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REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
.....	
DATE	SIGNATURE

CASE NO 2017/ 36759

In the matter between:

MASANDE MANUAL MAKHOLOSA

Applicant

and

ORIPFA MOMBEZI

First Respondent

OCTAVIA MONBEZI

Second Respondent

VALENCIA MOMBEZI

Third Respondent

EKURHELENI METROPOLITAN MUNICIPALITY

Fourth Respondent

JUDGMENT

Headnote - eviction – PIE complied with

The occupiers resisted eviction on the premise that the house was in the estate of their late father and the applicants had no rights having fraudulently acquired registered title – the house had been allocated under the old permit system to the late father, later converted into ownership – however the late father then bonded the house, defaulted and lost ownership as long ago as 1993 through a court sanctioned sale in execution – the house had been sold and bought three times and the present owners/applicants were innocent third parties

No attempt to set aside the transfer of ownership – no indication of any grounds to substantiate a fraud by applicants

Ndlovu Ngcobo Bekker v Jika applied

Occupiers of 87 Berea Road considered as to what is just and fair in circumstances

Eviction granted – three months grace extended to evacuate

Sutherland J:

Introduction

[1] The relief sought in this application is the eviction of the first to third respondents from the property at [...] L Street, Tembisa extension 5, Leboeng Section, also known as Erf [...] Tembisa Extension 5 Township.

[2] I am informed that the respondents approached the Pro Bono desk at this Court for assistance in November 2017, about 8 months before the hearing. They were represented at the hearing by Adv Mkhize, instructed by BM Mudzuli attorneys at the request of the Pro Bono coordinator. Apparently, Adv Mkhize has been involved in assisting the respondents from the time they approached the pro bono desk. Initially, another firm of attorneys were asked to take on the matter but had not come on record by Monday 4 June when the matter was called for the first time. Adv Mkhize appeared

without a mandate, and the matter was stood down to 7 June to enable him to obtain one.

[3] The respondents filed an answering affidavit in January 2018. At my instance, at the time the matter stood down, I directed that the respondents were to file any further affidavits they saw fit to address the issues relevant to an eviction order. As a result, a supplementary affidavit was filed at the hearing and admitted without objection.

The Ownership of the property

[4] The applicant is the registered owner of the property. He acquired it by purchase from Masenyeletsa and Maria Maponya on 15 February 2017. A copy of the deed of transfer, no T37124/2017 date 24 May 2017, was produced to establish this fact.

[5] The respondents dispute this fact. The basis for that dispute is meritless. The matter must be approached on the basis of the proven ownership of the applicant.

[6] The respondents themselves have never been owners of the property. They have lived continuously at the property since at least 1990.

[7] The respondent's late father, David Azwinhangwisa Mombezi and their mother, Alvinah Thivauhudzi, were at one time vested with rights of leasehold in the property.

Initially, they held a lease, granted on 7 August 1990. The leasehold was converted to full ownership pursuant to section 2(1) of the Upgrading of Land Tenure rights Act 112 of 1991. The Report of the Registrar of Deeds does not state on what date this was formalised.

[8] A mortgage bond in favour of Khayaletu Home Loans (Pty) Ltd was registered against the property. On 25 November 1993, pursuant to an attachment, a copy of which was presented to the court, the property was sold in execution to the bondholder. By these means, the parents of the respondents ceased to hold rights to the property.

[9] Since the time the parents of the respondents lost rights in the property, the property changed hands on several occasions. The persons who sold the property to the applicant had bought it at a sale in execution at the instance of Nedbank.

[10] The respondents purport to have been ignorant of the events. Given the history of the transfers of ownership and the previous foreclosure this seems unlikely. A bond was registered and on the probabilities the Bank would have at least inspected its security. However, since service of this application, no steps have been taken to set aside the several changes of ownership. Moreover, their locus standi to do so is doubtful, as they have never themselves been owners. Their mother, a former co-owner, who is not a respondent might have had locus standi to do so but she has not done so either.

[11] Vague allegations of fraud are made concerning the several transfers. The allegation is bald and unsubstantiated. The respondents persist in the specious belief that the property is still in the estate of their late father. Moreover, no grounds have been advanced to question the bona fides of the applicant in buying the property. The applicant has taken out a bond with FNB to cover a purchased price of R350,000.

[12] To sum up, no sound reason exists to question the *bona fide* acquisition of the property by the applicant.

The application of the Prevention of illegal eviction and unlawful occupation of land Act 19 of 1998 (PIE)

[13] Authorisation was obtained from this Court to serve the eviction application on the respondents. Service was effected on 17 November 2017. The respondents procured, shortly thereafter, legal assistance, as alluded to above.

[14] Section 4(7) of PIE Act is applicable. It provides:

“ (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.”

[15] The application of this section has been explained in *Ndlovu, Ngcobo Bekker & Another v Jika 2003 (1) SA 113 (SCA) at [9]* where it held that the factors referred to in section 4(7) do not have to be taken into account if a property is sold in execution. That is the approach pertinent to this case; indeed, on two occasions there has been a sale in execution.

[16] What remains is an evaluation of the fact-specific circumstances as to the justice of an eviction.

[17] On one hand, the applicant has bought a house, incurred a mortgage liability and in addition to bearing those costs, is, at present, paying an additional sum in rent in a hostel. The property yields no revenue to him. Self-evidently, he seeks to establish a home in the property.

[18] On the other hand, the respondents who have never had any title to the property but have nevertheless lived there for in excess of 27 years, would have to find alternative accommodation. What information is disclosed is a bald statement that their mother and minor children live there. Despite an opportunity having been granted to them to supplement their papers with information that would further address their circumstances and lay a foundation for an argument that eviction would be unjust, the additional material before me does not substantiate such a contention. With legal

assistance they have persisted in resisting the application by relying on a claim to possess the property derived from their parents' title. I must infer that no further pertinent information could be adduced.

[19] In *Occupiers of Erven 87 and 88 Berea 2017(5) SA 346 (CC)* at [47] that court emphasised that the parties and their representatives have a duty to provide the court with information. Also, a court must active create opportunities for information to be presented pertinent to the issues. The solicitation of supplementary affidavits was to facilitate that end, and the respondents have had the fullest opportunity to place before the court whatever was thought to be relevant.

[20] In my view, given these circumstances, it is just and equitable that the eviction is granted. The competing interests have to weighed. The *bona fide* owner has needs for stability no less than the respondents. He cannot be expected to pay off a bond while the respondents occupy the property indefinitely. The respondents, who have had legal assistance, have never had title to the property and in addition have been either supine in advancing a case to resist the application or have no real defence that can trump the case of the applicant. This is an example where the loss must be borne where it falls.

The conditions of the eviction order

[21] Given the specific circumstances, as described above, in my view, an allowance of a reasonable period in which to find alternative accommodation is appropriate. The

Municipality has been cited, and if necessary it can be approached for temporary assistance.

[22] In my view, a period of four months is adequate to make the necessary arrangements. For the sake of clarity, the respondents must vacate by 31 October 2018. If they refuse, the applicant may cause a physical eviction on 1 November 2018.

The Order

1. The first to third respondents, and all persons claiming any right or interest of occupation through these respondents are evicted from the property Erf [...] Tembisa Ext 5, also known as [...] L street, Tembisa Ex 5, Leboeng Section, with effect from 31 October 2018.
2. In the event that the respondents fail to vacate timeously, the sheriff is authorised and directed to evict them on 1 November 2018 or as soon thereafter as may be possible.
3. The respondents shall bear the costs of the application.

Roland Sutherland
Judge of the High Court
Gauteng Local division, Johannesburg

Heard: 7 June 2018
Judgment: 14 June 2018.

For the applicant:

Attorney A L Cronje of Mackenzie Van der Merwe and Willemse Attorneys

For the Respondents:

Adv S W Mkhize,
Instructed by B M Mudzuli Attorneys.