the present instance control over the property passed to the sheriff who in turn passed control over to the Van Collers together with the risk when he passed the risk.

[9] In response to the Van Collers averments regarding ownership, the Macheles attached to their papers a copy of the Windeed report dated 30 January 2017

reflecting that they are still the registered owners of the property. Mr Schoeman, counsel for the Macheles referred to section 1 of the Pie Act which provides:

"'**owner**' means the registered owner of land, including an organ of state;

'**Person in charge**' means a person who has at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question."

[10] He argued that the Macheles were the registered owners and entitled to be on the property when served with the notice of motion. As the registered owners they did not require anyone else's permission to be on the premises. In view hereof, he argued that the application be dismissed with costs on the attorney client scale.

[11] Mr Jacobs argued in reply that the Van Collers had since become the registered owners of the property referring to the Windeed printout attached to the replying affidavit dated 17 February 2017. Regarding the termination of occupancy he argued that this was not necessary as the Macheles occupancy was terminated by the sale in execution of the property. The applicants as the new owners were entitled to take possession of the property.

[12] Mr Schoeman argued that from the founding affidavit and the Macheles answering affidavit it was clear that they lacked *locus standi* at the outset of the matter. The Van Collers were attempting to make out a case in their replying affidavit where such case ought to have been made out in their founding affidavit. The Macheles did not have the opportunity to reply to allegations made out in the replying affidavit which ought to have been in the founding affidavit. He argued in any event it was trite law that the evidence in their case ought to been in the founding affidavit.

[13] Counsel did not pursue the issue of the first applicant acting without authority of the second applicant. He argued however that there was no termination of occupancy in respect of the tenant Peter Hudson who did not oppose the application. Mr Jacobs conceded that there was no termination of occupation in respect of Mr Hudson. The Van Collers accepted the principle of *"huur gaat voor koop"* is a long established principle and failed to indicate why they failed to join Mr Hudson after becoming aware of his details. He left the relief in respect of the third respondent in the hands of the Court.

[14] Section 4(1) of the Pie Act provides:

> "(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier."

I have had regard to the definition of an owner in section one of the Pie Act. The applicants were not the registered owners of the property as reflected in the Windeed dated 30 January 2017. Mr Jacobs submission that they were the 'persons in charge' of the premises as defined in the Pie Act ignores that this would be someone other than the registered owner and does not trump the rights of the registered owner of the property as at the date of the launching of the application. This definition clearly catered for the position where the registered owner was not readily available and does not apply to the present circumstances where the respondents were still the registered owners. The applicants thus lacked *locus standi* to bring the application at the time the application was launched.

[15] The issue of *locus standi* is dispositive of the matter, however the Van Collers filed a Windeed report in their replying papers indicating they were the registered owners of the property. The law is trite that the applicant make out its case in the founding affidavit. In *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd And Another* 1980(1) SA 313 (D) Broome J prefers an approach adopted by Caney J as follows:

"The correct approach to the problem was enunciated clearly by CANEY J in *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N) at 553D:

'... the principle which I think can be summarised as follows... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.'"

[16] In certain circumstances it would be unjust to confine an applicant to the contents of the founding affidavit where highly relevant facts come to light later. These facts however must have been existent at the time of launching of the application and ought not to be new facts which developed later. An example of the Court authorising an applicant to introduce new material in reply was referred to by Broome in *Poseiden (above)* at 315H

"In *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) at 568E where the Court considered that, as the ramifications of the respondent's affairs were extensive and complex, it was impossible for the applicant to have had all the facts at his disposal before he launched sequestration proceedings. See also *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369A - B."

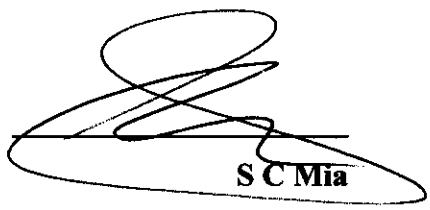
[17] The authorities however do not go to the extent of permitting an applicant to make out a case in reply when no case at all was made out in the founding affidavit in the original application. To consider the Windeed report attached to the Van Collers reply would therefore be impermissible and unjust as the Macheles would be denied an opportunity to answer to the claims made therein. The court would not have an opportunity to consider any responses from the Macheles to ascertain whether there are any defences or not. To grant an eviction order flowing from such circumstances would not be just and equitable.

[18] With regard to the lessee Peter Hudson, Mr Jacobs argued that the lessee falls under the third respondent all occupiers. There was no termination of Mr Hudson's occupancy. The principle "*huur gaat voor koop*" is recognised and there was no termination of his occupancy. Even if the view is held that the Macheles lost their right to occupancy when the property was sold this did not impact on the right of Peter Hudson who had a valid lease in place. Even if the hurdle of *locus standi* is bridged the Van Collers have not complied with the Pie Act *vis a vis* the lessee, Peter Hudson, who they became aware of early on in the proceedings.

[19] Mr. Schoeman initially requested a punitive costs order on the basis that the applicants lacked *locus standi.* He however proceeded on the basis that costs were in the discretion of the court. Mr. Jacobs argued that costs follow the cause. In this matter it is clear that the applicants were hasty in coming to court and launching this application before they were the registered owners of the property. I am however not of the view that a punitive costs order is appropriate as no malice or untoward action has been demonstrated in these proceedings.

ORDER

1. The application is dismissed
2. The applicants to pay the costs of this application on a party and party scale .



Acting Judge of the High Court, Pretoria

Appearances:

On behalf of the applicant	:	Adv TL Jacobs
Instructed by	:	Fuchs Roux Attorneys
On behalf of the respondent	:	Adv Z Schoeman
Instructed by	:	Sohn & Associates Attorneys
Date of hearing	:	21 April 2017
Date of judgment	:	18 May 2017