FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES**: HOPEWELL MCEBISI WINE + 1 v VUYELWA ZONDANI**

NOT REPORTABLE

- Case Number: **2044/08**
- High Court: **EASTERN CAPE HIGH COURT, PE**
- DATE HEARD: **26 FEBRUARY 2009**
- DATE DELIVERED: **27 FEBRUARY 2009**

JUDGE(S): **JANSEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **ADV HORN**

for the Respondent(s): **ADV THERON**

Instructing attorneys:

- Applicant(s): **O'BRIEN ATTORNEYS**
- Respondent(s): **LEGAL AID BOARD**

CASE INFORMATION -

- ***Nature of proceedings*:**
- ***Key Words*:**
- ***Summary:***

IN THE HIGH COURT OF SOUTH AFRICA **NOT REPORTABLE**

(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No.: 2044/08

Date delivered: 27 February 2009

In the matter between:

HOPEWELL MCEBISI WINE First Applicant

NOXOLO CAROLINE WINE Second Applicant

and

VUYELWA ZONDANI Respondent

JUDGMENT

JANSEN, J:

This is an application brought in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998. The applicants seek an order evicting the respondent from residential property which she currently occupies. The property is described as Erf 13242 Motherwell Port Elizabeth and situated at 134 Ngwevana Street, Motherwell, NU9, Port Elizabeth. The order is sought against the respondent together with her dependants and any other person or persons occupying the said property with her. The respondent opposes the application.

There is no material factual dispute in this matter. During 1991, when the respondent was residing in Tsoksville, Port Elizabeth, she attended the offices of Khayalitsha Housing in Port Elizabeth and applied for one of the properties in a housing scheme known as Servcon, apparently controlled by Standard

Bank. She was then informed that she did not qualify for a housing loan with Servcon because her income was minimal. A person employed by Khayalitsha Housing advised her to get another person to sign the documentation and to produce that person's salary advice to qualify for a bond with Standard Bank Servcon. The respondent was advised that Servcon would be aware that she was the person living in the property and that she would be regarded as the owner thereof although the property would not be registered in her name. The respondent then attended the offices of Khayalitsha Housing with her then boyfriend, one Sydney Oliphant, who then signed the agreement with Standard Bank Servcon. Mr Oliphant was at all times aware of the fact that the property actually was supposed to belong to the respondent. The respondent paid the deposit of R1 500,00 and was at all times responsible for the bond repayments on the property in the sum of R302,00. She moved into the property during 1991. The property was duly registered in the name of Sydney Oliphant during 1992. Since registration thereof the respondent paid diligently every month the bond repayment amounts directly into the Standard Bank account.

Since 1992 the respondent attempted to enter into an agreement with Servcon to purchase the property and to have it registered in her name. Eventually during 2003 the respondent did enter into an agreement with Standard Bank to purchase the property. The respondent was given pages 1 and 10 of the Agreement. In this Agreement it was acknowledged that the respondent was at the time in possession of the property. The purchase price thereof was R25 000,00. It was recorded in the Agreement that the transfer of the property into the name of the respondent would be attended to by a local firm of attorneys Joubert Galpin and Searle. A copy of a letter dated 12 May 2003 on a Standard Bank letterhead written by one Nicholas Nkoane, who was the Servcon Officer at Standard Bank, to the Servcon Housing Solution, PE Branch, was made available to the respondent. A copy thereof is attached to her opposing affidavit. That letter confirms approval of the respondent's offer to purchase the said property for an amount of R25 000,00. It was also recorded that the firm of Joubert Galpin and Searle will be handling the transfer. Since 2003 the respondent has been waiting patiently for the said firm of attorneys to contact her. She went to Servcon's offices on numerous occasions and also contacted them telephonically to enquire about the progress made, but she was always told to be patient. In the meantime she still continued to make bond repayments on the property. The last payment she made was on 19 January 2005. She then stopped making payments to Servcon at Standard Bank as one Gideon at Servcon informed her that she no longer needed to pay for the property as the property would be given to her by virtue of the fact that the Government has indicated that it would be allocating all Servcon houses to the current occupants free of charge.

The respondent had also been paying rates and paid for water for the property since 1991. When she attended the offices of the Nelson Mandela Bay Municipality in early 2008 she was, however, informed that she no longer needed to pay rates and taxes as her name was no longer reflected on their system.

When the papers in this application were served on the respondent she first became aware of what had happened in relation to the property in the meantime. Standard Bank instituted action against Mr Oliphant in whose name the property was registered (probably for non-payment of the bond instalments). Service was effected on 22 March 1995 by affixing the summons to the door of the property. That summons was never brought to the attention of the respondent. Default judgment was granted against Mr Oliphant in favour of Standard Bank. The property was then by virtue of a writ dated 8 May 1995 issued by the Registrar of the Court attached by the sheriff and sold by public auction on 7 July 1995 to and on behalf of The Standard Bank of South Africa Limited for a purchase price of R1,00. On 30 August 1995 the property was transferred to The Standard Bank of South Africa Limited. The respondent was unaware of the summons issued, the judgment granted, the sale in execution and the transfer of the property to Standard Bank. She continued to pay the monthly instalments in respect of the property which instalments were accepted by the Standard Bank until 2005 when she received a report from Gideon as stated above.

It must be accepted that in spite of the numerous enquiries made by the respondent at Servcon Standard Bank as to the transfer of the properties into her name Standard Bank did not follow it up and did not give any further instructions to the firm of attorneys. The firm of attorneys also did not contact the respondent.

The property was subsequently transferred to one Gerhardus du Preez. It does not appear from the documentation placed before this Court when exactly that transfer took place but it must have been approximately April 2007 as a letter dated 1 May 2007 by an attorney Howard Collin was directed to the respondent to inform her that the property had been sold and transferred from Standard Bank to Du Preez. The respondent was in this letter instructed to vacate the property within 30 days of date hereof. What does appear from annexures to the founding affidavit is that Du Preez purchased the property from Standard Bank for an amount of R50 000,00. On 23 October 2007 the said Du Preez in turn sold the property to the applicants for an amount of R165 000,00. A Deed of Transfer in respect of the property was registered in the applicants' names on 2 April 2008. On 1 February 2008 another letter was directed to the respondent, this time on behalf of the applicants, demanding that she vacate the property. The respondent admitted that she had received these letters, but after a discussion with the councillor of the ward in which she resides she simply ignored those letters because according to the councillor the property belonged to her, the respondent.

During her stay in the property the respondent made extensive improvements to the property. She erected a wall around the premises. She had the walls externally and internally plastered and painted. She installed electricity. She fitted a bath in the bathroom and had the bathroom as well as the kitchen tiled. She had two verandahs built to the house, one at the back and one at the front.

As stated above, the respondent is occupying the property since 1991. Although she did not have the property registered in her name at the time, she paid the deposit for the purchase and the monthly instalments on the bond. She was never informed about the summons issued against Mr Oliphant nor of the default judgment granted against him. She was not informed of the sale in execution and Standard Bank, who bought the property for a nominal price of R1,00, never demanded from her to vacate the property. Standard Bank continued to receive repayments from her on the bond. Then Standard Bank entered into an Agreement of Sale with the respondent and advised her that the deal was concluded. They even advised her that the matter was referred to a firm of attorneys to transfer the property into her name. In spite of the fact that there was in existence a Sale Agreement between Standard Bank and the respondent, the bank thereafter entered into an agreement with Mr du Preez and had the property transferred into his name. I cannot believe that Mr du Preez bought the property from Standard Bank without physically visiting the property to ascertain what he was buying. He must have known at the time that the property was occupied. It is the applicants' case that Mr du Preez verbally demanded from the respondent to vacate the property, but she denied that. On the well-known ***Plascon-Evans*** rule her version has to be accepted. According to the respondent she never received any verbal demand from Mr du Preez. He never spoke to her. Had Mr du Preez discussed the purchase of the property with the respondent he would have ascertained the real facts. She would have informed him and would have produced documentary proof that she had entered into a Sale Agreement with

Standard Bank purchasing the property. The same applies to the applicants. I cannot believe that they decided to buy the property without physically inspecting the property. They must also have realised that somebody was occupying the property. They should have made the necessary enquiries. Had they done that the respondent would have informed them that she was in occupation of the property since 1991 and that she had entered into a Sale Agreement with Standard Bank. The respondent would have informed them about her payments on the bond until 2005 and the reason for stopping to pay it.

It is not disputed that on paper the applicants are the registered owners of the property. They, however, can only blame themselves and Mr du Preez for the predicament in which they find themselves. They can also to a lesser extent blame Standard Bank and possibly Joubert Galpin and Searle for that. It may be mentioned in passing that the applicants are not without recourse and that certain remedies are available to them to get out of the predicament in which they find themselves.

The question to be asked is whether I should in the exercise of my discretion grant an order in favour of the applicants to evict the respondent from the premises. Section 4(7) of the Act is applicable. It provides that if an unlawful occupier (I accept that because of the fact that the property is registered in the applicants' names the respondent is an unlawful occupier) has occupied land in question for more than six months at the time when the proceedings are initiated (this is the case here) a Court may grant an order for eviction if it is of opinion that it is just and equitable to do so after considering all the relevant circumstances. The expression “just and equitable” was discussed by Sachs J in ***Port Elizabeth Municipality v Various Occupiers*** 2005 (1) SA 217 at 238-239. I can do no better than to quote paragraphs [33]-[37] of the judgment.

> “[33] In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*, a case with some similarities to the present, s 6 was helpfully analysed by Horn AJ. He pointed out that, in matters brought under PIE, one is dealing with two diametrically opposed fundamental interests. On the one hand, there is the traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation. It was with this regard that the Legislature had, by virtue of its provisions of PIE, set about implementing a procedure which envisaged the orderly and controlled removal of informal settlements. It is the duty of the court, in applying the requirements of the Act, to balance these opposing interests and bring out a decision that is just and equitable. He went on to say that the use of the term ‘just and equitable’ relates to both interests, that is, what is just and equitable not only to the persons who occupied the land illegally but to the landowner as well. He held that the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment.
>
> [34] Finally, Horn AJ went on to emphasise that each case would have to be decided on its own facts. Hopefully, once the housing shortage had been overcome, incidents of unlawful invasion of property by desperate communities in search of accommodation would disappear. In the interim, the courts would do the best they could and apply criteria that were just and equitable and acceptable to all concerned. What remained essential, he concluded, was that removals be done in a fair and orderly manner and preferably with a specific plan of resettlement in mind.

> [35] The approach by Horn AJ has been described both judicially and academically as sensitive and balanced. I agree with that description. The phrase 'just and equitable' makes it plain that the criteria to be applied are not purely of the technical kind that flow ordinarily from the provisions of land law. The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. The necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case.
>
> [36] The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.
>
> [37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in out evolving new society of the need for human interdependence, respect and concern."

Applying these principles in the instant case, I have concluded that it would not be just and equitable to grant an order evicting the respondent from the premises.

My decision not to grant an eviction order should not be interpreted by the respondent that she could remain on the property without any obligation on her. I do not know whether the statement by Gideon as to the transfer of Servcon houses to the occupiers thereof was correct. The respondent herself, just like the applicants, is in a predicament. She, however, also has remedies to solve her problems. I have been advised from the Bar by Ms **Theron**, appearing on behalf of the respondent, that the Legal Aid Board would assist the respondent to solve her legal problems in connection with the property.

As far as costs are concerned, the respondent was assisted by the Legal Aid Board. That was on my advice when the matter first came before me on 11 November 2008 and the respondent appeared in person. The Legal Aid Board is an organ of the State. The applicants are the lawful owners of the property. Although they are to be blamed for the situation in which they find themselves they were entitled to bring the application which would, had it been successful, have placed them in occupation of their property. I have therefore decided not to grant a costs order against the applicants, even though they were unsuccessful in their application.

In the result, the application is dismissed. No order as to costs is made.

J C H JANSEN

JUDGE OF THE HIGH COURT