REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 86012/2019

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

Date: 16/3/2020 Signature:

In the matter between:

FRANCINA OUMAKI TEME	APPLICANT
and	
EUGENE TSHEPO DUNGA	FIRST RESPONDENT
CITY OF JOHANNESBURG METROPILITAN COUNCIL	SECOND RESPONDENT

JUDGMENT

Van der Schyff, J.

[1] The applicant approached the Court on an urgent basis for an order in the following terms:

1. That the application be enrolled as an urgent application in terms of Rule 6(12) of the Court Rules, dispensing of the forms and service provided for in the Rules of Court, to the extent necessary;
2. That the eviction application pending in the Magistrate's Court for the District of Soweto to be held at Protea Magistrate's Court under case number 10214/2019 be stayed, pending the final adjudication of the application in this Court under case number 86012/19, that would determine ownership of the property of which eviction is sought;
3. Costs.

[2] The first respondent opposed the application. The first respondent contended that any urgency that might exist is self-created and that the applicant's prospects of success in the main application instituted in this Court under case number 86012/19, are so slim that the application must be dismissed if it is not struck from the roll due to lack of urgency.

[3] Since urgency needs to be determined on a case-by-case basis taking into consideration the unique facts of each case, I requested counsel to address me on urgency with reference to the merits of the application.

The applicant's case

[4] The applicant is a pensioner residing at Erf 774 Dube Township situated at 45 Ngwenyama Street Dube Township.[1] The first respondent instituted an eviction application in the Protea Magistrate's Court in which he seeks to evict the applicant and all the persons who occupy the property through her.

[5] The applicant submits that the application is urgent because the Magistrate indicated on 5 February 2020 that he intends to proceed with the hearing of the eviction

[1] A different address is ascribed to the applicant in the founding affidavit. Counsel for the applicant argued that reference to the address in the founding affidavit is an error. I noted that the address ascribed to the applicant corresponds with the address of the first applicant in the main application. I accept that this is an error based on the fact that if she was not staying at the Erf 774, the first respondent would not have launched an eviction application.

application on 20 March 2020, unless the High Court orders that the eviction application be stayed until the finalisation of case number 8601/2019.

[6] The applicant seeks under case number 8601/2019 (hereafter the main application) an order setting aside the sale of the property and a declaratory order that the property belongs to the four applicants and the first respondent in the main application. The four applicants and the first respondent in the main application are siblings.

[7] It is the applicant's version that the property was a family home, and that the first respondent in the main application was allowed to register the title to the property in her name on the basis that she held the property in trust on behalf of all the siblings who were the intestate heirs of the property after their father passed away. She sold the property to the first respondent without the consent and knowledge of the other siblings on whose behalf she held the property.

The first respondent's case

[8] The first respondent submits that the applicant has failed to set out a basis for urgency and further attempts to mislead the Court. In support of the argument the following facts were referred to:

i. The eviction application in the Magistrate's Court was launched on 19 August 2019 and enrolled for hearing on 18 October 2019;

ii. The applicant filed her opposing affidavit late, and the hearing of the eviction application was postponed to 6 December 2019;

iii. The first respondent who is the applicant filed his reply timeously, but on 5 December 2019 the applicant's attorney of record filed a new set of answering papers without the leave of the Court. He attended court on 6 December and applied for a postponement in order to file the present application in the High Court. The eviction application was postponed to 5 February 2020;

iv. On 4 February 2020 a supplementary opposing affidavit was filed, and the applicant's attorney requested a further postponement;

v. The Magistrate postponed the application to 20 March 2020 on the basis that the eviction application will be heard on 20 March 2020 unless the High Court stays the eviction application;

vi. This application was served on the first respondent's attorneys of record six days before the hearing date.

[9] It is also submitted in the answering affidavit that this Court does not have jurisdiction because all the parties are from Johannesburg. This point was not repeated during argument. A third point in limine that the cause of action underpinning the applicant's main application has prescribed was repeated during argument.

[10] First respondent's counsel requested that in the event that it is found that the matter is urgent, the application be dismissed. She submitted that there is very little prospect of success in the main application in light of the fact that only copies of documents are available to support the applicant's case, that all the necessary averments to substantiate a case in the main application are not made and that the applicant's case in general is too vague to be considered as having merit.

Applicant's reply

[11] The applicant denies that the application was only served on the first respondent's attorneys of record on 28 February 2020 and attached the Sheriff's return of service indicating that service occurred on 25 February 2020. The applicant likewise denied that the remainder of the points *in limine* had any merit.

Discussion

[12] The main application has been enrolled for hearing on 6 August 2020, in the unopposed motion court. It is evident from the applicant's founding affidavit that the main application was not served on either the first respondent in this matter who is cited as the third respondent in the main application (the purchaser and registered owner of the property) or the first and second respondent in the main application (the sellers of the property). It must be stated that this was not for the lack of trying

since the Sheriff attended three times to the address provided for the first respondent in this matter. This application was however served by agreement on his attorneys of record and it can be accepted that the main application will now become opposed. The court therefor has to consider that it might still take some time before the main application is finalised.

[13] I enquired from counsel for the applicant why the first and second respondent in the main application have not been cited as parties in this application. He argued that since this application was necessitated due to the Magistrate's view that the eviction application will be heard on 20 March 2020 despite having knowledge of the main application having been instituted, this application for interim relief only concerns the parties involved in the eviction application. Since the first and second respondents in the main application are not parties in the eviction application, they were not cited as parties to this application.

Re: Urgency

[14] Urgency is determined with reference to all the facts underpinning an application. When a Court is approached to stay an eviction application, the mere nature of the relief sought indicates that there is urgency in the application to be heard. It is only when an applicant is to blame for the urgency, and specifically where by inaction an application is launched at the eleventh hour without affording the opposing party sufficient time to oppose the application, the matter will normally be struck-off.

[15] In the present application the notice of motion is dated 19 February 2020. The notice of motion and its annexures was dispatched to the Sheriff for service on 20 February 2020. The sheriff was clearly informed that the matter was urgent. The instructions were received by the Sheriff on the same day. The Sheriff served the documents on the first respondent's attorneys of record on 25 February 2020. The delay in the serving of the papers can accordingly not be ascribed to the applicant.

[16] The second aspect that needs to be considered is the delay between the institution of the eviction application and the launching of this application being launched. It was argued on behalf of the first respondent that the applicant at least ought to have

instituted the application for interim relief at the time when the main application was instituted. The applicant's case is that the need to institute the interim application only arose when the Magistrate indicated that the eviction application would be heard despite the main application be instituted, which occurred on 5 February 2020. The date on which a Court order had to be obtained is however 20 March 2020, and the urgent application was set down to be heard on 10 March 2020. If the application was served on the first respondent on the day after it was received by the Sheriff's office, the first respondent would have had ample time to give notice of his intention to oppose and to file an opposing affidavit. In these circumstances the urgency, in my view, was not self-created. A founding affidavit, answering affidavit and replying affidavit was filed and I consider the matter ripe for hearing. As a result, condonation for the applicant's non-compliance with Rule 6 is granted.

Re: Merits

[17] It is trite that an applicant who applies for interim relief needs to show – (i) a *prima facie* right to the relief it seeks to obtain in the main application; (ii) that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (iii) that the balance of convenience favours the grant of the application; and (iv) that the applicant has no other satisfactory remedy.[2]

[18] Holmes J (as he then was) clarified the role of the phrase *prima facie* within the context of interim relief being sought, and the interrelation between the requirements for interim relief in *Olympic Passenger Service (Pty) Ltd v Ramlagen* 1957 (2) SA 382 (D) at 383C-F, where the learned judge stated:

> "It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the

[2] *Reckitt & Colman SA (Pty) ltd v SC Johnson & Sons (SA) (Pty) Ltd* 1995 (1) SA 725 (T) 7291-730G.

> papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict is refused, weighed against the prejudice to the respondent if it be granted."

[19] In the answering affidavit the applicant's prospects of success in the main application is disputed, and as a result it is submitted that the applicant has not made out the required *prima facie* right. The first respondent contends that the historical background to this application is irrelevant to the determination of this application. I do not agree. The historical background reveals five siblings who inherited their parent's house in equal shares in 1975. The Commissioner of the Department of Co-Operation and Development appointed the 5 siblings as heirs in equal shares and directed that the property be registered in the name of the eldest daughter, the first respondent in the main application and the seller of the property. The first respondent took session of the right, title and interest in the property in June 1980 and the right of leasehold was granted to her in April 1985. The right of leasehold was subsequently transferred to her husband, who is cited as the second respondent in the main application. In 1992 the property was registered in the name of the first respondent.

[20] In my view, the applicant has established a *prima facie* right although perhaps open to some doubt. If regard is had to the judgments in cases such as, *Adam v Jhavray*

1926 AD 147; *Dadabhay v Dadabhay* 1981 (3) SA 1039 (A); *Strydom v De Lange* 1970 (2) SA 6 (T) and *Hadebe v Hadebe* [2000] 3 All SA 518 (LCC), it is evident that informal trusts arrangement came into existence where property was registered in a specific party's name on behalf of other beneficiaries, without those beneficiaries being mentioned in title deeds. These informal trust arrangements were recognised in these cases. On the facts of the present matter it seems plausible that a family homestead came into existence with more parties acquiring an interest in the property than the registered owner who was to hold the property in trust for all the children.

[21] Counsel for the first respondent objected to copies of documents attached to the founding papers being admitted as evidence by the Court hearing the main application. I do not propose to decide this aspect as it will be dealt with by the trial court.

[22] If the section 12(3) of the Prescription Act 68 of 1969 is considered, I cannot accept at this stage as a fact that the applicant's right to the property, if it is found to have existed, has prescribed.

[23] The applicant contends that she will suffer irreparable harm if she is evicted from the property, pending the finalisation of the application. She states that she will lose occupation of the property based on the unlawful sale of the property, and she will be without a residence I have to consider that the applicant is a pensioner, a fact not denied in the first respondent's answering affidavit. This fact depicts the applicant as a vulnerable person. If she is evicted from the property she will not have security of tenure and herein lies the reasonable apprehension of irreparable harm to her personal security, property and human dignity.

[24] In the consideration of the balance of convenience, I take into consideration that the first respondent acknowledged in the founding affidavit to the eviction application that he was aware that the property he purchased "might be occupied" at time of purchasing it.

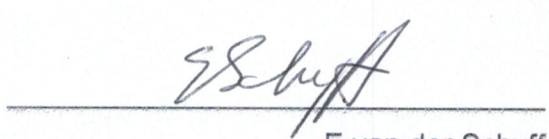
[25] It is true that the first respondent to date has not derived any financial benefit from his investment and is and remains liable for municipal charges and costs relating to services. He was not caught by surprise when he found the applicant in the property he purchased, since he was informed of the fact that the property might be occupied when he purchased it during February 2019. The Deed of Transfer was signed on 13 June 2019. The first respondent does not explain if steps were taken since having gained knowledge that it was occupied. The only inference is that the first respondent might have accepted that he would have to evict an occupant from the property at the time of acquisition thereof. In weighing up the prejudice that the applicant might suffer if the interim relief is not granted and she succeeds in the main application, against the prejudice that the first defendant might suffer if the interim relief is granted and the main application is dismissed, the balance favours the applicant of the urgent application.

[26] In light of the Magistrate's expressed view I have referred to, no other remedy was available to the applicant than to approach this Court for the interim relief.

ORDER

In light of the above, the following order is made:

1. The applicant's non-compliance with Rule 6 of the Uniform Rules of Court is condoned and the application is heard as an urgent application.
2. The eviction application pending in the Magistrate's Court for the District of Soweto to be held at Protea Magistrate's Court under case number 10214/2019 is stayed, pending the final adjudication of the application in this Court under case number 86012/19.
3. The costs of this application shall be costs in the cause.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Counsel for the applicant:	Adv H Bucksteg
Instructed by:	Carel J Schoeman Inc.
Counsel for the respondent:	Adv B Manning
Instructed by:	A Le Roux Attorneys
Date of the hearing:	12 March 2020
Delivered:	16 March 2020