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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2147/15
Date heard: 8 February 2018
Date delivered: 27 February 2018

In the matter between

BARBARA JANE STURDY

Applicant

And

MAURICE WILLIAM PIREZENTHAL

First Respondent

NELSON MANDELA BAY MUNICIPALITY

Second Respondent

JUDGMENT

GOOSEN, J.

[1] This is an application for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter “PIE”). The applicant and the first respondent are mother and son.

- [2] In January 2012 the parties concluded a deed of sale in respect of Erf [...], Cotswold, Port Elizabeth situated at [...] K. Street, Cotswold (hereinafter 'the property') in terms of which the applicant sold the property to the first respondent. The deed of sale records that the parties agree that the bare dominium of the property is sold and that the sale is subject to the registration of a usufruct in favour of the seller.
- [3] The property was registered in the first respondent's name on 29 March 2012. In accordance with the deed of sale the deed of transfer records, as a condition registered against the title, a lifelong usufruct in favour of the applicant.
- [4] Subsequent to the transfer of the property into the name of the first respondent, the first respondent continued to reside on the property with the applicant. It appears from the papers that the relationship between the applicant and first respondent began to steadily deteriorate. For present purposes it is not necessary to elaborate upon the nature and extent of the deterioration of the relationship, nor to outline the opposing averments made by the parties. It suffices to state that the first respondent effected certain renovations to the property; that the applicant was confined to a portion of the property comprising a converted servant's quarters; and that the first respondent proceeded to let out rooms on the remainder of the property to several persons. According to the applicant conflict emerged between the first respondent and the tenants on the one hand and her on the other.
- [5] The circumstances were such that in February 2014 the applicant sought legal advice. She was however unable to afford the legal fees required to pursue the matter and eventually she had to approach Legal Aid South Africa for assistance. This culminated in the launch of the present application in June 2015, in which the applicant seeks an

order of eviction against the first respondent and all those who occupy the property through him.

- [6] It appears from the court file that the matter has been postponed or removed from the roll on several occasions. Apart from one such postponement brought about by the need to comply with the provisions of s 4 of PIE, it is not clear what has occasioned the delay in finally bringing this matter to adjudication.
- [7] The application is opposed. At the hearing of the matter the ambit of the dispute was, for reasons apparent from the nature of the opposition advanced by the first respondent, confined to the question as to whether the granting of an order of eviction would be just and equitable in the circumstances of the matter.
- [8] In his answering affidavit the first respondent denies that he is in unlawful occupation of the property. He asserts that prior to his occupation of the property (in 2011) the applicant had tenants living on the property and she received a rental income from them. After purchasing the property, and whilst still living there, the first respondent proposed the extension of the “servant’s” quarters and its conversion into a flatlet for the applicant. A separate entrance was created so that the applicant did not have to share the entrance with the main house. According to the first respondent the main house was then converted to accommodate several tenants. The income derived from these tenants accrues to the first respondent to cover his living costs and to service a loan payable by him to the applicant.
- [9] He states that prior to the deterioration of the relationship between the applicant and himself the arrangement met with the applicant’s approval. In regard to the deterioration of the relationship he alleges that the applicant became increasingly

“irrational”. This, it appears, related to conflict between the applicant and several of the tenants occupying the property. The first respondent states that the applicant’s “irrational” behaviour even resulted in him attempting to have the applicant committed to an institution. He did not proceed with this because of the threat on the part of the applicant’s attorney to interdict him.

[10] A reading of the first respondent’s answering affidavit indicates a seriously deteriorated relationship between the parties. It contains numerous egregious allegations relating to the character of the applicant. The affidavit also indicates disregard on the part of the first respondent of the applicant’s rights in the property. Significantly, on the first respondent’s own version, the applicant’s prior consent to his use of the property to house tenants has been withdrawn. His continued use of the property is accordingly in breach of the applicant’s usufructury rights.

[11] Mr Lamprechts, who appeared for the first respondent, conceded, properly so, that the applicant as usufructury is “a person in charge” as defined by s 1 of PIE. (cf. Hendricks v Hendricks 2016 (1) SA 511 (SCA) at par 10 & 11; October NO and Another v Hendricks and Another [2013] ZAWCHC 12 (13 January 2013) at par 15). The withdrawal of the applicant’s consent to the first respondent’s use of the property renders the first respondent an unlawful occupier within the meaning of PIE. It is common cause that the formal requirements of section 4 of PIE have been met.

[12] It was argued by Mr Lamprechts that the issue to be determined is whether it would be just and equitable to evict the first respondent and those persons who occupy the property through him. Reliance was placed on s 4 (7), which requires that the court be satisfied that it is just and equitable to grant an order of eviction. It was submitted that the onus rests upon the applicant to place information before the court in order to

enable the court to determine the issue. Since the information placed before the court is insufficient, so it was argued, and eviction order cannot be granted.

- [13] The interplay between section 4 (7) and section 4 (8) of PIE was set out in City of Johannesburg v Changing Tides 74 (Pty) Ltd [2013] 1 All SA 8 (SCA) at par 11 and 12 as follows:

In terms of section 4 (7) of PIE, an eviction order may only be granted if it is just and equitable to do so, after the court has regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of section 4 are satisfied and no valid defence to an eviction order has been raised the court “must”, in terms of section 4 (8), grant an eviction order. When granting such an order the court must, in terms of section 4 (8) (a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered, in terms of section 4 (12) to attach reasonable conditions to an eviction order.

There does not appear to have been a consideration of the precise relationship between the requirements of section 4 (7), (or section 4 (6) if the occupiers have been in occupation for less than six months), and section 4 (8) in the context of an application for eviction at the instance of a private landowner. In some judgments there is a tendency to blur the two enquiries mandated by the sections into one. The first inquiry is that under section 4 (7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling in specific vulnerable groups are singled out for consideration. Under section 4 (8), it is obliged to order an eviction “if the... requirements of the section have been complied with” and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to 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. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under section 4 (7) that an eviction order would be just and equitable. In considering whether eviction is just and equitable, the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second inquiry. It must then consider what conditions should be attached to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again, the date that it determines must be one that is just and equitable to all parties.

- [14] The court went on to address the interplay in the context of an application made by a private landowner as opposed to an organ of state. The court noted that different

considerations apply at the first inquiry when the applicant is a private landowner. It was held at par 19 and 20, that:

In most instances, where the owner of property seeks the eviction of unlawful occupiers, whether from land all the buildings situated on the land, 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. That is consistent with the jurisprudence that has developed around this topic. In *Ndlovu v Ngcobo*, Harms JA made the point that ownership and the lack of any lawful reason to be in occupation are important factors in the exercise of the court's discretion. In the *Modderklip Boerdery* case, Marais J carefully weighed the different factors and granted an eviction order. His order was upheld by this Court and not questioned in the Constitutional Court. The eviction order granted by this Court in *Rand Properties* (not a PIE case, but one in which the circumstances relating to the building were similar) was set aside by the Constitutional Court in *Olivia Road*, but on the grounds of the lack of engagement between the municipality and the occupiers, not its appropriateness. In *Blue Moonlight*, an eviction order was granted at first instance and confirmed subject to different conditions in this Court and the Constitutional Court.

Where the eviction is sought by a private landowner the availability of alternative land or accommodation assumes greater importance in the second inquiry, namely, what is a just and equitable date for eviction? It is here that the constitutional obligations of the appropriate arm of government – in our cities this is inevitably the municipality – come into focus and assume their greatest importance. The reason is that, even if it is just and equitable to grant an eviction order that is not the end of the enquiry, because any eviction order must operate from a date fixed by the court and that date must be one that is just and equitable.

- [15] In the founding affidavit the applicant asserts that the first respondent is possessed of the means to secure alternative accommodation. The first respondent addresses this allegation, along with several other allegations, with an omnibus denial providing no factual basis for the denial of the means to secure alternative accommodation. The first respondent addresses the position of the tenants with a similar general assertion that they are “low income earners or in receipt of government grants” and therefore not in a financial position to “afford other similar accommodation”. This allegation is not supported by affidavits filed by the tenants. In seeking to address this deficiency the first respondent filed a supplementary affidavit to which were attached confirmatory affidavits filed by the tenants. Mr Mullins, on behalf of the applicant, did

not object thereto, arguing instead that the supplementary affidavit does not alter the fact that the first respondent is capable of obtaining alternative accommodation, as are the tenants.

[16] In this latter supplementary affidavit the first respondent proceeds also to rely on the fact that he is now experiencing health problems which impact upon his own capacity to earn an income. It should be mentioned that he stated in his answering affidavit that his income derives from his missionary work in the form of donations that he receives as well as the rental income earned from the rentals. In my view, the health considerations now raised do not, for the purposes of the first stage of the enquiry support a finding that the first respondent will be unable to find alternative suitable accommodation and accordingly that the granting of an eviction order will not be just and equitable.

[17] The same is true of the tenants. In the supplementary affidavit the first respondent provides details of the tenants and their circumstances. This indicates that seven of the ten tenants are employed either on a full-time or part-time basis. Two others receive grants and only one is unemployed. Notwithstanding that the tenants have themselves deposed to confirmatory affidavits, no details of their earning capacity or lack thereof is provided. Furthermore, no allegations are made by any of the tenants that they will be unable, for reasons of financial constraint, to find alternative accommodation, or that their circumstances render them vulnerable in the event of the eviction order being granted. To the contrary, the first respondent states that he 'assumes' that the tenants will be in the same position as him in regard to the impact of the eviction order.

- [18] I am of course mindful that the onus rests upon the applicant to satisfy the court that the granting of the order will be just and equitable. The applicant makes the allegation that the first respondent will be able to secure alternative accommodation. This is met by a bald denial in circumstances in which the first respondent can have been expected to provide appropriate information relating to his circumstances. The first respondent also seeks to suggest that the tenants who occupy through him cannot afford alternative accommodation yet puts up no facts to support such contention even when the tenants each depose to affidavits.
- [19] In my view, the facts adduced in evidence to contradict the allegations of the applicant do not indicate a real or substantial impediment to finding alternative accommodation such as would persuade this court not to grant an order of eviction. There is, it must be emphasised, no defence raised by the first respondent to the granting of an eviction order. In these circumstances the assertion of the property right by the applicant assumes greater significance.
- [20] It follows that I am satisfied that the requirements of s 4 have been met. Accordingly, what remains to be determined, in terms of s 4 (8), is a just and equitable date upon which the first respondent and the tenants must vacate the property. As has been indicated, this also requires consideration of the length of occupation and the availability of alternative accommodation or the means to acquire same.
- [21] Mr Lamprechts argued that a period of six months would be appropriate given the circumstances of the tenants and the period for which they have occupied the property. Mr Mullins, for the applicant, argued that a period of three months would be reasonable in the circumstances.

- [22] The facts set out above indicate that the first respondent has been in occupation of the property for several years. In the case of the tenants their occupancy varies from a period of two months to three years. I shall accept that in the case of some of the tenants they have been in occupation for a relatively lengthy period and that they should therefore be afforded a reasonably lengthy period within which to make alternative arrangements.
- [23] I have already indicated that there is no real or substantial impediment to the first respondent and the tenants finding alternative accommodation. The litigation, it should also be stated, has been ongoing for more than 2 ½ years. Half of the tenants have only gained occupation whilst the litigation was being conducted.
- [24] As already indicated the first respondent is not an indigent person who would be vulnerable to homelessness in the event of an eviction. Although the allegation is made that the tenants are low income earners the facts put up by the first respondent indicate that most of them are employed or receive an income. According to the first respondent he receives approximately R5000 per month from the tenants by way of rental. It is clear from allegations made by the applicant in her replying affidavit, dealing with the first respondent's answer, that the first respondent set about conversion of the property to make additional space for tenants as part of what he considered to be "a profitable business". This reflects both on the nature of the first respondent's occupation and use of the property as well as the particular circumstances of the tenants.
- [25] Having regard to all of these facts and the relevant circumstances, I am satisfied that it will be just and equitable to both parties to allow a period of three months for the first respondent and his tenants to vacate the property.

[26] In the result I make the following order:

1. The First Respondent and any person who occupies Erf [...], Cotswold, Port Elizabeth situate at [...] K. Street, Cotswold, Port Elizabeth (hereinafter 'the property') through the First Respondent is ordered to vacate the property on or before 30 May 2018;
2. In the event that the First Respondent and / or any person who occupies the property through the First Respondent fails or refuses to vacate the property on or before the aforesated date the Sheriff of this Court shall be authorised to evict the said person / persons from the property and, where necessary, to do so with the assistance of the South African Police Service;
3. The First Respondent is ordered to pay the costs of the application.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances: For the Applicant
Mr. N.J. Mullins SC
Instructed by Gregory Clark Attorneys

For the First Respondent
Mr. I. Lamprechts
Instructed by Chris Harding Attorneys