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

CASE NUMBER: 2021/49229

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

6 December 2022

In the matter between: -

RED OAK PROPERTIES (PTY) LTD

Applicant

(REGISTRATION NUMBER: 2020/768206/07)

and

CHANNEL MURNE

First respondent

**THE UNLAWFUL OCCUPIERS OF UNIT [...],
PEARLBROOK (DOOR [...]), [...] B [...] STREET,
HILLBROW, JOHANNESBURG**

Second respondent

CITY OF JOHANNESBURG LOCAL MUNICIPALITY

Third respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and

time for hand-down is deemed to be 10h00 on 6 December 2022.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This is an application for the eviction of the first and second respondents and any other persons occupying the immovable property through them. The immovable property is described as Unit [...], Pearlbrook (Door [...]), [...] B [...] Street, Hillbrow, Johannesburg (**“the property”**).

[2] The application is opposed. The deponent to the answering affidavit is the former owner of the immovable property, namely Mr Frans Makora Manyathela (**“the deponent”**). The deponent asserts in paragraph 5 of the answering papers that he has been authorised by the occupiers of the property to depose to the answering affidavit on their behalf. This was, but is no longer disputed by the applicant.

[3] The application is opposed on the following grounds: -

[a] The applicant lacks the requisite *locus standi* to bring the application and to apply for the relief sought;

[b] An application for the rescission of the order declaring the property specially executable is pending;

[c] There is collusion between the administrator, the Applicant and a separate juristic entity called Stratafin (Pty) Limited (**“Stratafin”**).

[d] The deponent intends to institute proceedings for the setting aside of the sale in execution of the property and therefore seeks an order for the stay of the eviction proceedings pending the final determination of this foreshadowed application.

[4] The applicant's compliance with the statutory requirements of the Prevention

Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (“**PIE**”) is not disputed.

THE APPLICANT’S CASE

[5] The applicant asserts that it is the sole lawful controller and forthcoming owner of the property pending its registration at the Johannesburg Deeds Office. In support the applicant attached a return of service to its founding papers, issued by the Deputy Sheriff, Johannesburg Central, confirming that the property was sold in execution on the 24th of May 2021 to the applicant.

[6] Prior to the purchase of the property by the applicant, the first and second respondents occupied the property. It is not known to the applicant whether the first and second respondents and all persons occupying the property through or under them, took occupation of the property through a lease agreement with the previous owners or whether they simply took occupation through own volition and no legal entitlement. However, the applicant confirms that no verbal or written lease agreement exists between the applicant and the first and/or second respondents in respect of the property. The applicant states that it never consented to the first and/or second respondents occupying the property either.

[7] As a result, the applicant instructed its attorneys of record to notify the respondent in writing to vacate the property by the 1st of September 2021. The notice to vacate was served personally on the first respondent on the 31st of August 2021. It is common cause that the property remains occupied despite the notice to vacate.

[8] The applicant asserts that it suffers prejudice as a result of the continued unlawful occupation of the respondents in that it is unable to occupy or let the property to a paying tenant. In addition, the respondents and all persons occupying the property through and under them, consume electricity and water for the applicant’s account. As a consequence, the applicant is deprived from a rental income and is effectively subsidising the use of electricity and water consumption to the property.

[9] The applicant states that it is not aware of the personal circumstances of the respondents and all persons occupying the property through and under them and therefore cannot make any submissions regarding the occupation of the property by elderly persons, children and/or persons with disabilities as required by PIE.

THE RESPONDENTS' CASE

[10] The respondents attack the applicant's *locus standi* on the basis that the applicant is not yet the registered owner of the property. Accordingly, so the respondents contend, the applicant has prematurely approached the court to seek an eviction of the respondents and other occupiers.

[11] In support of their objection, the respondents rely section 4(1) of PIE which provides that an owner of the property or a person in charge of the property is entitled to bring the eviction proceedings. The respondents submitted that ownership is demonstrated through the production of a Title Deed which was not done. The respondents concede, however, that the applicant relies on the alternative provided for in section 4(1) of PIE and that is for a lawful controller of the property to institution eviction proceedings. The respondents deny that the applicant has satisfied this requirement.

[12] The deponent states that it purchased the property during approximately 1991. This is common cause. During approximately 1991, after the property was registered, the deponent took occupation of the property.

[13] The deponent informs the court that around the 1st of August 2018, a group of unit owners of the sectional title Pearlbrook, applied for an order appointing Mr Jan van den Bos as administrator to Pearlbrook Body Corporate "*from a date obtained from the court registrar to hear part B of the application*".

[14] The deponent contends that from a reading of the court order it is clear that Mr Van den Bos was not immediately appointed as administrator and that this relief was postponed pending the hearing of part B of the application. The deponent states that it is common cause that no date has been allocated for the hearing of part B of

the application. As such, the appointment of Mr Van den Bos as administrator is incomplete. As a result, the deponent submits that Mr Van den Bos did not possess the requisite *locus standi* to institute application proceedings against the deponent for an order declaring the immovable property specially executable (***“the court order”***). The court order was granted on the 30th of July 2020.

[15] The deponent submits that he gained knowledge of the court order on the 6th of May 2021 and brought an urgent application seeking to stay the sale of the immovable property. Prior to the hearing of the urgent application, Mr Van den Bos agreed to an order for the stay of the execution proceedings, pending a rescission application to be brought by the deponent. The order to stay was made on the 11th of May 2021. On the 21st of May 2021, the deponent duly instituted the rescission proceedings which were opposed by Mr Van den Bos in his *nomine officio* capacity.

[16] In the circumstances, the deponent contends that the eviction proceedings ought to be stayed, pending the determination of the rescission application.

[17] The respondents, as a further ground of opposition to the eviction application, alleges that there is evidence linking the applicant directly to Mr Van den Bos and demonstrating clear collusion between the parties to sell the property. The deponent relies on deed searches conducted on Stratafin and makes the allegation that this entity engages in business with Mr Van den Bos. The deponent submits that Mr van den Bos colluded with Stratafin to declare properties at Pearlbrook specially executable to permit and/or allow the same directors using a different company, to purchase these properties at an auction and on-sell these properties for a profit. The deponent describes the conduct of Stratafin and Mr Van den Bos as unlawful and a basis for setting aside the sale in execution.

[18] As far as the personal circumstances of the deponent and the occupiers are concerned, the deponent provides the following information: -

[a] He is employed and has occupied the property for over 10 years.

[b] The Ngwenya family occupies the property with him.

[c] The Ngwenya family is headed by Elizabeth Ngwenya, aged 58, who has been in occupation of the property for over two years.

[d] Ms Elizabeth Ngwenya occupies the property with her daughter, Ms Prosper Ngwenya, aged 32 years, and her grandson, B [...] N [...], aged 10.

[e] Ms Elizabeth Ngwenya is the breadwinner and is employed as a cleaner at a monthly remuneration of R4 000.00.

[19] The deponent submits that in the event of the Ngwenya family being evicted, they will be rendered homeless and destitute and will require alternative accommodation from the third respondent, namely the City of Johannesburg Metropolitan Municipality.

APPLICANT'S REPLICATION TO GROUNDS OF OPPOSITION

[20] The applicant took issue with the late filing of the answering affidavit. The respondents were ordered by this court to file their answering papers by the 28th of March 2022, but only complied on the 6th of April 2022. This objection was not persisted with during the hearing of this application.

[21] Regarding the respondents' objection to the applicant's *locus standi* to institute the eviction proceedings, the applicant states as follows: -

[a] The Sheriff's return of service confirming that the property was sold to the applicant, constitutes *prima facie* proof.

[b] The purchase of an immovable property at an auction is a *sui generis* method of obtaining ownership of a property. It is trite, so the applicant argues, that the purchaser of a property at an auction is immediately allowed to take occupation of the property, irrespective whether or not the property has been transferred. As such, the purchaser is granted full access and control of the property from the day of purchase.

[c] The respondents' interpretation of the court order appointing Mr Van den Bos is incorrect.

[d] An application for the rescission of a judgment does not interfere with and/or halt the execution of a judgment.

[e] On appointment of Mr Van den Bos as administrator and in an attempt to normalise the situation in Pearlbrook Body Corporate, Mr Van den Bos sought to obtain financing on behalf of the Body Corporate. This was done as insufficient levy payments were made by owners for the fulfilment by the body corporate of its duties in terms of section 3 of the STSMA¹.

[f] Stratafin, a financial services provider in the community schemes industry who assists body corporates who are in financial distress by providing financing to such body corporates and acquires the rights in respect of the debtors' book of the body corporate as security.

[g] The applicant is a wholly-owned subsidiary of Stratafin and is the property-owning company of the financial services business, being Stratafin. In terms of the agreement concluded between the administrator on behalf of the body corporate and Stratafin, Stratafin would be required to issue clearance figures in conjunction with the administrator and/or managing agent to ensure that the security provided by the body corporate in respect of the funding received is paid once the unit is sold and transferred.

[h] In the event where the owner of a unit owes levies to the body corporate which exceed the value of the property and because a purchaser at an auction is required to pay the outstanding levies, nobody would purchase the unit if they were required to settle the outstanding levies that exceed the value of the property. For this reason Stratafin, through the applicant, would purchase these units where they have already advanced finance to the body corporate in respect of the outstanding levies and then would make the necessary write-offs once the property is registered in the

¹ The Sectional Titles Scheme Management Act, 8 of 2011

applicant's name to ensure that the maximum value be attained and the balance of the outstanding levies written off.

[i] The actions by Stratafin and the applicant are therefore neither nefarious nor collusive.

[22] The applicant contends that the personal circumstances of the respondents do not disclose a defence to the application for eviction. Furthermore, the City has been notified of these proceedings and when the order for eviction is granted, the respondents may approach the City for suitable housing.

THE RESCISSION APPLICATION

[23] At the hearing of this application, the court was informed that the rescission application was enrolled on the opposed roll and dismissed with costs on the 1st of May 2022 by Her Ladyship Madam Acting Justice Oosthuizen-Senekal. The court was favoured with a copy of the judgment.

[24] The deponent applied for leave to appeal, which was similarly dismissed with costs on the 9th of September 2022.

[25] It is instructive that the court, in dismissing the application for rescission, considered the *locus standi* point raised by the deponent against Mr Van den Bos. The court dismissed this point *in limine* on the basis that Mr Van den Bos was appointed as administrator of Pearlbrook Body Corporate on the 1st of August 2018. Accordingly, the court did not deem it necessary to entertain this point any further.

[26] The deponent brought the rescission application on the basis that the application for executability was served at his *domicilium citandi et executandi*, being the property, but that the deponent could not have become aware of the order because he was not present when service was effected. Furthermore, the application for rescission was founded on rule 42(1)(a), namely that the default judgment was erroneously granted in the absence of the applicant affected thereby.

[27] The court in dismissing the rescission application, found that the deponent had chosen the property as his *domicilium citandi et executandi* and moreover, that the deponent was misleading the court in that he used the property as his primary residence. The court therefore concluded that the deponent did not have a reasonable explanation for his default and that the application for rescission was not *bona fide*.

[28] It is important to point out also that the court recorded in its judgment that the deponent did not dispute the amount in arrears which formed the basis of the money judgment granted on the 6th of February 2020 by the Johannesburg Magistrates' Court.

DETERMINATION OF APPLICANT'S LOCUS STANDI

[29] Three different courts, in addition to the court that determined the rescission application, considered an objection to administrator's *locus standi*.² In each instance the court came to the same conclusion that on a purposive interpretation of the court order appointing Mr Van den Bos as administrator, his appointment was immediate. I am bound to follow these judgments, unless I can find that they are plainly wrong.

[30] In the process of interpreting the court order, Makume J³ motivated his finding that the order has immediate effect, as follows: -

"[13] It is unfortunate that paragraph 1 of the Court order is not a model of good drafting and may if read in its own cause confusion as to when Mr Van den Bos assumes powers. What is important is that the Court order should be read holistically to get the true intention of the order. What is it that the applicant in that matter sought to achieve by approaching court it can surely not have been to wait for a date in the future to give Mr Van den Bos powers in

² Jan van den Bos v Shivambo and the City of Johannesburg, case number 3176/2021 (judgment dated 8 September 2022) by Matojane J; Jan van den Bos N.O. v Manyakane and two others, case number 8956/2021 (judgment dated 20 July 2022) by Makume J; Okafor v Jan van den Bos and the City of Johannesburg, case number 2020/28938 (judgment dated 4 July 2022) by Crutchfield J; Jan van den Bos N.O. v Mogoane and three others, case number 2021/5838 (judgment dated 18 August 2022) by Swanepoel AJ.

³ Jan van den Bos N.O. v Manyakane and two others, case number 8956/2021 (judgment dated 20 July 2022).

terms of the Scheme. A reading of paragraph 3.12 puts this beyond doubt. It reads as follows:

[3] The Administrator vested with the powers and obligations as provided in terms of Section 16 of the Act which includes inter alia the right to:

3.12 approach the honourable court to institute legal proceedings:

3.12.1 for the recovery of arrears from Sectional Title owners and other debt owed to the respondents and to institute further legal proceedings where necessary for the aforementioned purposes in terms fully set out in Section 15 of the Act...'

[14] I find no ambiguity in the order granted appointing Jan van dan (sic) Bos as administrator of Pearlbrook. The Court order must be read purposively aimed at arrived at the true intention of the writer. The only basis that the applicant went to Court in case number 0899/2018 was because Pearlbrook Body Corporate had become dysfunctional and had to be placed under administration in order to remain in business. I can therefore find no reason why the powers of Jan van dan (sic) Bos would have had to wait for a future uncertain date. The respondent's point in limine regarding the locus standi of Mr Van dan (sic) Bos is just but one of the tactics to delay the inevitable and falls to be dismissed."

[31] I cannot fault the reasoning in these judgments incorrect and accordingly find that the respondents' point in limine has no merit and must fail.

COLLUSION

*[32] The most often quoted definition of collusion in our law is that given by Curlewis J in *Bevan v Bevan and Ward*⁴ where the learned judge said: -*

“In our law, ordinarily speaking, collusion is akin to connivance, and means an agreement or mutual understanding between the parties that the one shall commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury.”

[33] From the definition set out above it would seem that the Court held the view that for there to be collusion, there had to be some arrangement – express or implied – between the parties to mislead the Court by withholding or concealing material facts or suppressing a possible defence.

[34] In my view, the relationship between Mr Van den Bos, the applicant and Stratafin was more than adequately explained. A Deeds Search of the applicant attached to the founding papers confirms that Mr Van den Bos is not a director. Moreover, Mr Van den Bos was appointed lawfully in terms of an order of this Court. Save to dispute whether his appointment has taken effect, it is certainly not the respondents’ case that they have challenged the powers, functions or conduct of Mr van den Bos at any stage in any of the court proceedings instituted by them or by the deponent. This defence must accordingly follow the same fate as the *locus standi in limine* point, and must fail.

FINDING ON EVICTION AND PERSONAL CIRCUMSTANCES

[35] Where a private landowner applies for eviction, a court has to make two enquiries. First it has to consider all relevant factors and decide if it is just and equitable to order eviction. If it decided it is just and equitable to evict, it has to make a second enquiry into what justice and equity require in respect of the date of eviction and conditions attaching to the order. Once the first and second enquiries are concluded, a single order is to be made.⁵

[36] Section 4(1) of PIE provides that an owner of the property or a person in charge of the property is entitled to bring the eviction proceedings. During argument, this Court was informed that the property has subsequently been registered in the

⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at paragraph [25].

name of the respondent. Although no documentation evidencing this event was placed before me, the Respondents did not object to the manner in which this information was provided to the Court either.

[37] Even if I accept that the property has not been registered in the name of the applicant, the facts adduced in the papers only leads to one ineluctable conclusion and that is that the applicant is in charge of the property.

[38] In *Legator McKenna Inc and Another v Shea and Others*⁶ the Supreme Court of Appeal held that, in our law, the abstract theory of transfer applies to immovable property as well. Brand JA, writing for a unanimous court, stated (para 22):

*“In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely **delivery** - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or *saaklike ooreenkoms*. The essential elements of the real agreement are an **intention** on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E - F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra* at para 17)” (emphasis added)*

[39] The property was purchased at a sale in execution. The Sheriff delivered the property to the applicant. This is evident from the return of service. A return is regarded as prima facie evidence of its content.⁷ The validity of the return of service was not challenged by the respondents. In my view this puts an end to the argument.

[40] PIE imposed a new role on the courts in that they are required to hold a balance between legal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned.⁸ However, the extent to which the court must go beyond normal functions was also placed in perspective by the Supreme

⁶ 2010 (1) SA 35 (SCA)

⁷ Erasmus, Superior Court Practice : RS 17, 2021, D1-40; *Van Vuuren v Jansen* - 1977 (3) SA 1062 (T)

⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paragraph [13].

Court of Appeal in *Changing Tides*. It stated that this injunction must be seen in the context that courts are neither vested with powers of investigation, nor equipped with the staff and resources to engage in broad-ranging enquiries into socio-economic issues.⁹

[41] These are uncontested facts: -

[a] The rescission proceedings failed.

[b] There are no pending proceedings for the setting aside of the sale in execution.

[c] There is no lease agreement between the applicant and the occupiers.

[42] In the premises, I find that the respondents have failed to disclose a *bona fide* defence and they are in unlawful occupation.

[43] Section 4(7) of PIE provides as follows: -

“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

[44] The personal circumstances of the occupiers were scantily referred to in the answering papers. The deponent for example states that he is employed but does not disclose the identify of his employer or his monthly income. Mrs Ngwenya’s monthly income is disclosed, but it is not explained why her major daughter is

⁹ *Changing Tides* (*supra*) paragraph [27] at 313.

unemployed and dependent on her mother for financial support. Importantly, the deponent, being the former owner of the property, gave occupation to the Ngwenya family and the only logical conclusion to be drawn is that he is deriving a rental income as a consequence of the Ngwenyas' occupation.

[45] I also take note of the fact that the respondents have been represented by private attorneys throughout this application. Although it is suggested that the legal services were rendered on a *pro bono* basis, the practice note filed on behalf of the respondents is silent on this issue.

[46] In the answering affidavit the occupiers, save for the minor child and Ms Ngwenya's daughter, were all able to pay rent towards alternative accommodation.

[47] In the premises, the respondents failed to make out a case for homelessness. It has also not been suggested by the respondents that there is a shortage of immediately available accommodation for the occupiers.

[48] As a consequence of my finding that the respondents will not be rendered homeless in the event of their eviction, there is no reason for the third respondent to report. In the circumstances I consider it just and equitable to evict the respondents.

[49] Ms Lombard, appearing for the applicant, proposed a period of 2½ months within which the respondents are required to vacate the property. Mr Mhlana for the respondents indicated that they would abide by the decision of the Court.

[50] The Court takes cognisance of the fact that it is the festive season and that businesses, including rental agencies, close down. January is usually also a trying month for families who have to enrol children into school and pay school fees. The Ngwenya family is no exception. Upon consideration of the evidence, a period of three months afforded to the respondents to vacate the property would be just and equitable in the circumstances.

COSTS

[51] As far as the question of costs is concerned, I find no special circumstances urging me to deviate from the normal principle that cost should follow the result.

ORDER

[52] I therefore make the following order: -

*“1. The first respondent, second respondent and/or any other persons occupying the immovable property through and under them, being the property known as Unit [...], Pearlbrook (Door [...]), [...] B [...] Street, Hillbrow, Johannesburg (**‘the property’**) are hereby evicted.*

2. The first respondent, second respondent and/or any other persons occupying the immovable property through and under them are hereby ordered to vacate the property on or before the 31st of March 2023.

3. The sheriff or his deputy is authorised to do all things necessary to give effect to the order in paragraphs 1 and 2 above in the event that the first respondent, second respondent and/or any other persons occupying the property through and under them fail or refuse to vacate the property on the 31st of March 2023.

4. The first respondent and second respondents shall pay the costs of the application, jointly and severally, the one paying the other to be absolved.”

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 16 November 2022

DATE OF JUDGMENT: 6 December 2022

APPEARANCES:

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On behalf of third respondent: No appearance.