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

CASE NO: 50451/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

1/02/2023

In the matter between:

NDIVHUWO ROSE MATSHAYA

Applicant

and

SEBOYA WILLIAM MAPATHA

First Respondent

NTHABISENG MARIA MASITA

Second Respondent

**THE UNKNOWN OCCUPIERS OF ERF T [....] L [....]
GARDENS, EXT [....], TOWNSHIP, REGISTRATION
DIVISION J.R., GAUTENG PROVINCE, 0025**

Third Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Fourth Respondent

JUDGMENT DELIVERED ON 1 FEBRUARY 2023

CP WESLEY AJ

1. This is an opposed application in which the applicant seeks an order for the eviction of the first and second respondents, and their two minor children, from Erf T [...] L [...] G [...], Extension [...], Township, Registration Division J.R., Gauteng Province, 0025 (hereinafter referred to as the Property). The application is brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Property Act 19 of 1998 (hereinafter referred to as the PIE Act).

2. The second respondent opposes the application and has delivered an answering affidavit. The first respondent has played no part in the application.

3. The applicant's case is that she purchased the Property from the first respondent in terms of a written Offer to Purchase on an unspecified day in February 2021. The Offer to Purchase does not indicate the day on which it was signed by either of the parties to it. The Offer to Purchase does indicate that the first respondent is unmarried and that he alone is the seller. The applicant's case is further that on 9 April 2021 the Property was transferred to the applicant under Deed of Transfer T [...]. The Deed of Transfer also indicates that the first respondent is unmarried, and that he alone is the transferor.

4. The second respondent's case is that she was married to the first respondent by traditional rites on 29 December 2008, in community of property; that the Property forms part of the joint estate between her and the first respondent; that she did not know of, and did not consent in writing (or at all) to, the sale of the property to the applicant by the first respondent; and that the purported sale of the property to the applicant by the first respondent was accordingly non-compliant with section 15(2)(a) and (b) of the Matrimonial Property Act 88 of 1984 (hereinafter referred to as the MP Act),¹ and void or voidable on that basis.

¹ Which reads (in the relevant part):

"(2) Such a spouse [in a marriage in community of property] shall not without the written consent of the other spouse -

- (a) alienate ... or confer any other real right in any immovable property forming part of the joint estate;
- (b) enter into any contract for the alienation ... or conferring of any other real right in immovable property forming part of the joint estate; ...".

5. The upshot of the second respondent's defence is that according to her, the applicant is not the lawful owner of the Property and accordingly lacks *locus standi* to bring this application, notwithstanding that the Property is registered in the applicant's name, and that she and the two minor children have a right to occupy the Property. It was argued for the second respondent that the application should accordingly be dismissed, *alternatively*, be referred to oral evidence on the issue whether or not the second respondent is married to the first respondent, in community of property?

6. The applicant's reply to the second respondent's contentions is that the second respondent has not proved that she was married to the first respondent as alleged; that if she was thus married to him, the applicant did not know and could not reasonably have known that the transaction with the first respondent was being entered into contrary to section 15(2)(a) and (b) of the MP Act; that it is thus deemed that the transaction with the first respondent was entered into with the consent required in terms of section 15(2)(a) and (b) of the MP Act, as per section 15(9)(a) of the MP Act;² and with reference to *Vukeya v Mtshane and Others* (case no. 518/2019) [2020] ZASCA 167 (11 December 2020), that the applicant was entitled to rely on the content of the Deed of Sale (as above) and the Deed of Transfer (as above) as confirming that he alone was the owner and seller of the Property in order to bring her within the ambit of the protection afforded by section 15(9)(a) of the MP Act. It was argued for the applicant that the application should accordingly succeed,

7. Section 4(8) of the PIE Act reads (in the relevant part):

"(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the

² Which reads (in the relevant part):

"(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection

(2) ... of this section ... and -

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions ..., it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) ...".

unlawful occupier, it must grant an order for the eviction of the unlawful⁴ occupier ...".

(own underlining)

8. According to section 4(8) of the PIE Act, for the application to succeed I must be satisfied that the second respondent has not raised a valid defence. In the present circumstances I must make this determination on the basis of the disputed averments in the affidavits filed of record, as discussed above, and in particular the dispute of fact on the papers concerning whether or not the second respondent is married to the first respondent, in community of property.

9. Ultimately, I am not able to say whether or not the second respondent has raised a valid defence. This is because the second respondent's defence hinges on whether or not she is married to the first respondent, in community of property, which is in dispute on the papers. The dispute of fact is, in my view, genuine and the resolution thereof is material to the determination of the application.³ I am unable to resolve this dispute on the papers, and I am thus unable to reject the second respondent's defence out of hand. I am not inclined to dismiss the application by reason of the dispute of fact, notwithstanding that the applicant is persisting with it in the face of the dispute of fact

10. In my view, having regard to Uniform Rule 6(5)(g), the application falls to be referred to oral evidence with a view to resolving the dispute whether or not the second respondent was married to the first respondent, in community of property. Upon making that determination the court seized with the matter will decide the outcome of this application.

11. As indicated above, in argument the applicant relied on the *Vukeya* judgment. It was common cause in *Vukeya* that the first respondent had been married in community of property to her deceased husband, and that she never gave the required consent for the sale of their immovable property by her deceased husband

³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 235.

to the appellant. Apart from the fact that *Vukeya* was not an eviction application in terms of the PIE Act, the difference between *Vukeya* and the present application is that presently I am unable in the first place to decide on the papers whether or not the second respondent is married to the first respondent as alleged. Issues concerning the protection afforded by section 15(9)(a) of the MP Act will arise only after this issue has been determined, after the hearing of oral evidence. Accordingly, the applicant's reliance on the protection afforded by section 15(9)(a) of the MP Act and the *Vukeya* judgment is premature.

12. In the result I make the following order:

12.1 The application is postponed to a date to be determined by the Registrar of the Gauteng Division, Pretoria, for the hearing of oral evidence in terms of Uniform Rule 6(5)(g) on the issue that is set out in paragraph 12.2 below.

12.2 The issue upon which oral evidence is to be led at the aforesaid hearing is whether or not the second respondent was married to the first respondent, in community of property, as alleged by her in her answering affidavit.

12.3 Oral evidence shall be admitted from any person who has already deposed to an affidavit concerning the merits of the application.

12.4 Nothing in this order shall preclude the Court that hears the oral evidence from permitting, on such terms as to it seems meet, the evidence of any other witness to be admitted.

12.5 The costs of the application are reserved for determination by the Court that hears the postponed application upon the issuing of a final order.

CP WESLEY
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for applicant: Adv C Jacobs

Attorney for applicant: S D Nel Attorneys

Counsel for respondents: Adv Z Marx

Attorney for respondents: Shapiro & Ledwaba Inc

Date heard: 23 January 2023

Date of Judgment: 1 February 2023