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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 562/2017

In the matter between:

MINISTER OF POLICE

APPLICANT

and

LERATO ARGHYA KOAHO

1st RESPONDENT

KATLEHO CHRISTIAN KOAHO

2ND RESPONDENT

RELEBOHILE CHRISTIAN MPOTANE

3RD RESPONDENT

THABISO FRANCIS MPOTANE

4TH RESPONDENT

ANY OTHER UNLAWFUL OCCUPIER

5TH RESPONDENT

MANGAUNG METROPOLITAN MUNICIPALITY

6TH RESPONDENT

CORAM: MBHELE, J

HEARD ON: 15 JUNE 2017

JUDGMENT BY: MBHELE, J

DELIVERED ON: 19 SEPTEMBER 2017

[1] The applicant applies for an order evicting the first to fifth respondents from a flat known as Unit [...] M. flats, Nelson Mandela Drive Bloemfontein (the flat).

[2] First respondent is opposing the application.

[3] First respondent is an employee of the respondent and was allocated temporary occupation of official housing offered by the Applicant with effect from 20 April 2007.

[4] Applicant provided official housing to the first respondent as an instrument in execution

of first respondent's duties. She was attached to Crime Intelligence until 2014 when she was moved to the uniform branch at Navalsig Police station.

[5] After the period of temporary allocation lapsed, the respondent had to apply for reallocations of official housing. Her application was received by the applicant on 25 March 2008.

[6] On 14 January 2009 applicant and the first respondent entered into an Understanding wherein the first respondent would occupy a flat known as Unit [...] M. flats, Nelson Mandela Drive Bloemfontein for a period of 3 (three) years. The undertaking served as a lease agreement between the parties.

[7] The flat was to be utilized by the first respondent in execution of her duties because work specifications of the post she occupied at the time required that she be available on the terrain where such activities are performed during and outside her official hours of duty.

[8] Paragraph 9 of the applicant's Housing Policy (Policy) provides as follows:

"9.1. The official housing will be allocated for a period of two years to qualifying employees."

[9] Paragraph 2.2 of the undertaking provides:

"In the case of any discrepancies, inconsistencies or ambiguities, between the provisions of this undertaking and the Policy, the provisions of the policy shall prevail."

[10] First respondent occupied the flat continuously for the duration of 3 (three) years before she was served with the notice to vacate the premises.

[11] There has been no fresh undertaking signed between first respondent and the applicant since the expiry of the one signed in January 2009.

[12] First respondent remains in occupation of the property beyond the term of the contract.

[13] Applicant served a notice on the first respondent on 10 February 2012 notifying her of the expiry of the undertaking on 29 February 2012.

[14] The applicant served another notice dated 30 March 2015 on the first respondent on 11 May 2015 notifying her of its intention to approach court for eviction application in case she failed to vacate the property within 7 (seven) days from the date of receipt of the relevant notice.

[15] A further notice was served on 26 May 2015 through Sheriff on the first respondent's family member, B. Koaho, at the flat.

[16] Another notice was served on the first respondent through Sheriff on 07 November 2016.

[17] The flat was re- advertised and allocated to someone else in 2012 after the expiry of the contract between the applicant and the first respondent. The person allocated the flat could not take its occupation.

[18] Applicant re-advertised the flat for occupation in 2017. First respondent has now submitted an application to be considered for further occupation of the property. The closing date for applications was 31 March 2017.

[19] The outcome of the first respondent's application was pending at the time of hearing this application.

[20] Upon receipt of applicant's notices to vacate the flat in 2015, first respondent sent representation to the applicant requesting permission to stay in occupation of the flat. First respondent received no response from the applicant.

[21] The following issues are to be decided:

- (i) Whether the respondents are unlawful occupiers.
- (ii) Whether the respondent's holding over was consensual.
- (iii) Whether it is just and equitable to evict the respondents from the premises.

[22] It is first respondent's case that she submitted applications to stay in occupation of the

property in 2012 and 2015 and same were not responded to by the applicant. Applicant denies receipt of first respondent's applications for 2012 and 2015.

[23] Mr Masihleho, on behalf of the applicant, submitted that the first respondent's continued occupation of the property is illegal, as she occupies the property without consent from the applicant. He contended further that nothing entitled the first respondent to stay in occupation of the property as the contract between the parties has since lapsed. He further submitted that eviction of the first respondent and those occupying the flat through her is just and equitable in that the first respondent has since been promoted by the applicant and she is in a position to afford alternative accommodation. He contended, further, applicant has no obligation to allow the first respondent to stay in occupation of the flat pending the outcome of her application.

[24] Mr Johnson, on behalf of the first respondent, submitted that the first respondent had tacit consent from the applicant to occupy the property. He contended further that failure by the applicant to proceed with eviction application after the first notice was served on the first respondent shows that the respondent approved her continued stay on the property. He submitted that the first respondent's financial position makes it difficult for her to afford alternative accommodation. He, further, submitted that the first respondent stays with two minor children and her nephew whose lives would be disrupted should she be evicted from the flat. He argued that the first respondent has applied for permission to occupy the flat and that evicting her only to be returned to the premises should her application be successful will cause serious disruptions and inconvenience to her and her family.

LEGAL PRINCIPLES

[25] It is well established under **Plascon Evans** rule that in application proceedings, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

(See **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A))

and **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 SCA.

In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371

SCA, the supreme court of appeal held as follows:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

[26] The first respondent's explanation of why she maintained a belief that the applicant acquiesced to her continued stay on the property is not supported by available evidence. She avers that she submitted her application for permission to occupy the flat in 2012 and 2015 and on both occasions she received no reply. There are no details of how and when such applications were submitted. There is no proof of such applications ever being received by the applicant neither does she have a copy to show that she indeed submitted such applications. In her letter of representation dated 12 May 2015, written after receipt of notice to vacate on 11 May 2015, she makes no mention of such applications. The first respondent's version fails to establish a genuine dispute of fact, it is farfetched and untenable.

[27] Prevention of illegal eviction Act of 1998 (PIE) defines an "Unlawful" occupier in

section 1 as follows:

"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 who is an occupier in terms of the Extension of security of Tenure Act 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Right Act, 1996, (Act no 31 of 1996)."

[28] Security of tenure is protected in Section 26 of the Constitution of the Republic of South Africa. This section emphasizes the need for adequate housing.

[29] A lessee of property has no security of tenure in perpetuity. If the period of lease is left undetermined, it can be terminated on notice. Beyond the period of lease, the lessee has no security of tenure. (See **Maphango (Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd 2011 (3) SA 535 SCA**).

[30] It is trite that a tacit contract is established by conduct. The conduct of the parties must show that there was consensus between them.

In **Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others 1983 (1) SA 276 (A)** at 292 the court said the following:

"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem.

[31] A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they made express provision in the contract. (See **Robin v Guarantee Life Assurance Ltd 1984 (4) SA 558 (A) at 567**).

[32] The argument that the parties concluded a tacit contract is without basis. The undertaking expressly stated that first respondent's right of occupation of the flat would

cease after 3 years. The three year period, stipulated in the undertaking, expired in February 2012.

There is no evidence to show that she applied for reallocation since its expiry in 2012 until it was again re-advertised in 2017. Several notices served on her personally, members of her family and on the premises during 2012, 2014 and 2015 are a clear indication that the applicant did not approve of her continuous occupation of the flat. There is no evidence from which I can draw an inference that there existed a tacit contract between the parties.

[33] The court has to decide whether it is just and equitable to evict the occupier once it has established that the notice has been served. Section 4 subsections (7), (8) and (9) require the court to consider whether it is just and equitable to evict the occupier.

'(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.'

[34] In **Ndlovu v Ngcobo: Bekker and another v Jika** [2002] 4 All SA

384 (SCA) the Harms, JA said the following:

"The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of section 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in section 4 envisage.

The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (section 4(8)), has to **exercise a** discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense.....

Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation.

Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction.

Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties."

[35] It is clear that the first respondent's occupation of the property is unlawful as there is no contract authorizing such occupation. The argument that her pending application gives her a right to stay in occupation of the flat is misplaced. First respondent is not so poor that

she has no means for income. She is gainfully employed. The fact that the first respondent was placed under debt review in 2015 cannot be given as a reason justifiable enough for the first respondent to hold on to the applicant's property without a valid contract. Her financial position should rather be used as a mitigating factor to delay her ejection from the property. After considering all factors, I have to exercise my discretion. Such discretion has to be exercised judicially. I am not persuaded that evicting is unjust. The application must succeed. Mr. Johson submitted that should the court order the eviction of the first respondent she would require six months to make proper arrangements for alternative accommodation. I am of the view that 3 months from the date of this order is sufficient to enable the first respondent to sort out her financial problems and secure alternative accommodation.

[36] In view of the above the following order is made.

1. First and fifth respondents are declared unlawful occupiers of Unit [...] M. Flats, Nelson Mandela Drive, Bloemfontein.
2. First respondent and all other persons occupying the property through her are ordered to vacate the premises described in 1 above not later than 20 December 2017 at 12h00 noon.
3. First respondent and all other persons occupying the premises through them are ordered to remove all movable property, equipment and apparels belonging to them from the premises by no later than 20 December 2017 at 12h00 noon.
4. In the event the first and Second respondent or any other person occupying the property through them failing to comply with this order, the sheriff of the District Court Bloemfontein is authorized and directed to evict them and remove any movable property, equipment and apparels belonging to them forthwith.
5. Each party to pay their own costs.

NM MBHELE, J

On behalf of the Applicant:

Adv. PT MASIHLEHO

Instructed by:

STATE ATTORNEY BLOEMFONTEIN

11TH FLOOR FEDSURE BUILDING

49 CHARLOTIE MAXEKE STREET

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On behalf of the Respondent:

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Instructed by:

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