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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 46325/2013

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|-----|--|
| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

19/10/2016

DATE

.....
SIGNATURE

In the matter between:

DIBETLE KABELO EUGENE

Applicant

and

ARON CHILOANE

First Respondent

**ALL OTHER PERSONS CLAIMING
OCCUPATION OF ERF [...8] PROTEA
GLEN EXTENSION 12 TOWNSHIP**

Second Respondent

CITY OF JOHANNESBURG

Third Respondent

JUDGMENT

MIA, AJ:

[1] The applicant seeks an order evicting the respondent's from Erf [...8] Protea Glen Extension 12 Township (the property) in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act No. 19 of 1998 (the Pie Act). This matter was initially heard in November 2014. On 28 November 2014, an order was granted in the following terms by Maenetje AJ:

- "i. The application for eviction against the first and second respondents is dismissed;
- ii. the applicant is given leave to approach the court for an eviction order on the same papers, duly supplemented to deal with the factors in section 4 (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998.
- iii. no order as to costs."

[2] Pursuant to the above order, the applicant served and filed a supplementary affidavit on 10 April 2015. The matter came before Kathree-Setiloane J on 19 October 2015 when the matter was postponed *sine die* and the first respondent was ordered to file his answering affidavit on or before 26 October 2015, failing which the applicant was permitted to enrol the matter as an unopposed matter. The respondent filed an answering affidavit and the applicant filed a reply to the answering affidavit. When the matter was argued before me, counsel for the applicant indicated that the respondent had raised a number of new defences in its answering affidavit. However, the applicant would not seek an order that the new defences be struck out.

[3] The issues to be determined at this hearing of the application according to the applicant were as follows:

- 1. Whether the procedural requirements of the Pie Act had been met?
- 2. Whether there was evidence to demonstrate that it is just and equitable to grant an order for eviction, alternatively whether the respondent had raised a defence?

3. If the court finds that there was no defence, and it was just and equitable to grant an order for eviction, the court is required to determine when it would be just and equitable for the first and second respondents to vacate the above premises?
4. Alternatively, that the court, determine a date on which an eviction order may be carried out in the event that the first and/or second respondents had not vacated the property on or before the dates set out in the order.

[4] Before I proceed to consider the submissions made by counsel it is necessary to give a brief history of the facts of this matter. The first respondent resides on the property along with family members. His son Patrick Chiloane and his nephew Joseph Masikenya jointly purchased the property in which the first respondent and his family reside. The first respondent's son defaulted on the mortgage bond. The property was sold in execution and subsequently changed hands a number of times before it was sold by Dipapadi Property 7 CC to the applicant.

[5] In 2013 the first respondent was approached by Inyathi Properties, who wished to sell the property to the first respondent. Whilst the first respondent signed the offer to purchase it was never signed by the seller. The agent for Inyathi Properties later informed the first respondent that she had offered the property in error and could not sell the property to him. The first respondent has not taken any steps to purchase the property. There is no other legal action related to this property referred to by the first respondent, either to rescind the order granted by default or to set aside the sale in execution. It is not clear on the papers that the first respondent has *locus standi* to do so.

[6] The first respondent and his family have been residing on the property since 2003 even after the property was transferred to various owners. The applicant purchased the property on 26 February 2013 and the property was registered in the applicant's name on 10 July 2013. The applicant has been paying the municipal rates and taxes whilst the first

respondent has been paying for the consumption of electricity via a prepaid meter.

- [7] In pursuance of the order handed down by Maenetje AJ, the applicant filed a supplementary affidavit. In pursuance of an eviction order he placed further information before this court. At paragraph 14 onwards of the applicant's supplementary affidavit the applicant states:

- "14. First Respondent is also a layman Pastor and has a congregation as appears from paragraph 48 of his(sic) answering affidavit.
- 15. First Respondent, alternatively First Respondent together with his children and/or cousin have the monetary means to:
 - 15.1 Bought the property for R128 100,00 during 2003 and paying a bond to Nedbank, (see paragraph 5 of First Respondent's Answering Affidavit);
 - 15.2 Make an offer to purchase the property for an amount of R380,000 in 2013, (see paragraph 3 of First Respondent's Answering Affidavit) ; and;
 - 15.3 Apply and obtain bond finance from Standard Bank for purchasing the property in 2013, (see paragraphs 4 and 10 of First Respondent's Answering Affidavit);
- 16. From what is stated above as contained in First Respondent's answering affidavit, it is clear that First Respondent, his children and cousin will be able to afford alternative accommodation. The only reason why they have not vacated the property can thus only be because they stayed the without having to pay.
- 17. I submit that is that neither First Respondent and his children nor his cousin are at risk of becoming homelessness (sic)."

- [8] The applicant pays a monthly bond instalment to ABSA bank in the amount of R1 538.16 every month plus rates and taxes in the region of R600 per month to the City of Johannesburg on the property which the first and second respondents are occupying free of charge. In addition he also pays a monthly rental in the amount of R1 800 for alternative accommodation. He requires the property for his own use. He relies on the finding of Maenetje AJ that the respondents are unlawful occupiers

of the property and highlights that as a private owner of property he is not obliged to furnish the first respondent with free housing.

- [9] The first respondent refuses to vacate the premises. He relies on the emails from Nedbank and argues that Nedbank indicated that the property was paid up and the sale of the property was in error. He refers to annexure “AC2” and indicates that he was given an opportunity to “reverse everything”. Whilst the first respondent labours and under the belief that Nedbank is giving him the opportunity to “reverse everything”, the communication from Karen Gillyon to Babalwa Matshinye who endeavoured to assist first respondent reads as follows:

“Afternoon Babalwa

I have checked the EVHL notes & ascertained the following:

- Legal action was instituted against the client by Madhlopa attorneys in May 2005;
- Client made repayment arrangements upon receiving the summons;
- The client brokers repayment arrangements & therefore Judgment was obtained 25/10/2005;
- The property was sold at a Sale in Execution on 17/02/2006 for an amount of R90,000;
- The property was transferred into the purchases name 19/02/2007;
- the account was handed over to Shortfall recoveries in 2010 to collect the shortfall;
- The client then made repayment arrangements with Sanclare Debt Collectors working on our behalf to repay R1000.00 per month;
- Payments would received up until 4/10/2013 after which the remaining balance of R 16 416-27 was written off;

Kindly note that our department only handled the collection on the shortfall.”

- [10] The first respondent averred that he has paid the arrear amount due to Nedbank, and holds the view that he is the rightful owner of the property as the outstanding amounts due to Nedbank have been paid. He alleged further that elderly persons and children reside in on the

premises. The first respondent however fails to give details and particulars about the circumstances of these elderly persons and children.

[11] The Pie Act provides in section 4(7) and 4(8) as follows:

“(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(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).”

[12] Mr J.H Korsten, appearing for the applicant, submitted in relation to the new defences raised by the first respondent, that there was compliance in terms of the Pie Act. The respondent knew of these alleged defects relating to the sale of the property, namely the default judgment and sale in execution, but did not bring an application for rescission of the judgment against the registered owner of the property in 2003. The property had been transferred several times after the sale in execution as reflected in the windeed search attached to the papers. The property was transferred to Joshua Marako and Joshua Mathole in 2007, to First Rand Bank Ltd in 2011 and to Dipapadi Property 7 CC in

2013. The applicant purchased the property from Dipapadi Property 7 CC and is the current registered owner. The respondents are unlawful occupiers per Maenetje AJ's judgment, the salary is no sustainable defence to the first respondent's occupation of the premises. In view hereof he submits that the applicant is entitled to an order for eviction of the first respondent and those holding under him.

[13] Mr Mkhize, appearing for the respondent, argued that the applicant had not satisfied the requirements of the Pie Act. He argued that the applicant was aware he had not purchased vacant land and that the property was occupied. He conceded that the first respondent and those holding under him were in unlawful occupation of the premises. He conceded further that there was no indication on the papers that any step had been taken to set aside the sale in execution. He argued however that an eviction order would result in the first respondent and occupiers holding under him being rendered homeless.

[14] He submitted that the matter of *Gundwana v Steko Development CC and Others* 2011(8) BCLR 792 (CC), was applicable to the present matter. This was so, as the first respondent had paid the arrear amounts to Nedbank and that the applicant was not the rightful owner of the property. He argued further that section 25 of the Constitution was applicable and the first respondent ought not to be arbitrarily deprived of his home. In terms of section 26 he argued that the first respondent was entitled to have adequate access to housing. Mr Mkhize argued that the court should apply the principle established in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 CC to the present matter.

[15] In *Gundwana supra*, the court declared that it is unconstitutional for the registrar of the High Court to declare immovable property especially executable when ordering default judgment under rule 31(5) of the uniform rules of court to the extent that this permits the sale in execution of a home of a person. The court set aside the eviction order

against Mrs Gundwana. In *Gundwana*, the appellant became aware of the default judgement in the High Court when the sale in execution was imminent and took steps to set it aside. The Constitutional Court took into account that the constitutional issue was not fully raised before the High Court determining the eviction. Consequently the Constitutional Court elected to deal with the appeal against eviction whilst the application for rescission was still pending in the High Court. The facts of the present matter are not applicable *in casu*.

[16] I understand Mr Mkhize's submission with regard to the first respondents right in terms of section 26, to mean that I ought to consider whether or not it is desirable or permissible to order an eviction which will result in the respondents' being homeless if I were to grant an order for eviction as he has already conceded that the respondents are unlawful occupiers. Hence his referral to sections 25 and 26 of the Constitution which provide:

"25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

26 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

(My emphasis)

[17] In reply, counsel for the applicant, argued that the applicant had complied with the formalities required by the Pie Act. The new defences raised by the first respondent related to:

1. the ownership of the property;
2. allegations regarding the formalities not being attended to;
3. that the sale of the property was in error;
4. reliance was made on emails from Nedbank that the arrears had been paid;

- [18] He argued I dismiss the above defences as, it was common cause that the applicant is the current registered owner per the winded search. He submitted that all that was required at this point was to determine the date on which it would be just and equitable for the first respondent and those holding under the first respondent to vacate the property.
- [19] Having regard to the facts before me, the legislation referred to as well as the reported cases relied on, none of authorities suggest that the owner of private property is required to furnish free housing to unlawful occupiers. In *Ndlovu v Ngcobo: Bekker and another v Jika* [2002] 4 All SA 384 (SCA), Harms JA states at paragraph 3 and 4, as follows:
- “[3] PIE has its roots, *inter alia*, in section 26(3) of the Bill of Rights, which provides that ‘no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances’. *Cape Killarney Property Investment (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at 1229E. It invests in the courts the right and duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction.
- [4] PIE defines an ‘unlawful occupier’ in section 1 to mean –
 ‘a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)’.”
- [20] Even if I consider, as argued by Mr Mkhize, that the first respondent and all his son paid certain amounts to Nedbank each month, the annexure “AC2” referred to, clearly indicates that the amounts were paid toward the outstanding balance and was paid after default judgment was taken and after the property was sold in execution. The

argument that the respondent's will be rendered homeless ignores the first respondent's averment that he does not wish to access his reserve savings or that he previously applied to Standard bank for a bond. Thus the first respondent and those holding under him will not be rendered homeless and their dignity would not be impacted as argued by Mr Mkhize.

[21] Harms JA states at paragraph [19] in *Ndlovu supra*:

"[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide."

[22] In the matter *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (Socio Economic Rights Institute of South Africa as Amicus Curiae)* [2013] 1 All SA 8 (SCA), Wallis JA in dealing with the enquiry in terms of sections 4 and seven of the Pie Act states:

"the relationship between sections 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of section 26(1) of the Constitution, is faced with two separate enquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and

that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable.”

[23] The applicant is the owner of the property and the respondents are in unlawful occupation. The first respondent has not taken any steps to set aside the sale in execution. Thus on the first leg of the enquiry an order for eviction is just and equitable. The only remaining issue to be considered is whether it is just and equitable to order an eviction in view there being elderly and children residing on the premises. The circumstances of these elderly persons and children are not known to the applicant and the respondent has failed to furnish further information to assist this court in coming to a determination regarding when it would be just and equitable for the occupants to vacate the premises.

[24] On the papers it is clear that the first respondent is able to access a bond and has reserve funds which he is able to access to pay for accommodation. In view hereof the first respondent will not be rendered homeless as he has funds to pay for accommodation for himself and those holding under him. Thus on the second leg it appears that it will be just and equitable to afford the first respondent and those holding under him sufficient time to find alternative accommodation. Mr J.H Korsten suggested that three months would afford the respondent sufficient time. In view of the festive season

approaching resulting in a slowing down of business in the property market and business closing, this time should be extended.

[25] There has been no submissions regarding a deviation from the normal cost order consequently costs will follow the cause.

[26] In the result, the following order is granted.

ORDER

1. The first respondent and the second respondents herein are evicted from the property and buildings erected on the property better known as Erf [...8], Protea Glen Extension 12.
2. The first and second respondents are ordered to vacate the premises on or before 24th of February 2017.
3. In the event that the first and/or second respondents do not vacate the property on the above date, the Sheriff of the Court or his lawfully appointed deputy are authorised and directed to evict the first and/or second respondents from the property.
4. The first respondent is to pay the costs of this application.

S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant : Adv J.H Korsten
Instructed by : KBN Attorneys

On behalf of the respondent : Adv Mkhize
Instructed by : Selamolela Attorneys

Date of hearing : 10 October 2016

Date of judgment : 19 October 2016