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

Case Number:

2022/19225

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

STELLA DOROTHEA VAN LOGGENBERG N.O.

Applicant

and

KILLARNEY JONES

First Respondent

THE EKURHULENI METROPOLITAN MUNICIPALITY

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

JUDGMENT

[1] This is an application for the eviction of the first respondent, Ms Jones, from the residence of the deceased, Mr Hinchley. The application was instituted by Ms van Loggenberg N.O. (the executrix) in her capacity as the executrix of Mr Hinchley's deceased estate. She acts under letters of executorship issued by the third respondent, the Master of the High Court (the Master). The third respondent is the

Ekurhuleni Metropolitan Municipality (the City). Neither the Master nor the City has actively engaged in the litigation.

[2] The executrix describes Mr Hinchley as having been Ms Jones' boyfriend while he was alive. In her answering affidavit Ms Jones disputes this description and says that she was a 'universal partner or the like' of Mr Hinchley. This assertion, in turn, is disputed by the executrix. Mr Hinchley died of Covid complications in July 2021. At that time, and at least for a number of years prior, Ms Jones lived in the house with Mr Hinchley. She continues to reside in the house despite the executrix serving her with a notice to vacate. Hence, the application for Mr Jones' eviction.

[3] I should add at this point that Mr Hinchley left a will on his death. In it his ex-wife, Ms Carron Hinchley (Ms Hinchley), is named as the sole heir to his estate. The will was executed prior to the Hinchley's divorce. It is thus not surprising that Ms Jones is not named as a beneficiary in the will. This has proved to be a bone of contention between the parties, for reasons I will elaborate on later.

[4] The executrix contends that Mr Hinchley was the registered owner of the property from 2011 and remained the registered owner at the date of his death. The executrix was appointed on 3 December 2021. As such, and by operation of law Mr Hinchley's assets vest in her. She has the responsibility of administering the deceased estate and taking control of, and safeguarding, all property. This includes the house in which Ms Jones continues to reside. According to the executrix, she has been hampered in fulfilling her obligations by Ms Jones who, among other things, is alleged to have refused the executrix access to the house. The executrix obtained a court order against Ms Jones in March 2022 directing Ms Jones to provide the executrix with full and unfettered access to the property at all reasonable times. Ms Jones was interdicted from denying access to the executrix and was required to deliver a set of keys to her.

[5] Having gained access to the property and movables in it, the executrix found that a number of assets were unaccounted for. Ms Jones had disposed of a Land Rover vehicle registered to Mr Hinchley and had deposited the proceeds, amounting to R142 000 into her own bank account. She had also disposed of other movables,

including electronic equipment. The deceased's bank accounts reflected that Ms Jones had withdrawn approximately R24 000 from Mr Hinchley's business account and made debit card purchases on another one of his accounts in the amount of approximately R10 000. Ms Jones does not dispute that she sold these items or that she withdrew the funds, but she denies culpability. The executrix has laid criminal charges against Ms Jones in relation to her conduct and has instituted civil proceedings in the Magistrates' Court in terms of which the executrix seeks to recover movables and funds that Ms Jones took appropriated.

[6] The executrix says that Ms Jones has not approached her to normalise her occupation of the property. Instead, she continues to reside at the house without paying any rental. The executrix's view is that Ms Jones' continued occupation of the house is detrimental to the estate. According to the executrix, Ms Jones' obstructive behaviour led her to make a decision to take full control and occupation of the property so that she can proceed to wind up the estate. On 1 April 2022 she sent a letter to Ms Jones' attorney at the time giving her notice that she should vacate the property by 5 May 2022. This did not have the desired effect, and Ms Jones remains in occupation. The executrix's case is that Ms Jones has no right or entitlement to occupy the property. She is an unlawful occupier and it is just and equitable, and in the interests of the deceased estate, that she be evicted.

[7] In opposing the application, Ms Jones originally denied that she was an unlawful occupier. Her defence on this score was based, in the first instance, on her stated challenge in the answering affidavit to the appointment of the executrix to that position. In the second instance, and related to the first, Ms Jones averred that the will accepted by the Master was 'obsolete and/or invalid and/or of no force and effect and/or null and void'. This is because, so it was submitted by Ms Jones in her answering affidavit, on Mr Hinchley's divorce from Ms Hinchley the will became obsolete 'since the estate was settled on divorce'. In addition, Ms Jones contended that Mr Hinchley had mentioned many times before his death that he had concluded another will after the divorce 'thus rendering (the existing will) invalid'. Finally, Ms Jones relied on her previously-mentioned assertion that she was a 'universal partner or the like' of Mr Hinchley and as such, she contended that she had rights in the deceased estate, including rights in the house. She averred that she had

‘contributed vastly’ over the years to the development and upkeep of the property, which she ‘calls home’.

[8] As to whether it would be just and equitable to evict her from the property, in the event of her being found not to be in lawful occupation, Ms Jones stated in her answering affidavit that she was currently unemployed, although she had been employed in the past and was seeking employment. She was in constrained financial circumstances, and was being represented by Legal Aid in the eviction proceedings. While Ms Jones did not deny that she was not paying any rent to occupy the property, she pointed out that she was up to date with the payment of consumption charges and municipal rates. Ms Jones said that the application threatened her right to housing under s 26 of the Constitution. Her only family members in Gauteng were her sister and her brother’s children. She said that she could not impose on her brother’s children, nor could her sister accommodate her in the two-bedroomed flat she occupied with her daughter. Ms Jones denied that she could source comparable alternative accommodation in the area. She reiterated her contention that she had rights in the property.

[9] In her replying affidavit the executrix took issue with the defences raised by Ms Jones. The executrix pointed out that Ms Jones had never instituted proceedings to have her removed from her office. Consequently, her authority to continue to act under the letters of executorship subsisted unless and until it was set aside by order of court. Further, the executrix asserted that Ms Jones’ contention that another will existed was no more than a bare and vague allegation, devoid of supporting evidence. No will had been found by Ms Jones or anyone else save for the one accepted by the Master. The executrix pointed out, correctly, that under our law, a divorce subsequent to the execution of a will did not render that will invalid. What is more, Ms Jones had not instituted legal proceedings seeking to set aside the existing will.

[10] As to the averment of the existence of a ‘universal partnership or the like’ the executrix challenged this averment, too, as being ‘vague, sweeping and bare’. She criticised the answering affidavit of having failed to provide details such as, among others, how the alleged universal partnership was concluded; what its terms were

and how it operated; what assets and liabilities were included in it. The executrix asserted that Ms Jones: 'incorrectly equates simply having a long-term relationship with the Deceased ... with a universal partnership.'

[11] The executrix also disputed Ms Jones' assertion that she did not have means to maintain herself. She highlighted the lack of any details provided by Ms Jones in her answering affidavit about her finances or to explain how she had managed to pay the rates and other municipal charges on the property since Mr Hinchley's death. Nor were details provided as to what attempt Ms Jones had made to find employment.

[12] The executrix filed her heads of argument in September 2022. On 11 October 2022 Ms Jones gave notice of an application to file a supplementary affidavit. It was accompanied by the supplementary affidavit itself. Ms Jones stated in this affidavit that it served two purposes. The first was to supplement the averments in her answering affidavit because that affidavit 'did not fully set out what I had communicated to my erstwhile attorneys', particularly as regards her alleged universal partnership. In addition, she said, she wished to place two letters before the court obtained from overseas family members of Mr Hinchley which allegedly supported her claim that Mr Hinchley had revoked his existing will. The second purpose of the supplementary affidavit was to act as a founding affidavit in 'a conditional application for the revocation of the purported last will and testament of the late (Mr Hinchley), a declaration of invalidity of section 2B of the Wills Act 7 of 1953, condonation for the late lodging of my creditors (*sic*) claim and setting out a claim for universal partnership against his deceased estate.'

[13] Despite this protestation in the supplementary affidavit, the Notice to which it was attached contained no prayers for relief of this nature. Instead, the only relief sought was for leave to Ms Jones to file the supplementary affidavit. This remained the position up to and including at the hearing of the eviction application. In other words, Ms Jones has to date not formally instituted an application for the substantive declaratory and related relief described above. The executrix opposed the filing of the supplementary affidavit, pointing out, among other things, the procedural deficiencies in the purported 'conditional claim' for substantive declaratory relief.

The executrix also highlighted deficiencies in the documents attached to the affidavit and disputing most of the factual averments made by Ms Jones.

[14] By and large, the supplementary affidavit demonstrates an attempt by Ms Jones to boost the averments made in her answering affidavit and to deal with criticisms contained in the executrix's reply. The two letters attached from Mr Hinchley's brother and daughter from a previous marriage were written after the answering affidavit was filed. They are purported to provide evidence that Mr Hinchley intended to revoke the existing will and that he had executed a new will. The averments in these letters are vague on this score and do little more than record what Mr Hinchley is alleged to have told the writers. In any event, the letters are not accompanied by affidavits on the part of the writers and amount to no more than hearsay evidence.

[15] All in all there was little to recommend the admission of the supplementary affidavit. Developments at the hearing of the matter sealed the affidavit's fate. Ms Jones' legal representative accepted that despite what Ms Jones had stated in her supplementary affidavit, there was as yet no application serving before court for that relief. The hearing proceeded on the common cause basis that while these were avenues open to Ms Jones for legal recourse in future, she did not persist, in the eviction application, for orders declaring the will invalid; declaring s 2B of the Wills Act to be invalid; declaring that she was in a universal partnership with Mr Hinchley; or condoning the late lodging of her creditor's claim against the estate.

[16] Ms Jones was correct to clarify her legal position in this manner at the hearing. She could not justifiably have contended that there was a proper application serving before the court for this relief. A valid application for relief of this nature cannot be founded on a supplementary affidavit filed (as Ms Jones admitted in the affidavit) 'out of time and out of sequence'. At the very least, a Notice of Motion would be required to support the application. The application should have been instituted well before the completion of the exchange of affidavits under the rules of court. Moreover, it is doubtful whether application proceedings are appropriate in circumstances where, as here, there is a disputed claim to the existence of a universal partnership.

[17] The 'conditional application' referred to in the supplementary affidavit was still-born in these proceedings. Ms Jones may wish to pursue such relief in properly instituted proceedings in the future, but she correctly accepted that she could not persist in seeking it in the eviction application.

[18] For reasons that are not explained, after the supplementary affidavit was filed, Ms Jones also uploaded an exchange of correspondence between her and the executrix. The letters were not attached to an affidavit, and were simply uploaded onto Caselines. From them it appears that on 10 November 2022 Ms Jones wrote to the executrix claiming 'an advance/financial support' from Mr Hinchley's estate. The executrix appears to have disputed the validity of the claim. I say 'appears' because, without the necessary confirmatory and explanatory affidavits, the letters are not admissible evidence before me. The correspondence post-dated the supplementary affidavit. It's only relevance to the present application is to show that Ms Jones intends to pursue some claim(s) against the estate. For reasons already discussed, I am not called on in these proceedings to forecast what the outcome of any such claims may be.

[18] The upshot of all of this is that the supplementary affidavit is not relevant to the eviction application **and leave**, nor has a proper case been made out for its admission.

[19] It has been established that a court conducting an inquiry to determine whether an eviction order is permissible under s 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 (the Act) embarks on the following inquiry:¹

19.1 First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. 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.

¹ *Changing Tides*, n1 above, para 25, endorsed by the Constitutional Court in *Occupiers, Berea*, n1 above, paras 44-45

19.2 Second, and before it grants an eviction order, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order.

[20] In the case of private owners who seek the eviction of unlawful occupiers, two competing constitutional rights are implicated: the right to adequate housing and protection from unlawful eviction in s 26(3), and the protection against arbitrary deprivation of property under s 25(1) of the Constitution. Whether it is just and equitable to order an eviction in a particular case involves a balancing of these competing interests. A private owner is under no obligation to provide free housing.² On the other hand, the Act enjoins a court to consider all relevant factors, including, among others, the rights and needs of the elderly, children, disabled people and households headed by women.³ The court must obviously be alive to, and guard against, the risk that an eviction order may render a respondent homeless.

[21] The first issue to consider in this case is whether Ms Jones has established a defence to the claim for eviction. A defence, in this context, means a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease.⁴

[22] As I noted earlier, Ms Jones initially raised a number of defences to the eviction. She challenged the authority of the executrix. Section 4(1) of the Act provides that 'an owner or person in charge of land' may apply for an eviction order. Had there been any merit in her contention that the executrix lacked authority this would have provided Ms Jones with a valid defence based on lack of *locus standi* under s 4(1). However, this defence does not avail Ms Jones in this application. The basis on which Ms Jones challenged the executrix's appointment was that she believed that Mr Hinchley had executed a later will, revoking that which Ms Jones assumed formed the basis for the executrix's appointment. Quite apart from there being no evidence of a later will, absent the removal of the executrix and withdrawal

² *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC) at para 31

³ PIE Act s 4(7)

⁴ *Changing Tides*, n1 above, para 12

of her letters of executorship the executrix is *ex lege* the 'person in charge of' the house in which Ms Jones resides and thus lawfully entitled to seek her eviction.

[23] Ms Jones' second defence to the lawfulness of the eviction was that she was not an unlawful occupier because she was in a 'universal partnership or the like' with Mr Hinchley. Until the supplementary affidavit was filed Ms Jones had taken no legal steps to establish her stated claim of a universal partnership. The executrix correctly contended in her replying affidavit that the averments in Ms Jones' answering affidavit in this regard were vague and lacked the kind of specificity required properly to support her broad claim that a universal partnership existed. It was only in her supplementary affidavit that she purported to take steps to seek a declarator as to the existence of a universal partnership. I have already explained that at the hearing of the matter Ms Jones conceded that her 'conditional application' for such relief was not properly before court. This being the case, she has failed to establish that she is in lawful occupation of the property as a consequence of her asserted 'universal partnership or the like' with Mr Hinchley.

[24] It follows that Ms Jones has no legal defence to the eviction. The next issue to consider is whether it is just and equitable to order her eviction, having regard to all relevant factors. In considering factors relevant to the executrix, she has legal obligations that require her to wind up the deceased estate for the benefit of creditors and beneficiaries. She is under a duty to maintain the assets in the estate and their value. The executrix was unable to obtain access to the property and had to obtain an urgent court order before she could do so. Although Ms Jones denies that she has been obstructive, the fact that a court order was necessary to enable the executrix to carry out the most basic of her functions speaks volumes.

[25] It is clear from the affidavits filed by both parties that there is, at the very least, a lack of trust between them and an inability to co-operate. The executrix is hamstrung in carrying out her duty to wind up the estate for so long as Ms Jones continues to refuse to vacate the property. It need hardly be pointed out that a

property occupied by an unlawful occupier has a severely reduced value on the property market.

[26] It is a startling feature of this case that Ms Jones does not deny having appropriated funds and estate assets without the authority of the executrix. That she may feel her conduct was justified is beside the point. On Mr Hinchley's death the assets formed part of his estate. Ms Jones was not the executrix and the assets were not in her name. Unless authorised by the executrix or an order of court Ms Jones had no right to deal with those assets as if they were her own. Collectively, these facts demonstrate a justified need, on the part of the executrix, to take full possession and control of the house.

[27] It has been recognised that:

'In most instances where the owner of property seeks the eviction of unlawful occupiers, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order.'

Ms Jones' absence of a defence and the executrix's demonstrated need for possession tilts the scales of justice and equity in the latter's favour. Are there any relevant circumstances demonstrated by Ms Jones to reset the scales in her favour?

[28] The property in question is a substantial home with at least three bedrooms and a pool. Ms Jones lives on the property alone, without any dependents or other vulnerable family members. She is in her early fifties. Although she is currently unemployed she is, as I recorded earlier, seeking employment. She has held employment in the past in the fitness industry and as a personal assistant to a Managing Director until she was retrenched as a consequence of the Covid pandemic. Ms Jones does not contend that she is unemployable. From the details she provides of her previous employment she clearly has a range of employable skills. This is reinforced by the fact that Ms Jones was selected as a contestant in the Survivor South Africa TV programme after Mr Hinchley's death. From the information provided by Ms Jones there is every reason to believe that she will be in a position to be able to fund her own accommodation costs from a salary in the foreseeable future.

[29] Ms Jones likewise does not aver that she will be rendered homeless by her eviction. She says that her relatives in Gauteng will not readily be able to accommodate her because of space constraints. Ms Jones does not dispute that accommodation options are available in the Benoni area, where the house is situated. However, she contends that it is not comparable to the Benoni house where she has lived for over 10 years and to which she feels she has a claim. As things stand, Ms Jones has no established claim to the house, nor has she instituted legal proceedings to that end. Considerations of justice and equity do not entitle Ms Jones in these circumstances to insist on being accommodated, at a cost to the deceased estate, in the house.

[30] I conclude from my consideration of these facts that an eviction order is just and equitable in this case.

[31] I turn to consider the date of implementation of the eviction order. Here I think it is relevant that Ms Jones has lived in the house for over 10 years and for that time she regarded it as her home. I also take into account that as at the time of deposing to her affidavits Ms Jones had not yet secured employment. The house is unbonded and Ms Jones avers that she keeps the municipal accounts up to date. In these circumstances, it would be just and equitable to afford Ms Jones a period of three months within which to put her affairs in order and relocate to alternative accommodation.

[32] The executrix sought a costs order against Ms Jones. The general principle is that costs should follow the result, although the court has a discretion to depart from this principle in an appropriate case. Ms Jones is represented by Legal Aid. Although the executrix questioned whether Ms Jones was being transparent about her financial circumstances, the fact that Legal Aid has agreed to represent her indicates that she falls within the ambit of their means test. I accept that Ms Jones has financial constraints at present, although this is likely to change in the future when she secures employment. I take into account, too, the fact that in opposing the eviction application Ms Jones sought, albeit unsuccessfully, to advance her constitutional rights under s 26. My view is that in these peculiar circumstances, no

order of costs should be made. This means that the estate must bear its own costs and those of Ms Jones must be borne by Legal Aid.

[32] I make the following order:

1. The application by the first respondent for leave to file the supplementary affidavit is dismissed.

2. The first respondent is evicted from the immovable properly situated at 30 Long Tom Street, Boatlake Village, Benoni, Gauteng and legally described as Erf [...] Rynfield Extension 10 Township, Registration Division I.R. Province of Gauteng (the 'Property').

3. The first respondent and all those who occupy the Property through and under her are directed to vacate the Property within 90 (ninety) days of service of this order.

4. If the first respondent has not vacated the Property within 90 (ninety) days of service of this order, the Sheriff of the above Honourable Court is hereby authorised and directed to carry out the eviction order on/or after the eviction date by removing from the Property the first respondent.

**RM KEIGHTLEY
JUDGE OF THE HIGH COURT
JOHANNESBURG**

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LEGAL AID SOUTH AFRICA

DATE OF HEARING:

08 MARCH 2023

DATE OF JUDGMENT:

03 APRIL 2023