

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION (BHISHO)**

Not Reportable

Case No: 690/2018

In the matter between:

BOCHABELO WORREL VINCENT OREILY NKOMO

First Applicant

and

NOMPUCUKO MQOKOZO

First Respondent

THE BUFFALO CITY METROPOLITAN

Second Respondent

JUDGMENT

NQUMSE AJ:

Introduction:

[1] This is an application for eviction against the respondents in which the applicant seeks an order in the following terms:

- 1.1 that the first respondent and any other occupiers of the property known and described as No. 535 Zone 4, Zwelitsha, be evicted

forthwith alternatively within such period as the court may deem appropriate.

- 1.2 That the sheriff of the court be directed to evict the first respondent and all other occupiers of the property, should they fail to comply with the court's direction in terms of paragraph 1 above, and furthermore, if necessary, to obtain the aid and/or assistance of the South African Police Services to execute the order, provided that the sheriff shall at all times be present during such eviction.
- 1.3 That the costs of the application be paid by the first respondent.
- 1.4 Further and/or alternative relief.

[2] The first respondent's opposition to the application is ostensibly premised on acquisitive prescription.

[3] Although the Buffalo City Metropolitan Municipality has been cited as a respondent no relief is sought against it and has therefore taken no part in these proceedings.

Background facts:

[4] The applicant stated in his founding affidavit that his father who passed away in 2008 was the registered owner of the aforementioned property. Pursuant to his passing and according to his last will and testament all rights, title and interest in the property in question shall pass to his mother who accordingly became the registered owner of the property. His mother passed away in 2016 leaving behind her will and testament according to which, all rights, title and interest in the said property passed to the applicant. Accordingly the applicant became the registered owner of the property. In support of his allegation he attached a copy of a title deed which was annexed to the founding affidavit as "BN 2".

[5] In 2017 the applicant visited the said property with a view to prepare it for purposes of letting it out to tenants. Upon arrival at his property he established that it was occupied by the first respondent who she advised that he was the registered owner of the property. He further advised the first respondent that she had no lawful right or entitlement therein. Despite his demand for the first respondent to vacate his property his demand was met with resistance.

[6] Applicant further stated that the first respondent enjoys a free stay in his property since she is not paying for her occupation and neither does she pay the rates and taxes. As a result the applicant is burdened with the upkeep of a property that does not generate any income to ameliorate his financial constraints. He also stated that the first respondent's further occupation of his property will further deteriorate his financial position.

This is at the backdrop of the first respondent's ownership of a residential property in Ginsberg which she chose to lease out to tenants whilst she deprives him of the use and enjoyment of his property that he is a registered owner thereof.

[7] In her answering affidavit the first respondent raised a defence of *res judicata* as a point *in limine*. She avers that the order sought by the applicant has been adjudicated upon in the Zwelitsha Magistrate's Court. She therefore contends that the remedy that was available to the applicant is to appeal the judgment of the magistrate. She made reference to annexure "NM 1" as the annexure that purports to be the judgment of the magistrate.

[8] At this juncture I pause to indicate that as a result of the reference to annexure 'NM1' the proceedings took a different turn momentarily, as it will become clearer hereunder.

[9] After the first respondent had served and filed her answering affidavit, she noticed that the judgment referred to as "NM 1" in her affidavit has not been annexed

but instead had annexed the transcript of the proceedings. This prompted the first respondent to serve on the applicant a notice of filing. It is necessary to refer in some detail to the notice of filing and the contents therein:

The notice states “Be pleased to take notice that the first respondent herewith files documents for court’s attention in this matter. Be pleased to take notice further that this document relates to the first respondent’s answering affidavit which was unintentionally omitted. Annexure “NM 1” in the papers is a transcript of court proceedings whereas it should have attached the actual judgment. That transcription is hereby substituted for the final judgment as Annexure “NMT 1”.

[10] The document that was annexed to the filing notice is a copy of the typed version of the judgment of the magistrate which was marked “NM 3”. What was annexed in the answering affidavit is a copy of an A4 page which is a manuscript of the magistrate marked “NMT 1”. It is the latter document that counsel for the first respondent sought to introduce as a judgment of the magistrate’s court.

[11] Counsel for the applicant protested the introduction of this document on the grounds which were set out in the replying affidavit which ostensibly point to the fact that the procedure employed by the first respondent to produce the document was flawed. He further pointed out the absence of the authenticity of the said document. Counsel for the first respondent was at pains to explain why the document has not been authenticated by means of an affidavit, and it lacked, the bare minimum of affixing a stamp of the clerk of the court or certification thereof as a true copy of the judgment of the court. He also had difficulty to reconcile the situation that was addressed in *Yisehleli Edward Nyamso and Head of Department of Sports and Others*¹ by Mbenenge J (as he then was), in relation to the situation that is obtaining in this matter, since what she seeks to do in this matter is to substitute a document that has been annexed on the papers with another document. Whereas in *Nyamso*, the court sought to give a direction to what a litigant can do who has ‘omitted’ to annex a document. He was

¹ Case No. 643/2014 ECLD (Bhisho) 27 September 2016

further embattled with the numerous discrepancies which appear in the markings of these documents and the obvious confusion that has been brought to bear, by the discrepancies in the markings and referencing in the papers of the first respondent. Save to admit repeatedly the errors that are apparent, counsel for the first respondent could proffer no other helpful explanation.

[12] Consequently, I ruled that the document the first respondent sought to introduce as inadmissible for the reasons above. This therefore was dispositive of the point *in limine* and the defence of *res judicata*.

[13] I shall now revert to the remainder of the answering affidavit and the averments made therein. The first respondent alleges that she has been in possession of the said property since 1975 with the intention to acquire its ownership. In 1979 her husband purchased it from the applicant's late father, however transfer thereof failed due to lack of co-operation from the applicant's father. She further states that since the eviction application is launched after 30 years being in uninterrupted occupation of the property, in terms of the Prescription Act² she has acquired ownership through "acquisitive prescription". The first respondent reiterated in her answering affidavit that the property in her possession was purchased and has been in possession thereof for 30 years. She therefore denies that her occupation is unlawful.

[14] In reply, the applicant was more elaborate in his attack of the defence of *res judicata* that the first respondent had relied on as a point *in limine*. He pointed out quite sharply the failure of the first respondent to meet the necessary requirements in order to succeed with the defence of *res judicata*. Most importantly in his attack was the lack of showing that the *lis* in the previous proceedings was between the same parties, with the same issues which were finally adjudicated upon.

[15] However, in the light of the ruling I had already made on the admissibility of the judgment that was a subject of *res judicata*, the reply by the applicant on this aspect

² Act 68 of 1969

needed no further consideration. Save that the first respondent has failed to prove that the decision she was relying on of the magistrate was between the same parties and the issue for adjudication was the same (see *Tradax ocean Transportation SA MV and others*)³.

[16] Applicant further contended in his reply that the first respondent has not denied that he is the registered owner of the property. In light thereof the first respondent bears the onus to prove that she has a better title to the property than the applicant. He further submitted that the first respondent has not placed evidence before the court in which she establishes acquisitive prescription.

[17] As it can be gleaned from the facts above, it is not in dispute that the property in question belonged to the father of the applicant who was the registered owner thereof and who in the event of his passing transferred all his rights, title and interest in the property to his wife. It is also common cause his wife registered the property in her own name and in the event of her passing on, according to her will and last testament, transferred all her rights, title and interest in the property to her son, who is the applicant.

[18] It is further common cause that the applicant registered the said property in his own name and therefore became the title holder thereof.

[19] It is also common cause that the first respondent has no other right she claims in the property save that she has occupied it for more than 30 years, a fact that has not been denied by the applicant.

Is the first respondent an unlawful occupier?

[20] As already alluded to above the first respondent has been in occupation of the property in question for a period not less than 30 years albeit not registered owner of the property. Of significance are the averments made by the first respondent that her

³ [1999] 3 ALL SA 175(A); and *Hochfeld Commodities v Theron* 2000 (1) SA 551 at 566-567.

late husband purchased the property from the applicant's father, however, the property could not be transferred to her late husband and/or to their estate due to the non-cooperation of the owner of the property. This makes it patently clear that the intended sale of the property between the parties aborted or at least never yielded the desired results.

[21] In the absence of any other evidence how the first respondent became in possession of the property, the only reasonable inference that can be drawn on the available evidence is that she gained possession through the aborted sale. Possession is described in the Prescription Act 18 of 1943 as possession *nec vic nec claim nec precario*, i.e. Peaceably and not with the revocable permission of the owner (see generally *Bisschop v Stafford*,⁴ *Malan v Nabygeleegen Estates*,⁵ *Pratt v Lourens*).⁶

[22] In terms of the Prescription Act 68 of 1969 a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.⁷ If an acquirer had received either express or tacit consent it follows that the acquirer did not act as if he or she was entitled to exercise the servitudal right.⁸

[23] The first respondent avers that she was in possession of the property openly as if she was the owner thereof for an uninterrupted period of more than thirty years. She however, does not explain how she possessed the property openly as if she was the owner thereof. In other words the first respondent has failed to show how she is an adverse possessor which excludes possession by virtue of some contract or legal relationship that recognizes the ownership of the other.⁹

⁴ 1974 (3) SA 1(A)

⁵ 1946 AD 562

⁶ 1954 (4) SA 281 (N)

⁷ See section 1 of the Prescription Act.

⁸ *Pezwla Private Estate (Pty) Ltd v Meterlerkamp* [2014] ALL SA 664 2014 (5) SA 37 (SA).

⁹ See *Malan v Nabygeleegen Estates* supra at 572

[24] In *Morgenster 171 (Pty) Ltd v De Kock & Others*¹⁰ Rogers AJ referred to *Welgemoed v Coetzer and 4 Others*¹¹ where Murray J said that in order to constitute adverse possession for purposes of acquisitive prescription there must be acts of use that are patent to the true owner. In *Smith & Others v Martini Executor Dative*¹² De Villiers CJ said the common law requirement '*nec clam*' that the possession should be so patent that the owner, with reasonable care, could have observed it, that there should be 'sufficient visible proof of their possession'.

[25] As indicated above there was no evidence proffered by the first respondent to the effect that she possessed the property in a manner that constitutes adverse possession and which demonstrates in a patent manner that she is the owner thereof.

[26] It is trite law that the first respondent must have been in possession of the property *nec vic, nec clam, nec precario* in order to claim prescription.

In *Malan v Nybergelegan*, the Appellate Division held as follows:

"In order to avoid misunderstanding, it should be pointed out that mere occupation of property '*nec vic. nec claim, nec precano*' for a period of thirty years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as a lease or usufruct which recognizes the ownership of another."

[27] As indicated earlier that in this case the first respondent has not explained how she became in possession of the property except that her husband bought it from the applicant's father, who in turn refused to co-operate for the transfer of same. Whilst not

¹⁰ (2012) (3) SA 59 (WCC); [2012] 2 ALL SA 640 (WCC); [2011] ZAWCHC 571; ZAWCHC (5 December 2011)

¹¹ 1946 (TPD) 701

¹² (1899) 16 SC 148

much said is about the sale of the property, the question is why does she not allege ownership by virtue of the sale agreement but instead choose to rely on prescription that has not been fully proved. On the contrary, the evidence points to the fact that the applicant's father has been for all intents and purpose regarded himself as the owner of the property. This is borne out in his last will and testament where upon his death, left the title and interest to the property to his wife who in turn regarded herself as the owner after the passing of her husband and upon her death, as her will dictated, left the title and interest in the said property to the applicant.

[28] In light of all the facts before me I am not satisfied that the first respondent has satisfied the requirements envisaged in the Prescription Act upon which she bases her claim for ownership.

[29] My view in this regard is further fortified in the failure of the first respondent to dispute that the applicant is a title holder of the property and consequently the owner thereof. She failed to discharge the onus on her to prove that she has a better title (See *Du Toit and other v Furstenberg and others*¹³

[30] In terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act¹⁴ (PIE) an unlawful occupier is defined to mean –

“A person who occupies land without the express or tacit consent of the owner in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997 and excluding a person where an informal right to land, but for the provisions of this Act, would be protected by the provision of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)”

Since the applicant's right to his property is unassailable, he is entitled to evict the respondent from his property if her occupation thereof is without any consent or legal

¹³ [1957] 1 ALL SA 172 (O) at 174

¹⁴ Act no of 1998

agreement that protects her stay therein. In the circumstances of this case I can come to no other conclusion other than to find the first respondent to be an unlawful occupier.

[31] In terms of section 4(7) of PIE an eviction order may be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of section 4 are satisfied and no valid defence to an eviction order has been raised the court “must”, in terms of section 4 (8), grant an eviction order. When granting such an order the court must in terms of section 4 (8)(a), determine a just and equitable date on which the unlawful occupiers must vacate the premises. The court is also empowered in terms of section 4(12) to attach reasonable conditions to an eviction order. (See *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others*)¹⁵.

[32] The applicant has alleged in paragraph 22 of his founding affidavit that the first respondent is a joint owner with her husband of an alternative residential property being 1069 Tyamyashe Street in Ginsberg. In further support of this allegation the applicant annexed a Deeds Office Search marked “BN 6” which confirmed first respondent’s ownership thereof. The applicant further went to lengths of investigating what the status of that property was and found that it is currently leased to tenants. For sake of completeness I find it necessary to recite the response of the first respondent to this allegation where she states:

“Save to admit the allegation confirmed in paragraph 22 but I deny each and every allegation contained in the remaining paragraphs”.

By remaining paragraphs she was referring to paragraphs 23, 24 and 25 which paragraphs have no bearing whatsoever in the allegations made in paragraph 22 of the

¹⁵ [2012] ZASCA 116; 2012 (6) SA 294 (SCA), 2012 (11) BCLR 1206 (SCA), 2013 ALL SA 8 (SCA) 14 SEPTEMBER 2012).

founding affidavit. The upshot is that the first respondent admits that she has alternative accommodation.

[33] The applicant having complied with the notice requirements under section 4 of the Act and in the absence of any relevant information placed before me by the first respondent as envisaged in section 4 (8), I come to the only conclusion that the eviction is just and equitable. What remains to be considered is the date of eviction of the first respondent and any conditions that may be attached to the order of eviction.

[34] The first respondent has alternative accommodation and I therefore find no reason to delay her eviction unreasonably. As was stated in *Ndlovu v Ngcobo : Bekker & Another v Jika*¹⁶ that the effect of PIE is not to expropriate private property. What it does is delay or suspend the exercise of the owner's rights until a determination has been made whether an eviction would be just and equitable and under what conditions.

[35] In *City of Johannesburg*¹⁷ the court referred to the Constitutional Court judgment which stated that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupier.¹⁸ It is however difficult in this case to see on what basis I should accommodate the first respondent to a lengthy period before she can vacate the applicant's property in the light of her being an owner of an alternative accommodation.

[36] In the circumstances I make the following order:

36.1 The first respondent is declared an unlawful occupier of the property described as No. 535, Zone 4, Zwelitsha.

¹⁶ 2003 (1) SA 113 (SCA) para 17; *Wormeld N.O. & Others v Khambule* 2006 (3) SA 562 (SCA) para 15.

¹⁷ *Supra*

¹⁸ Para 18

- 36.2 The first respondent and any other persons occupying the said property with and through the first respondent are hereby evicted from the property mentioned in paragraph 36.1 above
- 36.3 The first respondent is ordered to vacate the property on or before 30 May 2019 and not to return thereafter.
- 36.4 It is further ordered that in the event that the first respondent and/or any other persons who occupies the aforementioned property through the first respondent on the date indicated in paragraph 36.3 above, refuse to vacate, the sheriff, alternatively his duly appointed deputy, together with such assistance as he deems appropriate as authorized and directed to evict the first respondent and any other persons who occupy the property through the first respondent from the said property.
- 36.5 the first respondent is ordered to pay the costs of this application including reserved costs for the 6 and 20 November 2018.

V M NQUMSE

ACTING JUDGE OF THE HIGH COURT

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Date heard : 28 March 2019

Date judgment delivered : 09 May 2019