



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Appeal case no: **A100/2021**
Case no: **3894/2019**

In the matter between:

IZAK JACOB STEENKAMP NO

Appellant

and

LETSEGO HUDSON MOETI

1st Respondent

**ANY OTHER OCCUPIERS OF ERF 7205,
MANGAUNG FREE STATE PROVINCE**

2nd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

3rd Respondent

MASTER OF THE FREE STATE HIGH COURT

4th Respondent

CORAM: DAFFUE J, NAIDOO J et LITHEKO AJ

HEARD ON: 22 MARCH 2022

DELIVERED ON: 25 MARCH 2022

JUDGMENT BY: DAFFUE J

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 25 March 2022.

I INTRODUCTION

[1] This is an appeal by the unsuccessful applicant in an eviction application against the judgment of a single judge of this division who on 29 April 2021 dismissed the application with costs.

II THE PARTIES

[2] The appellant in this appeal is Mr Izak Jacob Steenkamp in his official capacity as the Master's representative in the estate of the late Eurashion Kagisho Ditsebe, estate number 7242/2004, in terms of Letters of Authority issued to him on 20 March 2019.¹ Adv HJ Benade appeared on behalf of the appellant before us, instructed by Steenkamp and Jansen Inc, Bloemfontein.

[3] The 1st respondent is Mr Letsego Hudson Moeti a major male person and occupier of Erf 7205, Mogoera Street, Mangaung Free State Province ("the premises"). Although Kalaote Attorneys are on record as the 1st respondent's attorneys, there was no appearance on behalf of first respondent in the court *a quo* as was the case in this appeal. In both instances, no heads of argument were filed in either court on behalf of the 1st respondent. The 2nd, 3rd and 4th respondents in the court *a quo* are also cited as such in the appeal, they being any other occupiers of the premises, the Mangaung Metropolitan Municipality and the Master of the Free State High Court. These parties did not oppose the initial relief sought in the court *a quo* and also do not feature in this appeal. The Master filed a report² abiding by the decision of the court *a quo*, but no report was obtained from the Mangaung Metropolitan Municipality.

III THE RELIEF SOUGHT IN THE COURT A QUO

[4] Having been authorised to serve the required s 4(2) notice in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE"),³ the appellant sought the usual orders, to wit that the 1st and 2nd respondents be declared unlawful occupiers of the premises and that they be ordered to vacate the premises by not later than 31 October 2019.

IV FACTUAL MATRIX

¹ Annexure "S1" to the founding affidavit, p 26

² Record, pp 42 & 43

³ 19 of 1998

[5] The following background is important to grasp the opposition of the 1st respondent, supported by the Moeti elders:

- 5.1 On 17 March 1958 the deceased married Baojele Cornelius Moeti, the uncle of the 1st respondent. Mr Moeti passed away on a date not reflected in the papers.
- 5.2 The deceased became the registered owner of the premises on 9 December 1999, having received ownership from the Mangaung Metropolitan Municipality.
- 5.3 On 5 February 2003 the deceased executed her last Will.
- 5.4 On 26 September 2004 the deceased passed away. The Will was not registered with the Master at that stage and no executor was appointed accordingly.
- 5.5 On 20 April 2012 the deceased's one son, Eric Itumeleng Moeti ("Itumeleng") passed away. We have no idea whether his descendants are still alive. According to his death notice⁴ he had two children, Kagisho Moeti and Shanyana Moeti who were both majors at the time of his death. We have no idea if his death was reported to the Master, and if so, whether someone has been appointed as executor in his estate.
- 5.6 On 16 August 2018 the other son, Lebogang Garth Moeti ("Lebogang") passed away. A certain Mr Bikane has been appointed as Master's representative in his estate, but this person does not feature in the litigation. Also, this information was only revealed when the replying affidavit was filed.⁵
- 5.7 In August 2018 and at the funeral proceedings of the late Lebogang, the Moeti family members attended a meeting at the premises where

⁴ Annexure "S13" to the replying affidavit on p 97

⁵ Annexure "S14" on p 98

Lebogang had been residing prior to his death. It was resolved at the meeting, as confirmed by the 1st respondent and Moeti elders such as his father and aunt, that he, the 1st respondent, should occupy the premises and consequently, he relocated to the premises in October 2018.

5.8 On 20 March 2019 the appellant was appointed in terms of s 18(3) of the Administration of Estates Act⁶ as Master's representative in the deceased's estate, she having passed away 15 years earlier.

5.9 It is apparent from the aforementioned that there was a delay of 15 years between the date of the deceased's death in 2004 and the appellant's appointment as the Master's representative in 2019. Three years have lapsed since this appointment and the 1st respondent is in occupation of the premises for nearly four years.

5.10 The executors or Master's representatives in the estates of the deceased's two sons, Itumeleng and Lebogang, have not been joined in the proceedings. None of their descendants feature in the application. Insofar as the two sons might have been married at the time of their death, no affidavits of the surviving spouses have been obtained by either the appellant or the 1st respondent. I mention this while being well aware of the contents of the deceased's Will to which I shall return in a moment.

IV THE HISTORY OF THE LITIGATION THUS FAR

[6] The following is a history of the litigation:

6.1 On 23 August 2019 the appellant initiated proceedings under PIE to evict the 1st respondent and other unlawful occupiers from the premises.

6.2 It was at all relevant times the appellant's intention to market and sell the premises. In fact, the appellant stated in the founding affidavit that

⁶ 66 of 1965

he had obtained a purchaser for the premises and that a valuation was required by SA Home Loans in order to facilitate the purchaser's application for a home loan.⁷ There is no information as to the debts of the deceased's estate and if so, whether her heirs would not be prepared to settle those in order to receive transfer.

6.3 Although the answering affidavit was filed on 18 October 2019, the replying affidavit was filed hopelessly out of time, to wit 15 months later on 25 January 2021.

6.4 The matter was heard and adjudicated by a single judge of this division who dismissed the application on 29 April 2021. Leave to appeal was granted on 13 August 2021.

VI REASONS FOR THE COURT A QUO'S JUDGMENT:

[7] The court *a quo* held that the appellant failed to prove that the 1st respondent was an unlawful occupier and based on this conclusion dismissed the application with costs.⁸

[8] Although the court *a quo* held that the appellant had *locus standi* by virtue of his appointment in terms of s 18(3) of the Administration of Estates Act, the following aspects were apparently considered in order to come to the aforesaid conclusion that the 1st respondent was not an unlawful occupier of the premises:

8.1 The deceased's Will was considered and based on the contents thereof the premises could not be sold to finalise the deceased's estate.⁹

8.2 Insofar as the appellant sought an eviction order with the aim to sell the premises contrary to the deceased's Will, neither the validity, nor the

⁷ Paras 8.3 & 8.4 of the founding affidavit, p 5

⁸ Judgment para 24, p 108

⁹ Judgment para 19, p 107

execution of the Will was ever questioned. Thus, the appellant's request for relief should not be adhered to.¹⁰

8.3 Bearing in mind the reference in the Will that the premises should remain "the property of the Moeti generation", the court *a quo* relied on the evidence of the 1st respondent's father and aunt, they being identified as Moeti elders.¹¹

8.4 The court *a quo* also considered the customs and traditions of customary law and who were the elders of the Moeti generation, referred to by the deceased.¹²

8.5 The court *a quo* held eventually that 1st respondent had been authorised by the people in control of the premises, to wit his father, Jeremiah Moeti and his paternal aunt, Martha Lebakeng to reside at the premises and consequently, as he had been rightfully authorised to reside there, he did not fall within in the definition of an unlawful occupier.¹³

VII RELEVANT PROVISIONS OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT

[9] It is apposite to deal with three definitions contained in PIE, to wit:¹⁴

"**owner**" means the registered owner of land, including an organ of state;

'person in charge' means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question;

'unlawful occupier' means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person ..." (the remainder of the definition is irrelevant) (emphasis added)

¹⁰ *Ibid* para 20, p 107

¹¹ *Ibid* para 21, p 108

¹² *Ibid* para 22, p 108

¹³ *Ibid* para 23, p 108

¹⁴ Section 1 of the Act

- [10] On the basis that we may not agree with the court *a quo* that the 1st respondent is not an unlawful occupier, it is necessary to quote the relevant sub-sections of s 4 of PIE:¹⁵

- “(7) 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 land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
- (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-
- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).
- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.” (emphasis added)

VIII RELEVANT AUTHORITIES

- [11] Having dealt with the relevant provisions of PIE, I deem it apposite to mention some authorities:

11.1 The Supreme Court of Appeal has recently dealt with an appeal following upon a successful eviction application in *Davidan v Polovin NO and Others*¹⁶. It confirmed the jurisdictional requirement to trigger an eviction under PIE, *i.e.* that the person to be evicted is an unlawful occupier within the meaning of PIE. It stated that consent by the owner or person in charge of the premises is a valid defence.¹⁷

¹⁵ Sub-sections 4(7) – 4(9) of PIE

¹⁶ [2021] 4 All SA 37 (SCA) (5 August 2021)

¹⁷ *Ibid*, paras 11 -14

11.2 In *Port Elizabeth Municipality v Various Occupiers*¹⁸ the court held that PIE expressly requires courts to infuse elements of grace and compassion into the formal structures of the law and therefore, courts shall consider the spirit of *ubuntu* in these kind of cases. This *dictum* was repeated with approval in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*.¹⁹ It is also important to note that in the last mentioned case, as is the situation in *casu*, the applicant for eviction did not seek eviction to enable him to move into the premises. There is therefore no competing risk of homelessness on the part of the appellant (the applicant in the court *a quo*).²⁰

[12] The duty of an executor in a deceased estate is to obtain possession of the assets of the deceased person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, as well as taxes and the costs of administering and winding-up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid, among the legatees and heirs under the Will or among the intestate heirs on intestacy.²¹

[13] It is accepted that the estate of the deceased person vests in the executor in the sense that the *dominium* and other rights and obligations of the estate reside in him or her.²²

[14] The appointment of a Master's representative in terms of s 18(3) of the Administration of Estates Act and the duties of such a representative are in line with the duties of executors as set out in annexure "S1".²³ The Letters of Authority confirms that the representative is authorised to take control of the assets of the estate as reflected in the inventory, to pay the debts and to transfer the residue of the estate to the heir/heirs entitled thereto by law.

¹⁸ 2005 (1) SA 217 (CC) at para 37

¹⁹ 2012 (2) SA 104 (CC) at para 38

²⁰ *Ibid*, para 39

²¹ Corbett, Hahlo and Hofmeyr, *The Law of Succession in South Africa*, 2nd ed, quoted in LAWSA vol 31, para 208

²² LAWSA vol 31, para 213

²³ *Supra*, p 26

[15] Although ss 42(2) and 47 of the Administration of Estates Act refer to the duty of executors pertaining to the sale of immovable property, there can be no doubt that these sections apply *mutatis mutandis* to Master's representatives who fulfil exactly the same role as executors, but only in respect of small estates. I quote:

“42 Documents to be lodged by executor with registration officer

(1)

(2) An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists.”

47 Sales by executor

Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

(a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) if the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.” (emphasis added)

X EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE APPELLANT'S COUNSEL

[16] The deceased's Will reads as follows:

- “1. I do hereby revoke all Wills and codicils previously by me and declare this to be my last Will.
2. I bequeath the property namely **7205 Mogoera Street, Rocklands Location,** Bloemfontein to the following:-
 - (a) **ERIC ITUMELENG MOETI ID No: 581003 5934 089**
 - (b) **LEBOGANG GARTH MOETI ID No: 600707 5887 082**
3. The said property shall not form part of their estate as result of their current marriage and future including their children.
4. The said property to remain sole estate of the Moeti generation.”

There can be no doubt, that although paragraphs 3 and 4 are ambiguous and may well lead to future litigation, the deceased elected to appoint her two sons as legatees, they being elected to inherit a specific asset, to wit the premises.²⁴

- [17] Mr Benade submitted that the appeal should succeed with costs insofar as there cannot be any doubt that the appellant, he being the person in charge of the premises belonging to the deceased estate, did not expressly or tacitly consent that the 1st respondent may occupy the premises. In fact, the appellant directed the 1st respondent to vacate the premises. Mr Benade submitted that the permission by the Moeti elders is irrelevant insofar as they could not be regarded as persons in charge who had legal authority to give permission to 1st respondent to reside on the premises.
- [18] Mr Benade conceded that if we were to find, contrary to what the court *a quo* held, that the 1st respondent is indeed an unlawful occupier, this court is not prevented from considering whether the facts contained in the affidavits, and in particular those referred to by the court *a quo* in the paragraphs quoted, are such that we may still dismiss the appeal on the basis that having considered all the relevant circumstances, it would be just and equitable not to grant an eviction order.
- [19] In light of the definitions in PIE and the common cause facts, I am satisfied that the court *a quo* erred in concluding that the appellant had failed to prove that the 1st respondent was an unlawful occupier of the premises. However, that is not the end of the matter.
- [20] The following aspects are regarded as relevant surrounding circumstances making it just and equitable to dismiss the appeal. The 1st respondent should not be evicted from the premises for the following reasons:

20.1 The appellant, who is not a relative of the deceased, or any of her heirs, or of any of the other Moeti family members, was duly appointed

²⁴ LAWSA vol 31, para 207; and consider the difference in the legal position between heirs and legatees at paras 210 & 331: a legatee acquires a vested right in the asset bequeathed to him/her, while the heir has a right to the residue of the estate only after debts and legacies have been paid

by the Master to take control of the assets, to pay the debts and to distribute the residue of the estate to the deceased's heirs and to do just that and nothing extraordinary. The appellant does not need the premises for his occupation and consequently, there is no competing risk of homelessness on the part of the appellant.

- 20.2 The appellant failed to advance any reasons why it was deemed necessary to sell the property to a buyer not even identified in the papers.²⁵ It is not indicated who the buyer is, but equally important, the appellant failed to mention the purchase price and why was it necessary to sell the only asset of any value.
- 20.3 The appellant failed to explain why the immovable property could not be transferred to the estates of the two sons in accordance with the provisions of the deceased's Will. There is no doubt that the appellant also believed that the residue of the deceased's estate had to be divided equally between the estates of the two sons.²⁶ The ambiguity in the deceased's Will did not matter to the appellant.
- 20.4 The appellant failed to present any evidence as to the liabilities of the estate which might have prevented transfer to the estates of the two heirs. In any event, and if there were liabilities that needed to be settled before transfer could be effected, I would have expected the appellant to present evidence of what he had done to obtain payment from the estates of the two heirs. There was no reason to sell the immovable property if cash could be provided to settle any estate debts.
- 20.5 When the 1st respondent placed on record that the sale of the premises was in direct conflict with the Will and that the Moeti family was never consulted by the appellant,²⁷ the appellant made an about turn in reply and stated the following:

²⁵ Founding affidavit para 8.4 p 21

²⁶ See para 8.3 of the founding affidavit p 21

²⁷ Answering affidavit para 7.4 p 56

"I insist that the property either is to be sold and the proceeds divided between the estates of the two heirs or it is to be transferred in co-ownership to the estates of the two sons. ... This stance by the Respondent is disputed. My authority stands until the Master's direction in terms of Section 18(3) has been reviewed and/or set aside."²⁸

20.6 The appellant failed to show that he had any authority to sell the immovable property as clearly stipulated in s 47 *supra*.

20.7 The 1st respondent gave a detailed family background in order to conclude why he had authority to occupy the premises,²⁹ relying on the terms of the Will as a member of the Moeti generation, as well as the resolution taken by the family elders.³⁰ Notwithstanding these allegations, the appellant failed to present any evidence by any of the descendants of the two sons, Itumeleng and Lebogang and/or their surviving spouses, if applicable. Also, and unlike as could be expected, and bearing in mind the insistence that the premises shall remain within the Moeti family, the appellant failed to state that it was indeed impossible to effect transfer to the sons' estates because of estate liabilities.

[21] Finally, I am satisfied that it is not just and equitable that the premises should be sold to a third party, unrelated to the Moeti family in the said circumstances and without any suggestion, allegation or submission that it is necessary to do so in order to wind-up the estate and in the absence of consultation with the heirs and any descendants which would obviously include representatives of the Moeti family. The spirit of *ubuntu* must take precedence *in casu*.

[22] I repeat, we do not even know what purchase price was agreed upon with the unidentified purchaser and/or whether the purchase price is market-related.

[23] The deceased's Will is not a model of clarity as can be gleaned from the paragraphs thereof quoted *supra*. However, as said, this might be the subject

²⁸ Replying affidavit, paras 13 & 14, p 93

²⁹ Answering affidavit, para 2, pp 52 - 54

³⁰ Answering affidavit, para 9, p 57

of future litigation and neither we, nor the appellant, have to concern ourselves about that at this stage. This court is not called upon to interpret the Will. It is not necessary to conclude whether the bequest to the two sons is subject to conditions, and if so, the nature thereof. Appellant will give effect to the Will if he transfers the immovable property to the estates of the two sons provided that all debts and administrations costs are being paid before then. The heirs in these estates may possibly become embroiled in a conflict, but that should not concern either the appellant, or this court. Whoever eventually obtains ownership by way of succession, whether testate or intestate, will have to decide how to deal with the 1st respondent.

- [24] In considering the appeal, one's mind is directed to the Constitution.³¹ Section 25(1) reads as follows:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

PIE has its roots in s 26(3) of the Constitution which stipulates that no one may be evicted from their home without an order of court after considering all relevant circumstances. Although the appellant may not have intended to deprive the estates of the two sons of their inheritances, the unnecessary sale of the premises in uncertain circumstances will deprive the Moeti's of their ancestral home, something that must be close to their hearts. This is a crucial aspect that cannot be ignored.

- [25] It is also important to note that no report was obtained from the Mangaung Metropolitan Municipality, indicating that land had been made available or could reasonably be made available by the municipality for the relocation of the 1st respondent.

XI CONCLUSION

- [26] The appeal should be dismissed for the reasons advanced herein. The final issue to be considered is, as always, the liability to pay costs. The general rule is that the successful party is entitled to costs and that the loser must foot the bill. *In casu*, if the usual order is made, the effect will be that the costs will

³¹ Act 108 of 1996

have to be paid by the deceased's estate. We have no option than to make such an order. A punitive costs order *de bonis propriis* might have been made against the appellant, but there is no request for such an order and also, these orders are seldom made. The appellant was also not given an opportunity to address us on the issue. Consequently, such order is not called for. In the court *a quo* the application was dismissed with costs. These two costs orders will probably leave the deceased's estate with no equity, meaning that there will be nothing to distribute once the costs have been paid. A value of a mere R100 000.00 was put on the premises when the appellant was appointed as Master's representative, but there is no indication of the real market value. Although this outcome is far from ideal, this court cannot come to any other conclusion.

XII ORDER

[27] The following order is made:

1. The appeal is dismissed with costs.

JP DAFFUE J

I concur

S NAIDOO J

I concur

MS LITHEKO AJ

On behalf of the Appellant:
Instructed by:

Adv HJ BENADE
Steenkamp & Jansen Inc
BLOEMFONTEIN

On behalf of the 1st respondent: No appearance