

REPUBLIC OF SOUTH AFRICA



**IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)**

CASE NO: 2013/32291

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

Date: _____ **Signature** _____

In the matter between

GABANI PETRUS MFUPHI

First Applicant

And

JOYCE MAMPHO LEKATA

First Respondent

THE CITY OF JOHANNESBURG

Second Respondent

J U D G M E N T

Summary: A contract for the alienation of land shall be in writing. It may be written in any language including the Zulu language. It must comply with the peremptory provisions of section 2 read with subsection 6(1) of the Alienation of Land Act 68 of 1981 for it to be valid.

The process of eviction by a private owner of land which is consistent with the provisions of subsections 25 and 26 (3) of the Constitution read with section 4 of the

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act is constitutionally and legislatively compliant.

MOSIKATSANA AJ

Introduction:

[1] This is an application for an eviction order in terms of section 4 of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*¹ (PIE Act). First applicant seeks the eviction of first respondent and all those occupying through or under her, from certain immovable property known as Erf 5009 Orange Farm Extension 2 Township – also known as 5009 Jikeleza Street, Orange Farm Extension 2, Johannesburg, registered under the name of the first applicant.

Factual Background:

[2] The facts of this case are sharply contested. They are characterised by two conflicting narratives. First applicant's narrative consists of the following chronology of events.

First Applicant's Narrative:

[3] During the course of the year 2005, first applicant took ill and could no longer work. He left his residence in Johannesburg, to return to the Free State Province, to convalesce close to his family, where he would obtain medical treatment.

¹ Act 19 of 1998

- [4] Prior to first applicant's departure for the Free State Province, he entered into an oral lease agreement with first respondent. According to the oral lease agreement, the first respondent was to pay the first applicant, monthly rental of R1, 500.00.
- [5] First applicant contends that from the inception of the oral lease agreement, first respondent failed to make regular rental payments. First applicant contends that consequently, first respondent fell into arrears. The last rental payment by the first respondent was made in June 2008.
- [6] In 2008 first applicant had recuperated from his illness. He was re-employed. He moved back to Orange Farm where his residential property is situated. Upon his return, first applicant, informed first respondent, that she should vacate his property, so he could move back in. First applicant contends that first respondent refused to vacate the property and continues to live on the property which is the subject of the current dispute.
- [7] First applicant contends that since January 2013, he has consistently informed first respondent that he has cancelled the verbal lease agreement they had entered into and that she must surrender vacant possession of the property to him. However, first respondent resolutely refused to vacate the property.
- [8] First applicant avers that the first respondent and all persons holding by, through or under her, are unlawful occupiers of the residential property that is registered in his name.

- [9] First applicant states that he is currently in a lease agreement in terms of which he pays a monthly rental of R2,000.00. He submits that he considers it unfair that he should continue to pay rent when he has property which is unlawfully occupied by first respondent. First applicant states that he needs the property for himself and his children's accommodation.
- [10] First applicant asserts that first respondent is not an indigent person and that she can obtain rental property for herself anywhere in the Johannesburg area. First applicant submitted a housing report from the second respondent indicating the availability of residential properties within the Johannesburg area.
- [11] On 30 July, 2013 first applicant through his attorneys, caused to be delivered to first respondent, a letter of notice, calling upon the respondents and/or any persons occupying the property through or under her, to vacate the property by no later than 31 August 2013. The letter of notice was delivered to the first respondent, by the first applicant's son, Nkosinathi Mfuphi, who has filed a confirmatory affidavit. The notice period has since expired and first respondent refuses to vacate the property.

First Respondent's narrative

- [12] First respondent contends that she purchased the property from the first applicant for an amount of R35, 000.00. First respondent submitted as proof of purchase, a handwritten document, which she asserts in her replying affidavit, is a signed agreement, for the purchase and sale of land. The document which is handwritten in the Zulu language, states:

‘Imvume yo ku thengiselana kwendlu

Mina ngingu Petros Gabani Mfuphi Ngithengisela U Mampho Joyce Lekata indlu yase Ext 2 ngoba ngiyo hlala e ext 7 nomfazi wami. Indlu Ibiza R35-000

I mali a banginikeze yona u R20,000.00 cash. Savumelana ngokuthi e sele uzoikhokha khona maduzane nje.’²

First respondent asserts that the handwritten document is a valid contract for the purchase and sale of immovable property in that it identifies the parties, the immovable property and the purchase price. First respondent, asserts that she paid the full purchase price during 2007.

- [13] First respondent states that during 2007, she instructed her attorneys to attend to the registration of the property in her name. She submitted a letter dated 1 November, 2007. The letter addressed ‘to whom it may concern’ and apparently signed by someone named Ashlie Farrand, states that Backenberg attorneys have been instructed to attend to the registration of transfer, of the above mentioned property, from the first applicant, to the first respondent. The letter from the first respondent’s attorney also states in part that:

‘All of the relevant costs have already been paid in full and the parties have signed all of the necessary documentation to enable me to proceed with my mandate.’

- [14] First respondent submits that during May 2013 she was informed by a previous employee of Backenberg attorneys, that the attorney who was attending to the transfer of the property in first respondent’s, name was struck

² Loose translation:

‘Agreement for the sale of a house

I Petros Gabani Mfuphi, sell to Mampho Joyce Lekata, the house situated at Ext 2 because I am going to stay at ext 7 with my wife. I am selling the house for the amount of R35, 000.00

I received a deposit in the amount of R20,000.00 cash. We agreed that the balance will be paid in the near future.’

off the roll and that first respondent's conveyancing file was transferred to Langehoven Attorneys.

[15] First respondent also states that during May 2013 she attended at the offices of Langehoven attorneys, who informed her that the deeds registration documents had been sent to Pretoria, for registration of transfer. First respondent, also states, that when she followed up on the matter of the registration of the transfer of title in her name, she was informed that her file was lost. She accordingly referred the matter to the Law Society.

[16] First respondent states that on 7 February, 2010 first applicant gave her an affidavit, in which first applicant deposed to the fact that, he had sold first respondent the above mentioned property and that first applicant, also gave first respondent, a copy of the title deed to the property. First respondent attached a copy of the affidavit allegedly deposed to by first applicant, to her answering affidavit. In the affidavit it is partly stated as follows:

‘... I wish to give my property to Mampho Joyce Lekata ID 760826 0677 086. Situated on this property is a seven roomed house. I also willingly handed over my title deed to the lawyers for transfer purposes.’

First applicant vehemently denies that he deposed to the said affidavit. He also denies that the signature that appears on the affidavit is his signature.

[17] First respondent denies that she is an unlawful occupier. She avers that she did everything in her power to effect registration of transfer of the property in her name to no avail. First respondent also denies that, Nkosinathi Mfuphi, delivered to her, a letter of notice to vacate, sent by the first applicant's lawyers. First respondent states that Nkosinathi Mfuphi, is her ex-boyfriend,

and that he had only attended at the property, to discuss an outstanding domestic violence dispute, between himself and first respondent.

Issues for Determination:

[18] The following issues which arise from the foregoing facts are to be determined by this Court:

[18.1] Whether or not there is a valid agreement between first applicant and the first respondent for the sale of land;

[18.2] Whether or not the court ought to grant an eviction order in favour of the applicant.

[18.3] In the event, that an eviction order is granted, the amount of time, that the first respondent must be afforded to find alternative accommodation.

Determination of the Issues:

[19] This Court is confronted with two conflicting versions of the events leading to this dispute. In weighing the probabilities the Court is guided by the principles enunciated in the classical case of *Plascon Evans Paints Limited v Van Riebeek Paints (Pty) Limited*.³

³[1984] ZASCA 51; 1984 (3) SA 623 (A)

[20] Applying the probability calculus articulated in the *Plascon Evans* case⁴ to the factual matrix of this application, I proceed to make my findings regarding the following issues:

Whether or not there is a valid agreement between first applicant and first respondent for the sale of land:

[21] First applicant has proven ownership of the property within the meaning of section 1 of the PIE Act,⁵ by producing a title deed registered in his name.

[22] First applicant stated that he terminated the oral lease entered into between himself and first respondent. Conversely, first respondent avers that she purchased the property from first applicant pursuant to a sale agreement. In support of this contention she produced a handwritten document in the Zulu language, purporting to be a contract for the purchase and sale of land. The fact that the purported deed of alienation is written in the Zulu language does not invalidate it. If anything, it brings it in line with s 5⁶ of the Alienation of Land Act⁷ (ALA) read with s 6⁸ of the Constitution Act⁹. However, the purported deed of alienation, does not fully comply with s 2 and s 6 of the ALA, in that the formalities prescribed in s 2A and ss 6(1) of the ALA, are omitted in the purported handwritten deed of alienation. The requirements prescribed in s 2A read with ss 6(1) of the ALA are peremptory. Non-compliance therewith invalidates the purported handwritten deed of alienation.

⁴ *Id*

⁵ Section 1 defines owner of land partly as 'the registered owner of land...'

⁶ which states that the purchaser is entitled to choose the language in which the deed of alienation shall be drawn up.

⁷ 68 of 1981.

⁸ The section includes Zulu as one of the eleven official languages of South Africa and it enjoins respect for all official languages.

⁹ 108 of 1996

- [23] First respondent alleges that she paid an amount of R 35,000.00 as the purchase price for the property. However, she has not provided proof of such payment.
- [24] First respondent also relied on a letter from her lawyer, stating that the lawyer was charged with the process of transferring ownership of the property from the first applicant to the first respondent's name. Before registration of transfer could be effected, the lawyer was according to the first respondent's version, struck off the roll of attorneys.
- [25] First respondent also proffered an affidavit, purportedly deposed to, by the first applicant, in which he allegedly deposes to the fact that, he **gives** the property, to the first respondent. The use of the word **give** in the affidavit is inconsistent with the notion of a contract for the purchase and sale of land mooted by the first respondent. I find the first applicant's remonstrance that he did not depose to the affidavit plausible and I am persuaded by it.
- [26] In my view, it is unnecessary to decide on the validity of the impugned contract for the purchase and sale of land in order to determine who the rightful owner of the property is, under the PIE Act. Even if it were to be found that the handwritten contract for the purchase and sale of land between the parties is valid, it would not defeat the title deed as proof of the first applicant's lawful ownership of the land for purposes of making a determination under the PIE Act.

Whether or not the court ought to grant an eviction order in favour of the applicant:

[27] A determination of this issue must necessarily be made with reference to the PIE Act. The history and purpose¹⁰ of the PIE Act is not to subvert, the property rights of lawful owners of land such as the first applicant¹¹, but to ensure the orderly eviction of unlawful occupiers in line with section 26(3) of the Constitution.

[28] In order to balance the competing rights of landowners and unlawful occupiers of land, the PIE Act has set out an equitable scheme in ss 4(6) which applies to proceedings by an owner or a person in charge of land for the eviction of an unlawful occupier of land, who has been in occupation of the property, for longer than six months.

[29] Subsection 4(7) envisages that a person in the position of first respondent, can only be evicted if a court,

‘...is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including... the rights and needs of the elderly, children, disabled persons and households headed by women.’

[30] Subsection 4(8) of the PIE Act further provides that:

‘4. Eviction of unlawful occupiers ...

(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 unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).’

¹⁰ For an analysis of the history and purpose of the PIE Act, see *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 91) SA 217 at paras: 8-15

¹¹ The rights of property owners are protected in s 25 of the Constitution Act 108 of 1996.

[31] I now turn to consider whether this Court ought to grant an eviction order. First applicant has complied with all the formalities under the PIE Act. All the relevant information relating to the circumstance of the first respondent, were placed before this court including the fact that she has two children one of whom is a minor. No tangible evidence has been led to the fact that the first respondent is indigent. First applicant solicited the views of the second respondent, regarding the availability of land within its jurisdiction for the accommodation of the first respondent and her two children.

[32] The fact that information pertinent to the personal circumstances of first applicant and her children was placed before this court as prescribed under the PIE Act and that the second respondent was joined in the action indicates that this court is fulfilling its constitutional and statutory mandate in terms of the PIE Act in granting an eviction order and that in the circumstances an order of eviction ought to be granted.

In the event that an eviction order is granted, the amount of time that the first respondent, must be afforded to find alternative accommodation:

[33] In determining a just and equitable date on which the unlawful occupier must vacate the property, the court must have regard to all the relevant factors, including the period the unlawful occupier and her family resided on the property.

[34] Having considered all the relevant circumstances above, I find that first applicant has made a proper case for the eviction of the first respondent and all those persons occupying through or under her. Accordingly, the period of

time within which first respondent is to vacate property is set out in the order below.

The Order:

[35] An order is granted in the following terms:

[35.1] First respondent and all other persons occupying or claiming a right of occupation through or under her, are ordered to vacate the property known as Erf 5009 Orange Farm Extension 2 Township – also known as 5009 Jikeleza Street, Orange Farm Extension 2, Johannesburg.

[35.2] First respondent and all other persons occupying or claiming a right of occupation through or under her are ordered to vacate the said property by no later than 15 January, 2015.

[35.3] In the event that first respondent and all other persons occupying or claiming a right of occupation through or under her have not vacated the said property as directed in paragraphs [35.1] and [35.2] above, the Sheriff is hereby authorised and required to carry out the eviction order forthwith, by removing the first respondent, and/or any other person occupying the property through or under her from the said property.

[35.4] The Sheriff is authorized to approach the South African Police Service for assistance.

[35.5] First respondent is ordered to pay the costs of the application.

TL MOSIKATSANA AJ

APPEARANCES:

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INSTRUCTED BY

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COUNSEL FOR SECOND RESPONDENT

UNREPRESENTED

DATE OF HEARING

26 MARCH 2014

DATE OF JUDGMENT

18 NOVEMBER 2014