

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICAGAUTENG DIVISION, PRETORIACASE NO: 59237/2017DATE: 2018-11-16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 30/04/2019SIGNATURE

In the matter between:-

CATHEDRAL ROCK INVESTMENTS 159 CC

Applicant

and

JUDITH MARGARETHA BLOEM

First Respondent

CITY OF TSHWANE METROPOLITAN**MUNICIPALITY**

Second Respondent

JUDGMENT

SHANGISA (AJ):**Introduction**

[1] This is an application for eviction brought by the applicant against the first respondent in terms of section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, No 19 of 1998 (“the PIE Act”). The applicant is a close corporation and the owner of an immovable property known as Plot 46 Tiegerpoort in Pretoria.

[2] Throughout this judgment I shall refer to the property as the immovable property. The applicant seeks an order in terms of which the first respondent must be evicted from the immovable property. The latter order is based on the applicant’s contention that it is entitled to invoke *rei vindicatio* as the owner of the immovable property which is currently in possession of the first respondent.

[3] The nub of the applicant’s case is that the first respondent is in unlawful occupation of the immovable property. Accordingly, it is important to set out the factual background to the present application.

[4] The first respondent is married to one Mr Dirk Cornelius Jonathan Bloem and the parties were married on 31 December 1988. The marriage between the first respondent and Mr Bloem still subsists. It is worth mentioning that the deponent who deposed to the founding affidavit on behalf of the applicant is Mr Maynard Petrus Bloem, who is the brother of the first respondent’s husband.

[5] The first respondent instituted proceedings for divorce against her husband in December 2015. It is common cause that the first respondent’s husband

together with his brother who is mentioned above purchased the immovable property and registered it in the applicant's name.

[6] The first respondent's husband and his brother purchased, in equal halves, the membership interest in the applicant during 2004. It is common cause that the first respondent and her husband occupied one of the residences located in the premises of the immovable property. His brother on the other hand who deposed to the founding affidavit on behalf of the applicant also shared the same premises with his family and they occupied another residence.

[7] The same premises of the immovable property were also occupied by one Mrs Martha J C De Klerk, a relative of the first respondent's husband who occupied the third residence on the immovable property.

[8] After the first respondent issued a divorce summons against her husband, she alleges that the latter consulted an attorney who, according to the first respondent, drafted an agreement between the first respondent's husband and his brother Mr Maynard Petrus Bloem in terms of which the first respondent's husband allegedly sold his 50% membership interest in the applicant to his brother for an amount of R600 000.00. The first respondent disputes the lawfulness of the latter transaction. She contends that her husband's purported selling of his 50% member's interest in the applicant was a simulated transaction contrived to deprive or defraud her of the assets that had accrued to the estate during the subsistence of the party's marriage.¹

¹ See First Respondent's Answering Affidavit (to the eviction), at paras 3.14 – 3.18

[9] The application for eviction is opposed by the first respondent on several grounds. Before I deal with one or more of these grounds of opposition, I deem it important to first set out the grounds on which the applicant relies for its eviction application.

Factual Background

[10] The applicant, in the main, contends that as the owner of the immovable property it is entitled in terms of *rei vindicatio* to evict the first respondent since she occupies the property unlawfully and without any valid underlying *causa*. In this regard, the applicant contends that the first respondent has no lease agreement which validly justifies her continued occupation of the immovable property.

[11] As a result of the foregoing, the applicant contends that as the owner of the property it is entitled to place reliance for the eviction of the first respondent from the immovable property on the provisions of the PIE Act.

[12] Because of the view that I take of this matter and the conclusion to which I arrive I do not deem it necessary to delve much into the provisions of the PIE Act on which the applicant places its reliance. In my view, it is also not necessary to resolve the numerous disputes of fact that obtained between the parties concerning the first respondent's husband's 50% member's interest in the

applicant².

[13] The same holds true for the dispute between the parties concerning the purported selling of the first respondent's husband of his 50% membership interest in the applicant to his brother for an amount of R600 000.00³.

[14] It suffices, in my view, in disposing of this matter to have regard to one of the main important grounds of opposition raised by the first respondent. In her papers, the first respondent mentions that given the acrimonious divorce proceedings that are pending between her and her husband and the allegations of harassment that she levels against her husband, his brother who is now the sole member of the applicant and their sister or aunt Mrs De Klerk, she, to a significant extent mentions that this acrimonious divorce is inextricably bound up with the attempts to unlawfully evict her from the property⁴.

[15] In this regard she lays the blame at the feet of the applicant's remaining sole member who is her husband's brother as well as her husband. In my view, it is unnecessary at this stage for this court to make any determination about the correctness or otherwise of these allegations. These allegations will more appropriately be ventilated later at the pending divorce trial.

[16] For our present purposes, it suffices merely, in my view, to have regard to

² See First Respondent's Answering Affidavit, at paras 3.19 -3.21

³ See First Respondent's Answering Affidavit, at paras 4.6 – 4.12

⁴ See First Respondent's Answering Affidavit, at para 420, the First Respondent avers as follows: ".....In the divorce action issued during December of 2015 under case number: 98328/2015, I claimed a decree of divorce, maintenance for our major but dependent children, repayment of an amount that I pleaded my husband owed to me as well as a division in terms of the accrual in accordance with our ante-nuptial contract."(my emphasis)

the defence raised by the first respondent and determine if it establishes a *prima facie* case concerning the lawfulness of the eviction that can be argued and raised at the pending divorce trial. In that connection, the determination of this matter hinges on the Order the applicant obtained in terms of rule 43 which bears on her occupation of the immovable property pending the finalisation of the divorce trial. On 9 March 2018 the first respondent lodged a rule 43 application in the pending divorce action between herself and her husband.

[17] The rule 43 application served before this court and was heard by Honourable Mr Justice Strijdom AJ. It is instructive that the first respondent in the course of those rule 43 proceedings obtained an Order on 23 March 2018. The relevant paragraph 2 of the Order that was granted by Justice Strijdom AJ reads as follows, and I quote:

“The applicant [Judith Margaretha Bloem] shall be entitled to remain resident at the property situated at Plot 46 Tiegerpoort Pretoria Gauteng Province [the immovable property] pending the finalization of the divorce action.”⁵

⁵ The validity of the Order issued by Strijdom AJ was not challenged. The applicant merely contended that it only applied between the parties in the rule 43 proceedings, and instead contended that it did not establish the first respondent’s right to remain in occupation of the unmovable property. In my view, this contention is misplaced. It ignores the factual matrix which resulted in the first respondent seeking protection from eviction from the immovable property on account of her allegations that the transactions between her husband and his brother were simulated. The first respondent’s contention was that at a trial she will be able to demonstrate that her husband unlawfully disposed of his 50% member’s interest in the applicant solely to defraud her. She also strongly suggested that the applicant, its sole member and her husband colluded to unlawfully dispose of the immovable property. Whether these claims have substance is a matter for the divorce trial to determine.

[18] It was argued on behalf of the first respondent that the effect and import of this order granted by Strijdom AJ was that the applicant may not evict the first respondent pending the finalisation of the divorce proceedings. The result is that the first respondent places reliance on the order of Strijdom AJ, and she accordingly contends that the eviction application was brought *mala fide* and could not be granted for as long as the Order of Strijdom AJ entitling her to remain in the immovable property remained valid and effective⁶.

[19] For its part, the applicant simply dismissed the relevance of the order granted by Strijdom AJ in the Rule 43 application. In that regard, it was contended on behalf of the applicant that the order granted by Strijdom AJ was only applicable between the first respondent and her husband.

[20] In my view the order granted by Strijdom AJ remains valid, effective and is binding not just only on the husband of the first respondent, but on other third parties who may seek to evict her from the immovable property pending the divorce trial.

[21] It is as well to pay regard to an important aspect of the factual background of this matter which is that there is a pending acrimonious divorce proceedings. The first respondent points out throughout her answering papers that because of the pending divorce proceedings her husband has on numerous occasions attempted to evict her from the immovable property.

⁶ See First Respondent's Answering Affidavit, at paras 2.1, 4.28, 4.47, and 4.59

[22] She also alleges that since she had filed for divorce from her husband her husband's brother who is now the sole member of the applicant, as well as other family members have been harassing her with the view to ejecting her from the immovable property.

[23] She contends that she has lived the better part of her adult married life in the immovable property together with her children who are dependent on her and her husband. She therefore contends that the eviction sought by the applicant must be seen as no more than a strategy contrived by her husband and his brother who is the member of the applicant to evict her from the property while the divorce is still pending⁷.

[24] The background that is set out concerning the acrimonious divorce that is pending and the fact that the first respondent's husband claimed that he had sold his member's interest in the applicant to his brother who is, as a result, now seized with 100% membership interest of the applicant, is highly relevant.

[25] It is not necessary in my view to determine the correctness or otherwise of these allegations. It seems to me that they could pertinently be dealt with at the pending divorce trial. In that connection, the first respondent also made it quite clear that she has launched an application to join other interested parties to the pending divorce trial, including the applicant's sole member who is her husband's brother, as well as their other relatives who occupy the immovable property.

⁷ See *Moremi v Moremi And Another* 2000 (1) SA 936 (W), at 942 (See also *Buck v Buck* 1974 (1) SA 609 (R), at 611.)

[26] It is significant, in my view, that the order of Strijdom AJ allowing the first respondent to remain in the property pending the finalization of the divorce action was obtained after the eviction application had been instituted.

[27] Following the foregoing averment by the first respondent, counsel for the first respondent further submitted that Strijdom AJ was made aware of the current eviction application before he granted the order of 23 March 2018. In effect, the import of the order of Strijdom AJ of 23 March 2018 protects the first respondent from being evicted from the immovable property pending the divorce proceedings.

[28] It is common cause that the divorce trial between the first respondent and her husband is pending. That being the case, the other factor which militates against the granting of the application for eviction relates to the prejudice that will undoubtedly be visited on the first respondent should she be evicted from the immovable property while the divorce action between herself and her husband is still pending.

[29] In my view, having taken into account the nature of the dispute between the parties in the eviction application, it seems to me that it will be premature to grant an order of eviction while there is still an order of this court granted by Strijdom AJ on 23 March 2018 which remains valid and effective.

[30] I should pause and mention that the order of Strijdom AJ has never been set

aside, varied or rescinded. It therefore remains binding on the applicant and other third parties, including the first respondent's husband.

[31] The nature of the dispute between the first respondent and her husband necessarily, in my view, also involves the applicant's ownership of the immovable property and its membership by the first respondent's brother-in-law and other relatives.

[32] I take into account the fact that the first respondent has instituted proceedings to join not only the applicant but also the applicant's remaining sole member who is the first respondent's brother-in-law and other parties. That application, in my view, was necessary given the nature of the allegations and disputes of fact and law raised by the first respondent against her husband and his brother who has become a sole member, with a 100% member's interest of the applicant.

[33] It would be prejudicial to the first respondent if an order of eviction from the immovable property were to be granted before all the contentious issues relating to the applicant's membership interest had been dealt with at the pending divorce trial.

[34] In my view, the fact that there is an order of this court granting the first respondent protection against eviction and an entitlement to remain in the immovable property is disposable of the present eviction application.

[35] I have pointed out already that the order of Strijdom AJ that entitles the first respondent to remain in the immovable property has never been varied, rescinded or set aside. In my view, it remains valid and effective against parties, including the applicant, who may seek to evict the first respondent from the immovable property, pending the finalisation of the divorce trial.

[36] During argument counsel for the applicant attacked the validity of the order granted by Strijdom AJ in this court. Among other grounds of attack advanced on behalf of the applicant was the fact that such an order could not be granted or effective against the applicant and other parties who were not party to the rule 43 proceedings.

[37] Without expressing any exhaustive views on this submission, it seems to me that it is of no moment that the order was granted in the absence of the third parties such as the applicant and its sole member who is the first respondent's brother-in-law.

[38] It suffices merely that the order granted by Strijdom AJ in this court is valid and binding on all parties, including the applicant in this matter, and in my view, that order is valid until it is set aside, varied or rescinded.

[39] If the allegation, such as was suggested on behalf of the applicant, is that the order was not properly obtained, the uniform rules of court⁸, including the common law principles, do avail a party who is aggrieved by such an order of

⁸ See for example, rule 31 and rule 42, as the case may be, of the Uniform Rules of Court.

some appropriate remedies.

[40] It is common cause that in this matter the applicant has not availed itself of any recourse in terms of the rules to have the order set aside, varied or rescinded. Perhaps for good measure this was not done given that the order granted by Strijdom AJ is interim in nature. I, however, express no view on the question of what remedy the applicant ought to have followed. It suffices merely that the order of Strijdom AJ affords the first respondent protection from being evicted from the immovable property pending the divorce trial.

[41] It is noteworthy that the order of Strijdom AJ only allows the first respondent to occupy the premises pending the finalization of the divorce action. That may well be one of the considerations that might have led to that order not being challenged. There may well be others. As I indicated above, I refrain from speculating on the reasons for the applicant's failure to challenge the order of Strijdom AJ given that it specifically had the immovable property as its subject-matter.

[42] Given the view that I take on this matter, it seems to me that whatever prejudice may be caused to the applicant is ameliorated by the fact that the order granted of Strijdom AJ is interim in nature and that it is effective only pending the finalization of the divorce action. One should not lose sight of the fact that the first respondent raises a marital dispute which implicates the validity of the agreement between her husband and his brother. At the pending trial, the first respondent seeks to assail the validity of the transaction concerning the

member's interest in the applicant between her husband and his brother. She alleges that the transaction was simulated.

[42] In sum, I should emphasise that in my view given that there is an order granted by Strijdom AJ that entitles the first respondent to remain in the immovable property, the presence of this order in and of itself disposes of the eviction application. It is trite that our courts have repetitively stated that even if an order or an act were unlawful it is valid and binding to the parties until it is set aside by the court. (See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) at para 82)

[43] And in some circumstances an unlawful or invalid order can produce legally effective consequences unless it is set aside. The authority for this proposition is based on the well-known leading decision of *Oudekraal* (supra) and has resulted in what is now commonly known as the *Oudekraal* principle.

[44] What is more, I can do no better than once again refer to how the Constitutional Court enunciated the aforementioned principle. Although that matter dealt with the actions of government and not necessarily with the court order, it is equally applicable in circumstances of the present matter where there is a valid court order entitling the first respondent to remain in the immovable property pending the divorce trial.

[45] Where the court order had not been set aside, in *Merafong City Local Municipality v Anglo Gold Ashanti Limited* 2017 (2) SA 211 (CC), at para 41,

Cameron J enunciated the principle as follows:

“The import of Oudekraal and Kirland was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside. (Own emphasis)”

[46] In my view, by parity of reasoning, the above-mentioned principle enunciated in *Merafong (supra)* applies with equal measure to the present proceedings. In the present matter, the order of this court granted by Strijdom AJ on 23 March 2018 is clear and unambiguous in that it entitles the first respondent to remain in the immovable property pending the finalization of the divorce action.

[47] In the circumstances, I therefore find that the eviction application cannot succeed. This is so on account of the order granted by Strijdom AJ in favour of the first respondent. I must emphasise that the order of Strijdom AJ that entitles the first respondent to remain in the immovable property is effective and valid pending the finalization of the divorce action between the first respondent and her husband.

[48] In the nature of things, the rule 43 order is only an interim order. That being

the case, I cannot conceive of any prejudice to the applicant if it were to wait for the finalization of the divorce action between the first respondent and her husband.

[49] I also take into account that there are allegations by the first respondent that the present application is designed to achieve what her estranged husband cannot lawfully achieve, and that, in instituting the present application, the applicant is merely being used by her husband to evict her from the property she has occupied with her children ever since the subsistence of her marriage. The ownership of the applicant's member's interest is a matter that will no doubt form part of the dispute between the first respondent and her husband in the divorce trial. As counsel for the first respondent submitted, the lawfulness of the disposition of the 50% member's interest in the applicant by the first respondent's husband, and ultimately the ownership of the immovable property, are issues that will be ventilated at the divorce trial.

[50] If the first respondent's husband cannot not in law evict the first respondent from the immovable property pending the divorce trial, it is not far-fetched that the allegations of a simulated transaction made by the first respondent against her husband and his brother will form the main subject-matter of the pending divorce trial. I make no finding, in that regard. That is, however, a matter that can only be determined by the trial court.

[51] The first respondent is quite adamant that this is merely a stratagem to try and achieve what cannot be lawfully achieved and that in the process the

applicant is being used to achieve this end⁹. Whether this is correct or not is a matter that will be properly ventilated at the trial for divorce that is pending between the first respondent and her husband.

[52] In my view, it suffices merely that the first respondent has occupied this property with her dependent children for the better part of her adult life and since the commencement of her marriage. The fact that the immovable property was initially co-owned by her husband who had a 50% member's interest in the applicant, is highly relevant. And so are the circumstances surrounding her husband's purported disposal of his 50% member's interest.

[53] The latter is a significant factor that no doubt will be central to the pending divorce trial where the dispute concerning the membership of the applicant and the interest that the first respondent's husband and his brother who now owns 100% membership interest will all be considered and determined by the trial court.

[54] For all the aforementioned reasons, I am of the view that the eviction application against the first respondent should fail. To sum up, this is on account of the presence of the court order granted by Strijdom AJ which entitles the first respondent to remain in occupation of the immovable property pending the divorce trial.

⁹ See *Moremi v Moremi And Another* 2000 (1) SA 936 (W), at 942 (See also *Buck v Buck* 1974 (1) SA 609 (R), at 611.)

[55] The court order of Strijdom AJ has not been set aside, varied or rescinded. It is therefore, in my view, binding on the applicant. Consequently, I find that the first respondent is entitled to remain in occupation of the immovable property in terms of the court order of Strijdom AJ pending the finalization of the divorce action. The first respondent contends that the transaction concluded between her husband and his brother was simulated and used to compel her eviction from the immovable property before the divorce trial. On the facts of this matter, it seems to me that it will not be just and equitable to grant an order of eviction against the first respondent.

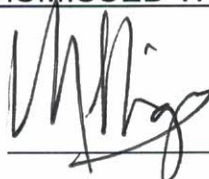
Costs

[56] As far as the costs are concerned, there is no reason why in this matter costs should not follow the result. The first respondent has succeeded in resisting the eviction application. Consequently, she is entitled to her costs.

Order

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

“The application for eviction is DISMISSED WITH COSTS.”



SL SHANGISA AJ

Acting Judge of the High Court,
Gauteng Division, Pretoria

APPEARANCES:

Counsel for the Applicant: Adv S Guldenpfennig SC

Instructed by: Van Zyl's Incorporated

Counsel for the First Respondent: Adv R Ferreira

Instructed by: Du Randt & Louw Incorporated

Date of Hearing: 13 November 2018

Date of Judgment: 16 November 2018

Revised