IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: 26552/2017

21/1/2020

JOSE ANTONIO BORGES NUNES **APPLICANT**

and

PHAKAMA MPUMELELO NKOSI **RESPONDENT**

EKURHULENI METROPOLITAN MUNICIPALITY **2ND RESPONDENT**

JUDGMENT

KHUMALO J

Introduction

[1] This is an application in which the Applicant as the registered owner seeks an order:

[1.1] that the First Respondent and all other persons that currently occupy ERF [….], PROVINCE OF GAUTENG, MEASURING 1002, (ONE THOUSAND AND TWO) SQUARE METERS HELD BY DEED OF TRANSFER NUMBER [….] be evicted and interdicted from remaining in occupation or continuing to occupy the said property, Which property is situated at [….], Midstream Estate, Midstream, Centurion (hereinafter referred to as the property);

[1.2] declaring the occupation of the property by the First Respondent and all other persons, illegal;

[1.3] that the First Respondent and all other persons occupying the property be ordered to vacate the property, within thirty (30) days from the date of the order, failing which, the sheriff or his deputy be authorised, with the assistance of the South African Police Service (SAPS), to do the necessary and reasonable steps to evict the First Respondent and any other persons that illegally occupy the property and remove their belongings and possessions from the property .

[2] The Applicant J B S Nunes (Nunes), bought the property at a sale in execution on 21 September 2016. The transfer of the property to his name was registered on 15 February 2017. The property was attached and sold in execution in enforcement of a default judgment debt obtained on 13 May 2016 by Standard Bank of South Africa (SBSA or the judgment creditor) against the erstwhile owner of the property Phakamole Trading CC (the judgment debtor CC) upon which it was sold in execution to Nunes on 21September 2016. At that time Mr P P Nkosi (Nkosi), the 1st Respondent and his family were in occupation of the property since 2010. Nkosi and his ex-wife Molebogeng Mbethe (Mbethe) hold equal membership in Phakamole Trading CC.

[3] Nkosi refuses to vacate the property unless by an eviction order. Nunes has as a result pursued Nkosi's eviction in terms of s 4 (1) of the Prevention of Illegal Eviction from and of Unlawful Occupation of Land Act 19 of 1998 (PIEU). All the necessary Notices and Application were issued on 6 June 2017. The procedural requirements were met with service accordingly effected upon Nkosi and the Municipality, that is joined as the 2nd Respondent. Mbethe has since vacated the property.

Respondent Opposition

[4] Nkosi has, in opposition of the eviction averred in his answering affidavit that immediately after the sale in execution on 21 September 2016, he left to go and look for money so that he can make alternative arrangements with SABS {whom he alleges was the actual purchaser of the property at the sale in execution), to settle the judgment debt but the sheriff nevertheless continued to conclude the conditions of sale privately with Nunes. He says he therefore disputes Nunes' ownership of the property on the basis that the sale in execution was irregular. He points out that he subsequently on 7 July 2017 launched an application to set the sale aside and it is still pending. In the mentioned Application which is annexed to the answering affidavit he alleges that the property is wholly owned by him whilst stating in contradiction that he is a holder of 50% member's interest in Phakamole Trading the erstwhile owner of the property and the Application instituted by him in that capacity .

[5] He has pointed out that after default judgment was obtained, he instituted proceedings on 19 September 2016 for rescission thereof as the manner and procedure in which it **was obtained was** irregular. He alleges that he will suffer severe and irreparable prejudice if evicted as the property is his and his two children's primary residence, his prejudice outweighing that which may be suffered by Nunes.

[6] He has therefore prayed for either the dismissal or alternatively the suspension of the eviction proceedings until the rescission and the setting aside of the sale In execution applications are finalised, arguing that it would not be in the interest of justice to evict him prior thereto as the two might be dispositive of the former.

[7] Nunes has in his Reply challenged Nkosi's *locus standi* to institute the applications for rescission and the setting aside of the sale in execution on the basis that he has confirmed to hold only 50% of the member's interest In Phakamole Trading as one of the only two members and had not attached a resolution that authorises him to launch the applications and to depose to the affidavits on behalf of the CC.

[8] Nunes accuses Nkosi of not being *bona fide* in bringing the Application for setting aside the sale, but to have brought it to avoid the eviction since even though the **sale was on 21 September 2016,** he **launched the Application only on** July

2017 after the eviction application was served on him **on 9** June 2017. He also was delaying finalising the rescission application he instituted in September 2016 which he has failed to set down for hearing. Furthermore Nunes denies that the sale in execution was irregular and that the purchaser at the sale in execution was Standard Bank but himself. He indicates that he will be prejudiced if the eviction application is delayed as commercially he will be losing money and accumulating costs.

[9] Nkosi's suffering of any prejudice is denied by Nunes on the basis that Nkosi owns a second property, that is, Erf 241 [….], measuring 1983 sqm in extent.

[10] Subsequently the Rescission and the Application to set aside the sale in execution were set down of on 30 April 2018. Nkosi on that date withdrew the application for rescission of judgment and sought to postpone the application to set aside the sale in execution. Only the Application for eviction and that of setting aside the sale in execution remains.

[11] Nunes subsequently filed a further affidavit that he referred to as the Supplementary Affidavit and attached an Affidavit signed by Mbethe that confirmed that neither was a resolution passed by the holders of the member's interest in Phakamole Trading, authorising Nkosi to institute the legal proceedings and or to launch the Application to challenge or set aside the sale in execution nor was there ever a discussion whereby it was resolved that Nkosi could challenge the sale. Mbethe confirmed that Nkosi has no *locus standi* to contest the sale in execution.

[12] The court had to decide on the acceptance of the Supplementary Affidavit where after the issue to be decided *in limine,* was NkosI's *locus standi* to bring an application to set aside the sale in execution. Depending on the finding of the court, if found that he has, the issue that had to be established was whether as a matter of law and/ or fairness, it would be in the interest of justice to order an eviction whilst Nkosi's action to set aside the sale was still pending (to delay the Application for eviction until finalisation of the Application to set aside the eviction0.

[13] The factors that were to be considered are the validity of the Application/action raised in defence, prospects of success and prejudice that may be suffered if the eviction application is not delayed until finalisation of Nkosi's application. If found that Nkosi has no *locus standi,* the onus would be on Nunes to prove that the eviction of Nkosi from the property would be just and equitable. He

has to inter alia, assert his ownership and unlawfulness of Nkosi's occupation, prejudice he would suffer if eviction not ordered. Lastly the determination of the date upon which such eviction may take place.

Legal framework

Locus standi

[14] A court would be slow to restrain a person from exercising his rights and carrying on his activities unless for a legitimate purpose. What Nkosi seeks is equivalent to an interlocutory interdict to temporarily suspend Nunes from exercising his right. It is therefore of paramount importance that the court firstly has to determine whether Nkosi, the launcher or the cited Applicant in the Application that is sought should suspend the hearing of the eviction Application (delay Nunes from exercising his eviction right), has established any *locus standi* to bring such an Application. (It is one of the factors Nunes raised that relates to the prospects of success together with the issue of delay and respective prejudice that would also determine if it would be in the interest of justice to pend the eviction application until finalisation of Nkosi's Application.

[15] It is trite that the institution of legal proceedings by a company and the prosecution thereof must be authorised by resolution; see *Ganes and Another v Telecon Namibia Ltd* 2001 (3) SA 615 (SCA) at par 19. A person who acts on behalf of a company is therefore required to allege that he is authorised by the company to bring the proceedings; see *Nunnerly & Co v Lipschitz* 1925 WLD 58. However once authorisation is placed in issue a mere statement by a managing director that all directors are aware of the proceedings and have authorised the bringing of the proceedings shall not be enough but a higher proof required; see Griffiths v Inglis (Pty) Ltd v Southern Cape Blasters (Pty) 1972 (4) SA 249 (C). As a result the best evidence that an application has been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the director's resolution; see *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352A.

[16] Nkosi has, in his Application to set aside the sale in execution, alleged to have instituted the legal proceedings as a holder of 50% member's interest who wholly owns Phakamole Trading CC. The statement is not sufficient and latter allegation incorrect. He cannot wholly own the CC if he only owns half of the member's interest.

He also cannot bring the Application in his personal capacity as he is not the owner of the property or party to the proceedings.

[17] Consequently as Nkosi does not wholly own Phakamole, he lacks a *locus standi* (authority) to bring the Application on his own, to set aside the sale in execution on behalf of the CC. The two members Nkosi and his ex-wife, Mbethe who hold equal member's interest in the CC are required to both sign a resolution authorising Nkosi to act on behalf of Phakamole and institute the legal proceedings. Nkosi has not filed a resolution in the Application to set aside the sale as pointed out by Nunes nor has he alleged to have been authorised by the other member. On the other hand Nunes has filed Mbethe's signed affidavit, albeit as part of a Supplementary (Further) Affidavit, in which Mbethe confirms that she has not given any authority to Nkosi and does not contest judgment and the sale in execution.

[18] It is commonplace that in Application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally commonplace is that an applicant must make out his case which will entitle him to the relief sought in his founding affidavit and that he must stand or fall by the allegations contained therein. See Business Partners Ltd v World Focus 754 CC 2015 (5) SA 525 (KZD). It is therefore the general rule that the court will not permit an Applicant to assert new facts in his replying affidavit. However, this rule, like all other general rules, is not without exceptions, as clarified by Nestadt J in *Shepherd v Tuckers Land and Development Corporation (Pty) Ltd* (1) that:

> "This is not however an absolute rule. It is not law of the Medes and Persians. The court has a discretion to allow new matter to remain in a replying affidavit This indulgence, however, will only be allowed in special or exceptional circumstances."

[19] An Applicant is entitled to introduce further corroborating facts by means of a replying affidavits should the contents of the answering affidavit call for such facts; see *Botswana (Pty) v Sentech (Pty) Ltd* 2013 (6) SA and which may then be responded to or substantiated by the filing of further affidavits. However 'none is authority for the proposition that a total defective application be rectified in further affidavits; *Poseidon .Ships Agencies (Pty) ltd v African Coaling and Exporting* Co *(Durban) (Pty) Ltd* 1980 (1) SA 313 D at 315 H - 316 A.

[20] The court will furthermore exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues In dispute; see *Dickinson v South African General Electric* Co *(Pty) Ltd* 1973 (2); *Cohen NO v Nel* 1975 (3) SA 963 (W). The matter in *casu* is one of those matters. It was as a result of Nkosi's defence in the Answering Affidavit that the disputed issue of Nkosi's *locus standi* arose. It is on that basis and the relevance of Mbethe's affidavit that I have accepted Nunes's Supplementary Affidavit. Mbethe's affidavit seeks to elucidate and confirm Nkosi's lack of legitimate standing as alleged in the Replying affidavit.

[21] *Locus standi* is fundamental to due process hence lack thereof invalidates the proceedings. Nkosi'"s lack of *locus standi* to challenge or bring the Application to set aside the sale in execution, either in his personal capacity or that of Phakamole Trading CC renders the application invalid. Consequently with no valid pending proceedings challenging the sale in execution, pending or delaying the hearing of the eviction application cannot be justified.

[22] In addition, not only has the challenge to the sale in execution been delayed, but Nkosi has shown no enthusiasm to get the Application finally adjudicated upon. It therefore cannot be in the interest of justice to delay the adjudication of the eviction proceedings.

If Eviction Just and equitable

[23] The onus being on Nunes to prove that the eviction of Nkosi from the property is just and equitable, with no legitimate challenge to his assertion of ownership and Nkosi's unlawful occupation of the property, the judgment order being no longer challenged and Nkosi lacking the legal standing to dispute the sale in execution (no *de iure (legal)* dispute exists), he had satisfied one of the factors to be considered when establishing if the eviction is just and equitable.

[24] Nunes alleges that he will suffer prejudice if eviction not ordered, in respect of loss of possible rental income, accumulation of body corporate levies and municipal rates.

[25] On the other hand Nkosi's submission is that he resides in the property with

two children and an elderly lady. He has not indicated the ages of the children, whether they are of school going age and how they will be affected by the eviction and the period they will need to move out of the property. The date suggested by Nunes is within a period of 30 days.

[26] Mr Ntloko, who appeared on behalf of Nkosi has argued that the PIE Act requires the court in determining whether it would be just and equitable to give specific consideration to the circumstances under which the unlawful occupiers have resided on the land in question and to pay particular regard to the rights and needs of the vulnerable occupiers. Pointing out that where an eviction will lead to homelessness, it is not generally jt and equitable and the participation of the local authority In the proceedings essential.

[27] Mr Van der Merwe on behalf of Nunes pointed out that Nkosi was never the registered owner of his primary residence property but has a residential property that is registered in his name that is bigger in extent in an affluent area and therefore is not a destitute illegal occupier. He has not claimed that he will be homeless or not be able to obtain alternative accommodation. He instead has indicated that he will be earning an income from various contracts in an amount that exceeds R25 Million Rand.

[28] Nkosi's situation is contrary to the arguments by his Counsel that the PIE Act aims to strike a balance between a property owner's common law right to exclusive use and possession of his or her property, and the needs of people who are driven to occupy land unlawfully because they have nowhere to go. Van der Merwe says that property owners are entitled to exclusive use and possession of their property but where their property is unlawfully occupied by people who would otherwise be homeless, that right is suspended until the state, usually the local authority is reasonably able to provide alternative accommodation to the unlawful occupiers; see *Blue Moonlight* {17]

[29] Nkosi is without a doubt obviously not destitute and would not be rendered homeless if evicted from the property. His eviction is therefore not unjust and inequitable, seeing also that there is no legitimate process that is pending.

[30] The date upon which Nkosi must vacate the property is proposed to take place within 30 days from the date of the order. Looking at Nkosi's situation, specifically the period he has been staying in the property and his indication that he

also has children residing in the premises, even though their circumstances not clarified, their needs would be adequately accommodated if he is ordered to vacate the property within 45 days from date of the order. On Nkosi's failure to vacate on the date ordered, the eviction may be carried out by the sheriff within 15 days of service of notice of intention to do so.

[31] Under the circumstances the following order is made:

1. The occupation of the property, ERF [….], PROVINCE OF GAUTENG, MEASURING 1002 (ONE THOUSAND AND TWO) SQUARE METERS HELD BY DEED OF TRANSFER NUMBER T[….], that is situated at [….] Midfield Estate, Midstream, Centurion by the First Respondent and all other persons is hereby declared illegal;

2. The First Respondent and all persons currently occupying the property be hereby evicted and interdicted from remaining in occupation or continuing to occupy the said property;

3. The First Respondent and all other persons occupying the property, are ordered to vacate the property within 45 days from the date of this order, failing which the sheriff or his deputy is hereby authorised within 15 days of service of notice of intention to do so with the assistance of the South African Police Service (SAPS), to take all necessary and reasonable steps to:

3.1 Evict the Respondent and any other illegal occupiers from the property; and

3.2 Remove their belongings and possessions from the property;

4. The First Respondent is ordered to pay the costs of the Application as between attorney and client.

NV KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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