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

Case No:13012/2022

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: NO |

21 February 2024

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In the matter between:

ROSELINAH NTHABISENG DLAMINI

First Applicant

EPHRAIM DLAMINI

Second Applicant

And

NKOSINATHI GUMEDE

First Respondent

FURTHER UNLAWFUL OCCUPIERS

Second Respondent

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Third Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicants launched an application for the eviction of the first respondent and other unlawful occupiers from the applicants' property, *to wit*, Erf 8[.], K[.] P[...], J[...] (*the property*) situated at 5 F[...] S[...], K[...] P[...], J[...]. The eviction is launched in terms of the Prevention of Illegal Eviction and Unlawful Occupation Act (*the PIE Act*).

[2] The application was allocated for hearing on 7 November 2023 and was postponed to 10 November 2023 as the first respondent's counsel on brief was engaged in a week-long trial and would have been available only on the first day of the week on which opposed motion matters were allocated, being Monday, 6 November 2023. The applicants reluctantly acceded to the postponement as the applicants' counsel contended that it has always been the intention of the first respondent to postpone the application. The applicants were solaced from my order that the application will be postponed for few days.

[3] The first respondent opposes the eviction application and has launched an application to stay the eviction proceedings pending a challenge to the acquisition of the property by the previous owners and also by the applicants. This application to stay is opposed by the applicants. Reference to respondent in this judgment shall refer to the first respondent as both second and third respondents are not participating in the *lis*.

Background

[4] The applicants purchased the property from the previous owners, Mrs Masunda and Ms Matikiti on 24 May 2021. The transfer of the property to the applicants was registered on 15 November 2021. The attorneys who were seized with the instructions to register the transfer were instructed to send a notice to the respondent to vacate the premises which notice was delivered on 19 January 2022. The respondent was given a period of 30 days failing which eviction proceedings were to be launched.

[5] The respondent failed to vacate the premises and the applicants then launched the eviction proceedings.

Issues

[6] The issues for determination are whether the respondent has made out a case for the interlocutory application and whether the applicants have made out a case for eviction in terms of the PIE Act.

Contentions and submissions by the parties.

Interlocutory application.

[7] The respondent brought an application, firstly, to stay the eviction proceedings pending determination of the legality of the acquisition of the property by the previous owners who were allegedly illegal immigrants in the Republic of South Africa. Secondly setting aside the sale and acquisition of the property by the said previous owners and the applicants. The challenge to the title, so respondent continued, would have to be preceded by an investigation which must be commissioned by the Minister of Home Affairs whose report would be used during the proceedings when the ownership is challenged.

[8] The applicants submitted that the interlocutory application is bound to fail because in addition to the contention that it is irrelevant for the purposes of the eviction application, the said application is besieged by insurmountable shortcomings, namely, that the respondent has failed to prove *locus standi* as he has no interest in the ownership of the property, and he further stand to receive no benefit from the legal challenge. In addition, the respondent's cause of action is predicated on the contention that the owner was not legally in the Republic of South Africa at the time of the sale agreement. The detailed information would be verified once the Minister of Home Affairs has concluded his investigation. Without such investigation the authenticity of information which underlies the respondent's case now before me cannot be relied on. Until such information is availed and verified the *lis* advanced by the respondent is unsubstantiated and bound to fail.

[9] I agree with the applicants' contentions that the respondent failed to demonstrate that he has *locus standi* and further that there is a cause of action. Even if the arguments advanced by the applicants are found to be meritless the application would still fail since it seeks to suggest that without the title there cannot be a lease agreement. This point has no foundation in our jurisprudence since '*... lessor need not have any title to the property at all. His lack of title will not, in the absence of express or implied provision on the point in the contract, affect the validity of the lease*'.¹

[10] In the premises the request to stay the application for eviction on the narrative set out in the respondent's application is unsubstantiated and bound to fail.

Eviction

[11] The applicants contend they are the owners of the property, and the respondent has not been given consent to occupy the said property and is therefore an unlawful occupier. Further that there is no reason why the order for eviction cannot and should not be granted. In addition, that the respondent was given sufficient notice to vacate the property which was forwarded by the conveyancing attorneys WP Wakapa and Partners Inc who were instructed '*... to give the First Respondent written notice of termination of the lease agreement and notice to vacate*'.²

[12] The applicants further submitted that the eviction application is predicated on section 4(7) of the PIE Act in terms of which where the eviction process is in respect of an unlawful occupier who has been residing in the property for a period in excess of six months may be evicted if land can reasonably be made available by the municipality or any other organ of state. And further that the court should have regards to the rights and needs of the elderly, children, disabled persons, and households headed by women.

¹ See AJ Kerr, '*The Law of Sale and Lease*', 2nd edition, Butterworths at 230. *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Limited and Another* 2006 (1) SA 621 (CC).

² See para 40 of the Applicant's Replying Affidavit at 013-9.

[13] There are no reasons, as submitted by the applicants' counsel why the respondent would be unable to pay the rental elsewhere which he may find reasonable. In any event, applicants submit, the respondent is not crying impecuniosity but just does not want to pay the rental until the immigration issue is sorted out.

[14] The applicants referred to the SCA judgment in *Changing Tides*³ which held that in the adjudication of the eviction matters the court should consider two enquiries. In terms of the first enquiry, the respondents are enjoined to present the facts before court setting out their valid defence for their continued occupation. The respondent, so went the argument, has failed to raise any valid defence.

[15] The second enquiry, so it was argued, is informed by section 4(8) of the PIE Act in terms of which once it is established that there is no valid defence an order of eviction must be granted but regard need to paid of the determination of a just and equitable date for the eviction and secondly a date on which the order would be carried out in the event the occupiers did not vacate on the date as directed by the court.

[16] Applicants further contended that the respondent has failed to present to the court personal circumstances which may have to be taken into consideration before an eviction order is issued, including his income, family dynamics and the duration they may require to obtain alternative accommodation.⁴

[17] The respondent raised several defences and some of which are spurious, frivolous, and unsustainable. The respondent persisted with the argument that title of the previous owners is susceptible to be set aside and further it would therefore follow that the applicants' title would equally suffer the same fate. As stated above this argument is stillborn and unsustainable.

³ *City of Johannesburg v Changing Tides T4 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

⁴ Para 23 of the Applicants Heads of Argument at 014-9.

[18] The respondent further contended that the applicants served the eviction application on the third respondent instead of Ekurhuleni Metropolitan Municipality. The deeds' search and ultimately the clearance certificate attached to the papers was issued by the third respondent. The respondents further contended that sale agreement was not attached, and the deed's search was not enough as evidence of the ownership. The applicants subsequently attached a copy of the Title deed on their replying affidavit. These contentions are therefore baseless.

[19] A further defence which was raised was predicated on the argument that there was a valid lease agreement which was entered into with the previous owners. The said lease agreement is an '*ex lege consequence of transfer of ownership of the leased property to the new owner who steps into the shoes of the old owner a landlord. No cession is required*'.⁵ To this end the respondent sought to invoke the common law maxim of *Huur gaat voor koop* in terms of which the purchaser who acquires an immovable property takes over the lease agreement which obtained at the time of acquisition. In view hereof it was submitted that the occupation was lawful and was never terminated.

[20] It was also conceded by the applicants who stated that the lease agreement is created or extended '*... ex lege, due to practical and equitable considerations. No new contract comes into existence*'.⁶ That notwithstanding the applicants contended that the said maxim can only be invoked by the respondent provided that rental was being paid.⁷ Now that the respondent has refused to pay rental then such a *maxim* is not available to him.

[21] Notwithstanding the contention by the respondent above that the lease agreement is created *ex lege* the respondent sought to contend that there was no lease agreement with the applicants and therefore no need to terminate any agreement. Applicants submits that the refusal to pay rental and the unequivocal

⁵ See Respondents' Written Submissions at 018-16.

⁶ See para 9 of Applicants' Written Submission at 028-4.

⁷ Ibid at 6 at 028-3.

statement that there is no lease agreement with the applicants is sufficient to justify the reason to contend that there is no lease to cancel.

Legal principle and analysis.

[22] The parties were requested to provide the court with written submissions which addressed two aspects namely, *huur gaat voor koop* maxim and also submission with the aspect of termination of occupation or withdrawal of consent to occupy, if applicable.

[23] The submissions regarding the *huur gaat voor koop* maxim were elaborate and authorities referred to provides that it is only available to the tenants who are paying rental. The submissions with regard to the issue of termination of occupation elicited divergent views from both parties.

[24] The applicants advanced several arguments some of them were contradictory as in one instance it is argued that termination of the lease was necessary and, in another instance, it is argued that it was not necessary.

[25] First, the applicants contended that in view of the respondent having stated that there is no lease agreement to cancel then there is no legal basis for the applicants to be required to terminate the respondent's right of occupation. This contention goes against the submission by the applicants that lease agreement exist and is binding on the purchaser '*... irrespective of whether or not he or she is aware of its existence*'.⁸ This argument will easily be defeated by the fact that by law there is a lease agreement which flows from the maxim *huur gaat voor koop*.

[26] Secondly, that the respondent has by his conduct terminated the lease agreement. In support hereof applicants referred to the SCA's judgment *Genna-Wae Properties (Pty) Ltd's*⁹. This judgment seems not to buttress the applicants'

⁸ See para 3 of the Applicants Written Submissions at 028-2.

⁹ *Genna-Wae Properties (Pty) Ltd v Medio Tronics (Natal) (Pty) Ltd*. (435/93) [1995] ZASCA 52; 1995(2) SA 925 AD; [1995] 2 All SA 410 (A) 930 March 1995).

argument except the confirmation that the *huur gaat voor koop* maxim is available provided both parties keeps their end of the bargain. The SCA referred with approval the judgment of Squiers J who stated that *'In the event of the lessee "choosing" not to pay rent he would commit a breach of the lease and be liable therefor for a new owner, and possibly also in damages'*.¹⁰ The interpretation that the maxim is applicable on condition that lessee pays the lease does not introduce anything novel in the jurisprudence of contract law. It simply states that the lessee should keep his part of the bargain failing which there is a breach. Regard had to the foregoing it follows that ordinary remedies for breach of lease agreement would apply which includes cancellation of the lease agreement and/or suit for damages.¹¹

[27] In contrast to the view by the respondent that there is no lease agreement with the applicants, counsel for the respondent also made reference to *Genna-Wae Properties (Pty) Ltd's* judgment where it was stated that the parties are bound to the existing lease agreement and the lessee *'... does not have an election whether to proceed with the lease he is bound, just as the purchaser is, to the terms of the lease as they stood between him and the original lessor.'*¹² The respondent's view that there is no lease agreement with the applicants appears to be an attempt to deny the existing fact.

[28] Thirdly, the applicants seem to be arguing that since the maxim is not available to the respondent who fails to pay the rental then there is no lease agreement all together. The applicants having stated that *'an occupier becomes an unlawful occupier when there is no valid lease between the parties...'*¹³ Whilst it is correct that the said principle cannot be available to a tenant who is not paying it does not *ipso facto* means that there is no lease agreement.

[29] The evidence presented buttress the contention that the applicants knew there that there was a lease agreement between the respondent and the

¹⁰ Ibid at para 33.

¹¹ The question may be raised whether the maxim *huur gaat voor koop* amounts to deprivation of rights to property and inconsistent with the right to property clause in the constitution would have to be raised and await the return of the colloquial jury.

¹² See para 14 of the Respondent's Written Submission at 028-19.

¹³ See para 28 of the Applicant's Written Submission at 028-8.

previous owners. In this regard the instructions given to the conveyancing attorney by the applicants was to terminate the lease agreement. In addition, the applicants stated that the eviction proceedings against the respondent by the previous owner was settled between the parties by the re-instatement of the lease agreement.

[30] To the extent that the consent to occupy through a lease agreement was never terminated by the applicants the relief sought based on the PIE Act would not be competent as the respondent would not qualify as an unlawful occupier. It was held by the SCA in *Petra Davidan*¹⁴ that consent is a valid defence. As it is similar in this *lis* serving before me *‘The letter of 23 February 2018 merely calls upon the appellant to vacate the property if does not accept the offer for monthly tenancy. There is no notice of termination of the existing (oral) lease in the letter’*.¹⁵ The court decided that absent the termination of the lease agreement is a fatal blow to the eviction proceedings in terms of the PIE Act.

Some points to ponder

[31] Whilst it is apparent that the respondent is enjoying occupation of the property without paying rental the applicants appear to be prejudiced for not receiving the rental. This would discourage rental market and property investors. But applicants are not left without a remedy as they are entitled to sue for the rental in terms of the lease agreement which arose *ex lege*. In this regard the summons could be issued with automatic rental interdict.

[32] The applicants may also have a recourse against the previous owners who should have granted the applicants *vacuo possessio* (free and unburdened possession that a seller must give to a purchaser) unless if the applicants have negotiated a selling price down on the basis that they will fund the eviction process. Ordinarily an investor would have visited the property he intends to acquire and had a discussion with the occupiers to establish any title they may claim underlying their occupation. It appears that the facts surrounding the

¹⁴ *Petra Davidan v Polovin NO and Others* (167/2020) [2021] ZASCA [2021] ZASCA 109 (5 August 2021)

¹⁵ At para 25.

respondent's occupation was made known to the applicants hence is aware that there was an attempt to evict the respondent which was settled and further attempting to terminate the occupation through the conveyancing attorneys who have not to have executed the instructions properly. As alluded to the applicants are not left without a remedy.

[33] The issue of the notice to vacate being equated to the intention to terminate the consent to occupy was not advanced vigorously and to this end a decision whether termination of lawful occupation¹⁶ should be inferred from a vacation notice (or be inferred from the parties' conduct) would await another day.

Conclusion

[34] The applicants' failure to successfully demonstrate that the respondent is an unlawful occupier dealt a fatal blow to the eviction application which is bound to fail.

Costs

[35] The costs shall follow the results.

Order

[36] I grant the following order:

1. *The respondent's interlocutory application is dismissed with costs,*
2. *The application for eviction is dismissed with costs*

Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties / their legal representatives by email

¹⁶ As the PIE Act applies only to unlawful occupiers.

and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **21 February 2024**.

Date of hearing: 9 November 2023

Date of judgment: 21 February 2024

Appearances

For the Applicants: Adv R Carvalheria

Attorneys for the Applicants: Baloyi SM Attorneys.

For the Respondent: Adv KM Choeu.

Attorneys for Respondent Hammond Pole Majola Attorneys Inc