

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

CASE NO: 10057/2021

**REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
DATE: 10/04/2023**

In the matter between:

WOUTER SCHOEMAN

First Applicant

NICOLA HUTCHING

Second Applicant

And

THEMBANI AGNES MAVIS MAVUNDLA

First Respondent

**THE UNKNOWN OCCUPIERS OF ERF
552 BIRCHLEIGH NORTH EXTENSION 3, KEMPTON
PARK**

Second Respondent

JUDGMENT

NOKO J

Introduction

[1] This is an application for eviction against Thembani Agnes Mavundla (*Ms Mavudla*) from Erf 5[...] B[...] N[...] E[...] 3[...], K[...] P[...] (*Property*) in terms of the Prevention of Illegal Eviction and Unlawful Occupation Act 1998 (*PIE Act*). The first

respondent is opposing the application. Her attorneys have filed opposing papers and the Heads of Argument.

[2] The respondent's attorneys subsequently withdrew as her attorneys on 11 October 2023. The respondent was personally not in attendance at the hearing. Notwithstanding her absence the applicants' counsel traversed the respondent's papers during his argument.

[3] Reference to respondent in this judgment will refer to Ms Mavundla as she is the only respondent participating in the *lis*.

Background

[4] The background which appears to be common cause is that the respondent was previously the registered owner of the property. The respondent had agreed to a bond to be registered over the property in favour of Standard Bank (*Bank*) as security for money lent at her instance and request. During 2019 the bank commenced foreclosure proceedings against the respondent who failed to keep up with her monthly repayments. Judgment was obtained against her. The property was sold via auction and was purchased by Mashinini Property Investment (Pty) Ltd (*Mashinini Property Investment*) represented by Mr Ncwae Zacharia Mashinini (*Pastor Mashinini*¹) .

[5] Registration of transfer to Mashinini Property Investment was effected in 2016. The property was subsequently sold by Mashinini to the Applicants for the sum of R900 000.00 and the transfer to the applicants was registered on 8 March 2019.

[6] The Applicants delivered a notice to the respondent to vacate the property on 7 January 2020. The Applicants then launched the eviction proceedings under the

¹ The respondent stated in her answering affidavit that Mashinini was her Pastor.

above case number on 3 March 2021 as the respondent failed to heed the vacation notice.

Issues

[7] Issues for determination are whether the Applicants have made out a case for eviction in terms of the PIE Act and whether the respondent has a valid defence.

Submissions and contentions by the parties

[8] Counsel for the Applicants submitted that the Applicants took ownership of the property and having not given any consent to the respondent to occupy the property her continued occupation is unlawful. The Applicants having complied with the provisions of the PIE Act therefore entitles them of the relief sought as set out in the notice of motion. The counsel further submitted that before the Applicants purchased the property, they had a discussion with Pastor Mashinini who stated in a letter² attached to the founding affidavit that there is no permission granted to anyone to occupy the property.

[9] On being asked by the court as to whether there was ever consent, expressly or tacitly, for the respondent's occupation, the counsel stated that it appears that there was consent after it was purchased by Pastor Mashinini.

[10] Counsel further outlined the case as presented in the papers filed on behalf of the respondent. The respondent averred that having realised prospects of the property being auctioned at the instance of the bank, she made arrangement with Mr Mashinini, her Pastor at Enlightened Christian Gathering Church, who owned Mashinini Property Investment to buy the property at the auction and thereafter sell it back to her. At the time she was in the process of selling her other house situated in

² Submissions regarding this letter were made by the applicants' counsel as stated below.

Oakdene (*Oakdene property*).³ The said second Oakdene property was indeed sold and she instructed her transferring attorneys to pay the proceeds of sale in the sum of R667 412.54. to Mashinini Property Investment (Pty) Ltd.⁴

[11] The respondent further states that at all material times she occupied the property with the expressed consent of Pastor Mashinini. Further that from the date when the purchase price was paid to Mashinini Property the consent was no longer a requirement as she was then the owner of the property. To this end, so argued Applicants' counsel, the occupation of the property was no longer with the consent of Pastor Mashinini. Further that the respondent on her own disavowed the consent that was provided by Pastor Mashinini.

[12] The belief that she was now the owner, so counsel for the Applicant argued, has no legal standing since the alleged arrangement with Pastor Mashinini regarding the purchase of the property offended the provision of the section 2(1) of the Alienation of Land Act which requires that agreements over immovable properties should, *inter alia*, be in writing. The alleged agreement with Pastor Mashinini was not in writing. Since she no longer had consent from Pastor Mashinini her continued occupation was without consent and therefore unlawful.

[13] I requested the Applicants' counsel to submit written arguments with regard to the import and admissibility of the letter from Pastor Mashinini annexed to the founding papers wherein it is stated that there was never a consent for a lease to the property. The written submissions (titled Applicant's Note) were uploaded and were accordingly augmented orally on 9 November 2023.

³ The respondent stated in the Respondent's Answering Affidavit that her Pastor offered to assist to acquire the property at the auction and further that since he is in the business of selling immovable properties, he would also assist in selling the respondent's property in Oakdene. See para 13 of the Respondent's Answering Affidavit.

⁴ It appears that the offer to purchase in respect of the Oakdene property authorised the transferring attorneys to pay the proceeds into a specified bank account details of Mashinini Property Investment.

[14] The Applicants submitted that the said letter “... *is hearsay evidence and inadmissible to prove the correctness of what is stated therein...*”.⁵ The letter was however “... *admissible to prove that a letter was received by the Applicants from Mr Mashinini prior to the purchase of the property stating that there was no written or oral agreement in place.*”⁶ This, counsel argued, should also apply to the respondent.

[15] The essence of the Pastor Mashinini’s letter becomes irrelevant, so counsel continued, as from the respondent’s own assertions the consent which was given by Pastor Mashinini had expired as at the time when the application for eviction was launched against the respondents.⁷ The respondent averred that the arrangement was that Pastor Mashinini will buy the property at the auction on 18 May 2016 and allow her to remain in occupation until she purchase the property back from Pastor Mashinini. The said purchase was done on 29 May 2018 when she instructed her attorneys to pay over the purchase price to Pastor Mashinini from which day she did not require consent to occupy as she was the owner. The Applicants quoted the respondent having stated that ‘*I am the lawful and rightful owner of the property and thus, do not need no one’s (sic) consent to reside therein.*’⁸ In the end, so argument goes, the respondent does not raise consent as a basis of her continued stay and in fact disavows the said consent as a defence.

[16] To the extent that the respondent does not raise consent as the basis for occupation then it (consent) is not an issue in dispute and no need for the Applicants to prove that consent was terminated as none was required by the respondent and

⁵ See para 3.1 of the Applicants’ Note at 000-28. Reference was made of statement by Opperman J in *Sheffrk v MEC for Road and Transport Free State Province* (4603/2015) [2022] ZAFSHC 142 (3 June 2022) at [1] stated that ‘*it is said that a document only proves what is written in it, but not the truth of what is written.*’

⁶ Ibid at para 3.2.

⁷ The respondent referred to *Ndlovu v Ngcobo, Bekker and Another v Jika* [2022] 4 All SA 384 (SCA) where it was stated that the issue of consent is relevant as at “... *the time of the launch of the applications to evict the occupiers.*”

⁸ See para 27 of the Applicants’ Note at 000-34.

none existed. The Applicants counsel referred to *Du Plessis v Mouton and Others* (4180/2021) [2022] ZAWCHC 101 (21 February 2022) at [18] where the court held that the onus rests with the occupier to prove any right over the property he hold against the owner of the property. The right of ownership is unsustainable and the right to occupy based on the consent has been eschewed by the respondent.

Respondent's default

[17] During the crafting of the judgment, I noted that the respondent may have not received the notice of withdrawal from her erstwhile attorneys which was not addressed to her. I then directed that the Applicants' attorneys to serve a set down (and record of hearing) on the respondent so that the latter may be given an opportunity to address the court and the Applicants would also be in attendance to reply if need be.

[18] The Applicants proceeded to forward the set down and the record of hearing to sheriff for service. In his return sheriff stated that several attempts were made to serve and there was no one in the property. Sheriff further stated that he was informed by the neighbour that the respondent has vacated the property.⁹ The Applicants retorted that they nevertheless require an order of eviction and this was in response to the me stating that having realised the turn of events it appears that the property is available for the applicants' occupation and proceeding with the application may be academic.

[19] The counsel further submitted that even though the notice of withdrawal may be found to be defective or irregular for want of compliance with Rule 16 the courts have ruled in previous judgments¹⁰ that orders may be granted that notwithstanding.

⁹ Sheriff stated in the return of service that '*Kindly note that the property is deserted as informed by Mr. Danzil neighbor*' See return of service at 024-34.

¹⁰ *Katritsis v De Macidi* 1966 (1) SA 613 (A), *De Wet and Others v Western Bank Ltd*, *Ramalephatso*

[20] The Applicants' counsel further submitted that the Applicants went to greater lengths in accommodating the respondent and also at its own expense requested sheriff to serve as directed by the court. Further that any delay may amount to denial of justice to the applicants.

Points in limine.

[21] The respondent had raised points *in limine* of non-joinder of both the Ekurhuleni Metropolitan municipality and Pastor Mashinini. There was a specific reference in the applicants' affidavit that the Ekurhuleni Metropolitan municipality is the respondent though not stating the same on the notice of motion.

[22] The respondent's contention that Pastor Mashinini would be impacted by the order granted as per the relief sought is also unsustainable as there is no basis that an eviction order would negatively affect the Pastor Mashinini or Mashinini Property Investment.

Legal principles and analysis

Irregular notice of withdrawal

[23] The judgments referred to by the applicants' counsel dealt with rescission applications are distinguishable to evictions applications the latter having grave impact and contributes to homelessness of families. The evictions application regime has received specific attention of the parliament as a result of the precarious land tenure of the general populace at the hands of landowners who were often unscrupulous. Non-compliance in this instance is important bearing in mind that the court need to consider, *inter alia*, the circumstances of the respondent and the families in order to impose a suitable conditions for evictions.

[24] To this end, I found that the defect in the notice of withdrawal is fatal.

Mootness of the application.

[25] I raised this issue during the address by the applicants' counsel after the failed attempt to serve the set down on the respondent. The sheriff of the court whose returns are ordinarily admissible as evidence stated that he was informed that the respondent has vacated the premises. The purpose of the relief sought is to evict the respondent and if she is no longer on the property the order and its purpose will be historical, abstract, academic, and hypothetical. In essence it will serve no practical purpose. It was held in *National Coalition*¹¹ case that "*A case is moot and therefore not justiciable if it no longer present an existing or live controversy which should exist if the court is to avoid giving advisory opinion or abstract proposition of law.*"¹²

[26] On the basis of the foregoing and with the object to preserve the over stretched judicial resources it is clear that the controversy which triggered the launching of these proceedings is no longer alive and the application is moot and deserves of no further attention of the court.

Letter by Pastor Mashinini and Consent.

[27] Notwithstanding that the submission by the applicants' counsel that the termination of the consent of Pastor Mashinini in this case is superfluous as there was no consent required and further that the letter from Pastor Mashinini became irrelevant, I will nevertheless briefly refer to the letter without negating that submission by counsel that it is inadmissible. The intention of the letter was to support the contention that there was no consent given to the respondent to occupy the property. The said letter makes no reference to the respondent though it was made on 28 August 2019. The said letter further does not state that there are

¹¹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

¹² At para 21. The judgment is referred to on the basis of parity of reasoning.

occupiers in the property who have been in the property at least since the said Pastor Mashinini purchased the property at an auction on 18 May 2018.

[28] It is clear that the respondent made an error or incorrect legal conclusion in thinking that payment of purchase price would give her rights of the owner which must, in law, be preceded by a written agreement in terms of the Alienation of Land Act. The applicants' counsel having correctly submitted that the alleged oral agreement between the respondent and Pastor Mashinini is invalid. This position was stated by the SCA in *Cooper's*¹³ case where it was held that '*The result of non-compliance with section 2(1), is that the agreement is of no force and effect. This means that it is void ab initio and cannot confer a right of action*'.¹⁴

[29] The question still needs to be determined as to whether there was consent and if so whether it was terminated. Pastor Mashinini in his letter states that the respondent did not have consent to be on the property at least as at time of launching of the property. The said letter though not admissible as evidence does not say whether the previous consent given was terminated. The facts demonstrate on the understanding that consent was not required after payment of the purchase price then, as set out above, this was an error of law on the part of the respondent possibly together with Pastor Mashinini.

[30] The fact that the respondent believed that as the owner she needs no consent was predicated on the belief that, *inter alia*, there is a valid contract of sale of the property between the Pastor Mashinini and her. This appears to be a mistake of law referring to an instance where a party misapplied or misunderstood rules or legal

¹³ *Cooper N O and Another v Curro Heights Properties (Pty) Ltd* (1300/2021) [2023] ZASCA 66 (16 May 2023).

¹⁴ *Ibid* at para [15].

principles which led to incorrect legal conclusions.¹⁵ The mistake would have been induced by misrepresentation or misapprehension of the law. It is not apparent from the papers whether the respondent was the only party mistaken or if the pastor was also mistaken. But Pastor Mashinini may have probably been aware that the contract with the respondent suffers from illegality on the basis of non-compliance noting that his company was a property investment company and further undertook to assist the respondent to sell her Oakdene property.¹⁶

[31] Since the understanding of the respondent that once payment of the purchase price is effected then she is an owner was legally wrong as ordinarily transfer must first be registered with the Deeds Registries and further there should have been a written agreement, the status *quo ante* may then obtain. Meaning all shall revert to the position before the payment of the purchase price to Pastor Mashinini by the respondent. Their contract is void *ab initio*. This should follow from the principle, though referred to in passing, that ‘... *the nullity of the agreement gives rise to the restoration of every party in the agreement to its original state.*’¹⁷ The position is therefore that the conditions of occupation are as they were before the payment of the purchase price. At that time the occupation was with the consent of Pastor Mashinini. Notwithstanding the letter which as set out above is inadmissible Pastor Mashinini does not confirm that he terminated the respondent’s occupation.

[32] The parties (Pastor Mashinini and the respondent) may have recourse against each other in terms of section 28 of the Alienation of Land Act for the refund with

¹⁵ Noting that the mistake can be unilateral, common and mutual. Its unilateral when ‘... one party to the contract is mistaken but the other is not. It is said to be common ‘... when both parties are of one mind and share the same mistake about anything other than the state of each other’s mind. And it is mutual when each party is mistaken about the other’s state of mind – they are at cross purposes. See The Law of Contract in South Africa at 313.

¹⁶ The applicants stated in the affidavit that maybe Pastor Mashinini proceeded to sell the property to the applicants because he may have not received the purchase price from the respondent. See para 62 of the Applicants’ Replying Affidavit.

¹⁷ See *Brits v Kloppe and Another* (24785/2021) [2022] ZAGPPHC (22 September 2022), at para 17.

interest for the amount so paid by the respondent. Pastor Mashinini (and the applicants as the current owners) would also be entitled to recover reasonable compensation for the occupation, use and enjoyment of the property by the respondent.

[33] The issues I raised on the consequences of the purported sale agreement between respondent and Pastor Mashinini are *res inter alios acta* in relation to the applicants but the essence appears to be that the parties' initial position should be restored as the arrangements and understandings predicated on the ownership subsequent to the payment by respondent is not effective in view of the provisions of Alienation of Land Act. As said above that initial position was that occupation was with consent of Pastor Mashinini and same was never terminated.

[34] Notwithstanding the incorrect belief and understanding that she became the owner and did not need consent the respondent persisted in her affidavit that she was residing on the property with consent of the Pastor and the agreement underpinning her occupation has not been cancelled. She disputed that she in an unlawful occupier.¹⁸ The applicants also seem to be approbating and reprobating. In one instance they stated that the respondent never occupied the property with consent before the property was purchased by them,¹⁹ at the same time stated that the consent to occupy lapsed when the property was transferred to the applicants.²⁰ In addition that the occupation is unlawful as they have not given the respondent consent to occupy.²¹

[35] It therefore follows that Pastor Mashinini did not terminate the respondent's right of occupation in which case the respondent's occupation is not unlawful and

¹⁸ See paras 47, 52 and 66.3 and 6.7.1 of the Respondent's Answering Affidavit.

¹⁹ See para 8.4 of the Applicants' Founding Affidavit.

²⁰ See para 149 of the Applicants' Replying Affidavit.

²¹ Ibid, at para 151.

recourse for a remedy in terms of the PIE Act would be incompetent. Even if the respondent may have not paid the purchase price as intimated by the applicants Pastor Mashinini should have terminated the respondent's right to occupy the property.

[36] The SCA in *Petra Davidan*²² held that absent the termination of the lease agreement is a fatal blow to the eviction proceedings in terms of the PIE Act.

[37] 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 generally dampen rental market and property investors. But Applicants are not left without a remedy as they are entitled to sue for the rental if due or sue for unjust enrichment.

[38] The applicants may also have a recourse against Mashinini Property Investment which 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. As alluded to the applicants are not left without a remedy. It is quite perplexing as it appears that the applicants may have purchased the property without having seen or being inside it which would have given them comfort for them to continue with the investment.²³

[39] It is noted that the respondent has not advanced an argument that she relies on the consent granted before payment of the purchase price to Pastor Mashinini this position becomes default as nothing can flow from the illegal sale agreement between Pastor Mashinini and the respondent including the alleged right of

²² *Petra Davidan v Polovin NO and Others* (167/2020) [2021] ZASCA [2021] ZASCA 109 (5 August 2021)

²³ This may be worse if the first applicant is an attorney and a conveyancer who appears of the letterhead of the applicants' attorneys.

ownership for which consent to occupy would not be required. The applicants need to satisfy the requirements of the PIE Act including that the respondent is an unlawful occupier and this can be demonstrated by showing that the right to occupy was terminated. There is no evidence to show that same was terminated hence the occupation was and remains lawful, noting that the respondent was persistent that she is not an unlawful occupier. PIE Act remains inapplicable where the occupation is not unlawful.

Conclusion

[40] Having failed to satisfy the court that the occupation of the respondent was lawfully terminated by Pastor Mashinini the relief sought in terms of the PIE Act remains incompetent.

Costs

[41] There are no reasons advanced that the general principle that costs should follow the results should be upset.

[42] I grant the following order:

The application for eviction is dismissed with costs.

Noko MV
Judge of the High Court

Delivered: This judgement is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10 April 2024.

Appearances.

Counsel for the Applicants:
Instructed by:

Adv G Egan
Wouter Schoeman Attorneys

Counsel for the Respondent:
Instructed by

No Appearance
N/A

Date of hearing:
Date of Judgment:

8 November 2023
10 April 2024.