IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 45323/2015
DATE: 1 JUNE 2016

In the matter between:

PADAYACHY *NO*, SANTHAM GANESAN **Applicant**

and

PADAYACHY, RAMNADAN **First Respondent**

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Second Respondent**

THE MASTER OF THE HIGH COURT, PRETORIA **Third Respondent**

JUDGMENT

MULLINS AJ:

INTRODUCTION:

[1] There are two applications before me, viz:

[1.1] The applicant's application for eviction of the first respondent (and all persons occupying through or under him) from [Erf 4… Laudium,

Tshwane, situated at ...Emerald Street, Laudium, Tshwane]("the property"); and

[1.2] The first respondent's counter-application to interdict the applicant from selling or encumbering the property pending (a) the first respondent's bringing of an application to review the third respondent's approval in terms of Section 47 of the Administration of Estates Act 66 of 1965 ("the Administration of Estates Act") of the applicant's sale of the property, and (b) the first respondent's making an offer to purchase the property at a sworn evaluation within 30 (thirty) calendar days of the date of such evaluation subject further to the first respondent's being granted finance within 60 (sixty) further calendar days, or (c) the termination of a claim which the first respondent might make against the estate of which the applicant is the executor, the estate of the late Marioor Moonsamy ("the estate").

[2] The applicant and the first respondent are brothers[1].

The applicant brings the application in his capacity as executor of the estate. The second and third respondents are the City of Tshwane (second respondent) and the Master of the High Court (third respondent), who are cited only for what interest in the matter they might have, and who have not involved themselves in the proceedings.

[1] The applicant is the elder of the two. There are also two younger siblings, Sooboo and Vajay Padayachy.

A RELEVANT CHRONOLOGY:

[3] It is useful to view the disputes between the parties with which I will deal below against the background of a relevant chronology of events:

[3.1] The mother of the applicant and first respondent, Marioor Moonsamy ("the deceased"), was born on 9 April 1919. She was thus 85 years old at the time of her death on 21 June 2003.

[3.2] Born on respectively 17 March 1951 (the applicant) and 22 December 1953 (the first respondent), the applicant and the first respondent are now 65 (the applicant) and 62 (the first respondent) years old.

[3.3] The property was transferred into the name of the deceased on 30 May 1980, under Deed of Transfer T32673/1980. It is still registered in her name.

[3.4] The deceased was at all material times resident in the property.

[3.5] At some stage, the first respondent and his family[2] moved in to the property with the deceased.

I say "at some stage", because when this happened is in dispute. The applicant says[3] that it was only at the time of the deceased's

[2] Whether the first respondent's family extends beyond him and his wife to their children is unstated in the papers.

[3] See paragraph 6.1 of the founding affidavit, where the applicant says that his brother "took occupation of the property during the time of the deceased's death, i.e. during or around June 2003".

death, whereas the first respondent says[4] that it was in approximately 1973, even before he got married in 1977.

I think I can fairly say that both on the rule in Plascon-Evans Paints Limited v Van Riebeek Paints (Pty) Limited1984 (3) SA 623 (A) and on the probabilities, the first respondent's version in this regard appears more likely, and I accept that the first respondent and his family lived with the deceased in the property for some considerable time before the deceased's death[5].

[3.6] The deceased passed away[6] on 21 June 2003.

[3.7] The deceased left behind a Will (signed by her on 2 February 1998) appointing the applicant as executor of her estate, and bequeathing same in the following terms in clause 3 thereof:

I bequeath my entire estate to my four children, namely:

Santham Ganesan Padayachy

Ramanadan Padayachy

Sooboo Luxmi Padayachy

[4] See the first respondent's answering affidavit, in which he says that he "lived in the property ... with my mother ... for the past about thirty ... years".

[5] The first respondent has attached to his papers photographs of the house on the property before certain improvements were effected to it, and photographs of it after, as also to the deceased, for which the first respondent signed surety, dated March 1983. It seems likely that the first respondent was sharing the property with his mother at that stage already.

[6] Of cardiac arrest.

in equal shares, subject to the following conditions:

3.1 If any one of my children shall predecease me such share accrue [sic] in equal shares to the remaining children;

3.2 All benefits accruing to any of my heirs out of my estate will not fall into or form part of the joint estate of any heirs and will remain free from the interference, control or debts of any spouse;

3.3 In the event of my immovable property being sold by my heirs my son **RAMANADAN PADAYACHY** will have the option to buy the property within 12 (twelve) months after my death at a sworn appraisement value and will the said amount be divided as per paragraph 3.

[3.8] What the reason was for the delay is unexplained in the papers, but the applicant was only appointed executor[7] on 6 May 2011.

[3.9] On 4 February 2015, an appraiser of properties, Mr Nico Erasmus, furnished to the applicant, in his capacity as executor of the estate, an appraisal of the property, which he valued as at that date at R1 500 000,00.

[7] In other words, received his Letters of Executorship from the third respondent. Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010 ed) explains on p8-1 that "the executor derives his authority to act only by receiving a grant of letters of executorship from the Master", and thus that the appointment only takes effect on receipt of the letters of executorship. The applicant's appointment is attached to his papers, numbered 7343/11, and dated 6 May 2011.

[3.10] On 6 May 2015, the third respondent authorised the applicant in terms of Section 47 of the Administration of Estates Act to sell the property by public auction.

[4] What I outlined in paragraph [3] are the bare bones of the chronology of the matter. There are of course other events and, for the sake of painting a more complete picture, I list some of them:

[4.1] On 6 February 2015, the applicant's attorneys wrote to the first respondent's attorneys. The letter is a long one, but it included the following paragraphs 6 to 8:

> 6. You will note from the attached valuation [Nico Erasmus' appraisal] that the property is worth R1 500 000,00. In terms of clause 3.3 of the Will your client were [sic] given a [sic] option to buy the property within 12 months after death at a sworn appraisement value....
>
> 7. Our instructions are that your client has obstructed the executor to do the sworn appraisement up to date hereof. However we have now done an appraisement and are giving your client an option to buy the property at R1 500 000,00. This option period has already expired. Your client is now given the option to buy the property at R1 500 000,00 which option he must exercise within 10 days of date hereof being the 15th of February 2015. Should we not receive an indication that your client wish [sic] to buy the property at R1 500 000,00 we will proceed to arrange a public auction of the property thereafter.
>
> 8. Should your client not exercise this option by the 15th of February 2015 you are hereby informed that the property must be vacated not later than the 30th of March 2015....h

[4.2] The first respondent didn't exercise the aforementioned option. He says the following in this regard in paragraph 22.4 of his answering affidavit:

> The value of R1 500 000,00 is in dispute. No sworn appraisement was done and it is uncertain as to whether the appraiser [Nico Erasmus] has been appointed and complies with the provisions contained in Section 6 of the Act.

[4.3] The applicant and the first respondent either did[8] or did not[9] enter into two simultaneous transactions, written on official SAPS documents in the form of affidavits, signed by each, as follows:

[4.3.1] The document signed by the first respondent:

> That I Ramnadan Padayachy hereby agree to pay Santham Ganesan Padayachy the sum of fifteen thousand rand for 25% of his shares re Estate No 7343/2011 M Moonsamy. I agree to pay
>
> RS 000,00 at the end of May RS 000,00 at the end of June RS 000,00 at the end of July

[8] According to the first respondent.

[9] According to the applicant's rather ambiguous denial in a supplementary answering affidavit, having raised arguments as to why the issue is legally irrelevant, he continues by saying in the alternative that "[if] I did enter into an agreement with the first respondent, as alleged by him, [he didn't honour] ... the alleged agreement by failing to pay the full contract price: ... he is in arrears with payment in the sum of R7 500,00". This intriguing alternative response

does seem to suggest that there is truth to the first respondent's allegations.

> This document serves as an official agreement between us and is legal and binding. The initials SGP to be signed next to each month, acknowledging receipts of amounts as indicated.

[4.3.2] The document signed[10] by the applicant:

> That I Santham Ganesan Padayachy under sound mind and body hereby declare that I hereby withdraw my position as executor to the Will re Marioor Moonsamy dated 2-2-1998 with immediate affect [sic]. I also appoint Ramnadan Padayachy 5312225123086 as executor and give up and transfer of my 25% shares of Estate No 7343/2011 M Moonsamy Erf No 436 to him. The property in question is situated at 233 Emerald Street Laudium. I also agree that this document is legal and binding that I also give up any claim whatsoever to the property - thank you.

THE ISSUES:

[5] Against that background, these are the issues which I have to decide:

[5.1] Whether the first respondent is in lawful occupation of the property[11];

[10] I should say "allegedly signed", but the ambiguous nature of the applicant's denial does indeed suggest to me that it was signed by him. I am no handwriting expert, but a comparison between the signature on the document and the applicant's signatures to his affidavits tends to confirm this to me

[11] Section 11(1)(c) of the Administration of Estates Act requires any person in possession of estate property (such as the first respondent's occupation of the property) to vacate same on the written demand of the executor, unless such person has a "right … to remain in possession of any such property". The first respondent relies on Section 11(1)(c), but that of course begs the question of whether the first respondent has any such right, which is in turn dependent on whether he is in lawful occupation of the property or not.

.

[5.2] If not, whether the applicant is entitled to an eviction order in terms of Section 4(1) of the Prevention of Illegal Occupation from and Unlawful Occupation of Property Act 19 of 1998 ("PIE"); and

[5.3] Whether I should exercise my discretion in favour of granting the first respondent's counter-application.

[6] I will address each of these issues in what follows.

GETTING SOMETHING OUT OF THE WAY FIRST:

[7] Advocate Fitzroy (who represented the first respondent) and Advocate Nel (who represented the applicant) were in agreement before me that the transaction (or illusions of transactions) of 30 May 2013 adverted to by me in paragraph [4.3] above, whilst interesting, are legally irrelevant.

They are legally irrelevant for a number of reasons, including (a) the fact that any purported transfer of executorship from the applicant to the first respondent is not effective unless recognised by the third respondent, and (b) the fact that both documents refer to a 25% share in the estate (or in the property), and not to a sale of the property as such.

IS THE FIRST RESPONDENT IN LAWFUL OCCUPATION OF THE PROPERTY?

[8] The first respondent relied on two grounds for his contention that he was in lawful occupation of the property, viz that he has an enrichment *lien* [12], and the provisions of the Will quoted by me in paragraph [3.7] above. In this regard:

[8.1] I agree with Mr Nel that the first respondent has failed to establish the existence of a valid enrichment *lien.* In this regard:

[8.1.1] The first respondent refers in this regard to the mortgage bond documentation to which I adverted in fn 5 above. He says that not only did he sign suretyship for the debt, but that he in fact applied for the loan, and serviced the bond[13].

[8.1.2] As Mr Nel points out, the suggestion that it was the first respondent who applied for the loan is contradicted by the very documentation which he attaches, which shows (as one would expect, given the ownership of the property) that the loan was applied for in the name of the deceased, although the first respondent signed surety.

---

[12] An enrichment *lien* arises where one party has necessary expenses on improving the property of another. Such party can retain possession or control of that property until the claim has been satisfied (or until security for the claim has been given). See Brooklyn House Furnishers (Pty) Limited v Knoetze & Sons 1970 (3) SA 264 (A) at 270E, and Syfrets Participation Bond Managers Limited v Estate & Co-operative Wine Distributors (Pty) Limited 1989 (1) SA 106 (W) at 109H.

[13] See paragraphs 5 and 6 of the first respondent's affidavit, where he says that "I applied for a loan at United Building Society during August 1983 in order to effect the improvements. ..... I was bound as surety and co-principal debtor for the aforesaid loan. I paid for all the renovations, improvements and extensions.... I paid an estimate [sic] amount of about

R58 695,00 for the improvements".

[8.1.3] I suspect that the loan was indeed for the benefit of the first respondent and his family, to enable them to renovate the property so as to be able to live in it with the deceased and, bearing in mind that he signed suretyship, the loan was quite possibly serviced by the first respondent.

But *suspicion* is a far cry from proof. The first respondent's allegations cry out for better proof than his mere *ipse dixit,* which proof is completely lacking. I accept that 1983 was a long time ago, and that the *documentation* might be lacking, but *detail,* such as how the first respondent serviced the debt and how the surprisingly exact figure of "about R58 695,00" is comprised, is totally lacking.

In those circumstances, bearing in mind that it was for the first respondent to establish the existence of the *lien,* I am satisfied that he has failed to do so.

[8.2] The second ground on which the first respondent contended that he is in lawful occupation, was based on his interpretation of clause 3.3 of the Will, as quoted by me in paragraph [3.7] above. In this regard:

[8.2.1] If I understand Ms Fitzroy's argument in this regard correctly, it ran as follows:

(a) Clause 3.3 of the Will is ambiguous. It doesn't tell us who was to obtain the "sworn appraisement value", it doesn't tell us how the first respondent was to exercise the option in the absence of the appointment of an executor[14], and it doesn't tell us whether the decision to sell the property must first be taken by the heirs before the option arises.

(b) Meaning must be given to clause 3.3[15] of the Will, and the applicant is bound to give effect to that meaning.

(c) That being so, the logical interpretation to be given to clause 3.3 is this:

(i) First, the heirs need to decide to sell the property, rather than take ownership of it in equal shares.

(ii) Only if and when the heirs take such a decision will the period of twelve months referred to in clause 3.3 of the Will commence, during which the applicant as executor will have to arrange for a sworn evaluation of the

[14] It will be recalled from paragraph [3.8] above that there was, for whatever reason, a lengthy delay in the appointment of the executor - the deceased passed away on 21 June 2003, and the applicant only received his Letters of Executorship almost eight years later on 6 May 2011.

[15] See *Ex parte* Mouton 1955 (4) SA 460 (A) and Loock v Steyn 1968 (1) SA 602 (A).

property, and the first respondent will have the opportunity to offer to purchase the property at that valuation.

[8.2.2) The first respondent put his standpoint slightly differently in paragraph 13 (the second paragraph 13) of his answering affidavit. There he said the following:

> In terms of the Will, in the event of the immovable property being sold, I have the first option to buy the property at a sworn appraisement value. The Applicant failed to afford me the opportunity to purchase the property at a sworn appraisement value.... The evaluation [of Nico Erasmus] ... is not a sworn appraisement value. I submit that the Applicant has no right to sell the property, or to evict me, before a sworn evaluation has not been done and I be afforded the opportunity to make an offer.

[8.3) I regret to say that I do not agree with either Ms Fitzroy's, or the first respondent's, construction of clause 3.3 of the Will. To my mind, neither pays heed to the phrase "the option to buy the property within 12 ... months after my death" in clause 3.3.

[8.4) The following serves as background in construing clause 3.3 of the Will:

[8.4.1) The deceased was a lay person, and the Will doesn't bear the hallmarks of having been drafted by a professional.

[8.4.2] The deceased was probably blissfully unaware, when she signed her Will, of the way in which our law administers deceased estates, including of delays in the appointment of executors, and the fact that execution of a Will is impossible until an executor has been appointed. She just thought that her Will will be read and given effect to by her eldest son as her executor, on her death. And she drew clause 3.3 with that in mind.

[8.4.3] In law:

(a) The four heirs, the deceased's children, were entitled to divide her estate (which appears to have been comprised primarily of the property) equally between them.

(b) Consequently, the property would (unless it had for example to be sold to meet estate debts) be registered in the names of the heirs in equal shares[16].

This would be the case unless the heirs should decide to sell the property or unless, in the event of disagreement between them in this regard, the executor should choose to sell the property

[16] See Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* (2010 ed) para 12.27 on p12-25, where the authors say that "[u]nless the will directs him to do so, it is not the executor's duty to convert all the assets of the estate into cash, but only such as are sufficient to pay the liabilities. Even then the executor should not sell assets if the legatees or heirs are prepared to pay the liabilities of the estate...

and.should obtain the approval of the third respondent to do so in terms of Section 47 of the Administration of Estates Act[17].

[8.5] To my mind, and against that background, it is apparent that what clause 3.3 of the Will intended was to afford the first respondent the option to offer to purchase the property within twelve months of the deceased's death at a sworn appraisal value, which option would only be effective if the remaining heirs should, either before the first respondent's exercising of the option, or in response thereto, decide to sell the property as opposed to having it registered in their names in equal shares[18].

[8.6] This construction to my mind gives full effect to clause 3.3. It gives effect to the fact that it is conditional upon the property being sold by the heirs, and it gives effect to the fact that the option is to be exercised "within 12 ... months after my death". It also requires the first respondent (the party exercising the option), and not either the applicant (the executor) or the other heirs to obtain the sworn appraisal.

[8.7] Ms Fitzroy argued that no steps could have been taken, and thus no option exercised, until the appointment of an executor, i.e. until

---

[17] See *Meyerowitz* above paras 12.27 and 12.28 on pp12-25 to 12-28.

[18] Thus, two events would be required in any order, viz (a) the first respondent should inform his siblings of his wish to purchase the property, and (b) the siblings should be prepared to sell (as opposed to taking transfer of the property in equal shares). As part of (a), a sworn appraisal would have to be obtained, and the first respondent's offer would have to be to purchase at the value set out in the sworn appraisal. So viewed, the option was actually a right of pre-emption, but nothing turns on this.

the applicant received his Letters of Executorship on 6 May 2011.

disagree. In this regard:

[8.7.1] I don't believe this matter turns on this, but it seems to me that the option granted by the deceased to the first respondent in clause 3.3 of her Will renders him a legatee. See, by analogy, Secretary for Inland Revenue v Estate Roadknight and Another 1974 (1) SA 253 (A) at 2598 and G.

[8.7.2] As pointed out by the Appellate Division in Greenberg and Others v Estate Greenberg 1955 (3) SA 361 (A), in our law, heirs and legatees do not acquire *dominium* in the estate (heirs) or property (legatees) immediately on the death of the testator. What they do acquire is a vested right to claim that *dominium* from the executor at a future date. See in this regard Centlivres CJ at 364G-365B:

> The position under our modern system of administering deceased estates is that when a testator bequeaths property to a legatee the latter does not acquire the *dominium* in the property immediately on the death of the testator but what he does acquire is a vested right to claim from the testator's executors at some future date delivery of the legacy, i.e. after confirmation of the liquidation and distribution account in the estate of the testator. If, for instance, immovable property is bequeathed to a legatee, he acquires a vested right as at the death of the testator but he does not acquire the *dominium* in that property until it is transferred to him by the executor. If that property has to be sold in order to pay the

> debts of the estate, the legatee may never acquire the *dominium* in that property.... It seems to me to be inaccurate to suggest ... that in ascertaining whether a legatee has acquired a vested right to his legacy as at the death of the testator one must enquire whether the *dominium* in the property resides immediately after the testator's death. The futility of such an enquiry can, perhaps, best be illustrated by taking as an example a bequest of a sum of money. When a testator bequeaths, say, £1 000 to A the *dominium* in that sum of money does not vest in A as at the death of the testator but A acquires a vested right to claim that sum from the executor at the future date I have indicated, provided that the estate is solvent.

[8.7.3] As Centlivres CJ said on p365B of Greenberg,

> [t]he test [is] ... whether, on a true interpretation of a Will, the testator intended that a legatee should acquire as at [the testator's] death a vested right to his legacy.

To my mind, it is apparent from clause 3.3 of the Will, and particularly the reference therein to an "option to buy the property within 12 ... months after my death", that this is precisely what the deceased intended - that the first respondent would obtain a vested right to exercise the option within twelve months, commencing on her death.

[8.7.4] There are of course instances where, on a true interpretation of a Will, it is apparent that an option granted in the Will was intended only to be exercised once an executor has been appointed. A good example of this is the

Roadknight matter to which I referred in paragraph [8.7.1] above, where the Will specifically directed *the testator's executors* to grant an option to his nephew. Clearly, there, the intention was that the option could only be granted once the executors had been appointed. There is no such provision in this Will.

[8.7.5] We know that for an option to be validly exercised it must be communicated. See Kahn v Raatz 1976 (4) SA 543 (A).

Ms Fitzroy's argument (as I understand it) is that the option extended to the first respondent in clause 3.3 of the Will had to be notified by him to the executor (the applicant), so that it couldn't possibly have been exercised within twelve months of the deceased's death. I do not believe this is a proper construction of matters. In this regard:

(a) It seems to me that the parties having an interest in the option were the other heirs.

Only once the first respondent exercised his option would they have to decide whether they want to sell the property, in which event they would be bound to sell to him at the appraisement value [19].

[19] Or, with reference to paragraph 8.5 above, things could happen the other way around, with the other heirs deciding that they would prefer to sell the property than take transfer of it, which would then trigger the first respondent's right of pre-emption. See fn 18 above.

(b) Thus it seems to me that, on a proper construction of clause 3.3 of the Will, what the deceased intended was that her son the first respondent should exercise his option within twelve months of her death *by communicating same to her other children* (her other heirs).

(c) There is fairly clear authority for the proposition that an option granted by a Will can be exercised before the appointment of executors. See Glass and Others v Ker NO and Others 1953 (1) SA 550 (A).

What happened in Glass was that the deceased had what appears to have been a fairly large shareholding in what was then a private company, H Lewis & Co (Pty) Limited[20]. His Will directed that those shares "after my death shall first be offered for sale to Meyer Lewis and Leon Lewis at their face value, and sold only should they refuse to purchase". For different reasons, the five members of the Appellate Division arrived at the same decision, which was that the two Lewis brothers obtained a vested right to be offered the shares at the date of the deceased's death. Important for present purposes is that Hoexter JA remarked at 564G that "[w]hat the testator had in mind was that the executors, if there had been no

.

[20] As a matter of interest, the company subsequently went public

exercise of the option before their appointment, should immediately after their appointment, compel the Lewis brothers to make their decision by making an offer to them". By implication, Hoexter JA was satisfied that the two Lewis brothers could have exercised the option *before the appointment of the executors,* a view which the authors Corbett, Hofmeyr and Kahn say in fn 47 on p231 of their work *The Law of Succession in South Africa* (2nd ed) "would appear to be a correct conclusion".

(d) There appears thus to be good authority for the proposition that *depending on the wording of the Will,* an option created in a Will can be exercised prior to the appointment of the executors. Reverting to the wording of clause 3.3 of the Will, I see no reason why this would not have been the case here.

[8.8] Consequently, on my view of clause 3.3 of the Will, it was for the first respondent to exercise the option within twelve months of the date of his mother's death, which he failed to do, with the result that it lapsed (the fact that the first respondent might, depending on the reading of the Will, have been unaware of the option is of no legal moment in this regard).

[9] I add that, interesting though the aforegoing excursion into the interpreting of Wills and the administration of estates has been, the first respondent's

claim to a legal right of occupation must in my view in any event fail, even if my aforegoing interpretation is wrong.

That is because the essential question remains whether the clause 3.3 option has lapsed or not? It seems to me that it has lapsed on *any* interpretation of the clause. If the running of the period of twelve months provided for in clause 3.3 was suspended until the appointment of the executor, then that happened on 6 May 2011. If it was suspended until the heirs decided that the property was to be sold, then it seems to me that the decision to sell has been taken, expressly or by clear implication, well more than twelve months ago[21].

[10] I am consequently satisfied that the first respondent has been unable to establish that he is in lawful occupation of the property.

It follows from this that the first respondent is not in lawful occupation of the property.

THE FIRST RESPONDENT'S POINT OF NON-JOINDER:

[11] It bears mentioning at this stage that whereas the first respondent had taken a point of non-joinder in his answering affidavit (the contention that

[21] The first respondent makes it plain that he has always wanted to exercise the option, which by definition means that he is in favour of the estate's selling the property. See for example paragraph 22.5 of his answering affidavit, in which he says that "I intend to purchase the property". The executor's attorneys' letter of 6 February 2015, to which I adverted above, makes it plain that the applicant wanted, in February of 2015 and before, to sell the property. The papers are silent as to the attitude of the youngest two children, but there is no reason on the papers to believe that they are against the sale. To the contrary, the third respondent has authorised sale by public auction in terms of Section 47 of the Administration of Estates Act, the need for which authorisation only arises where "the ... heirs are unable to agree on the manner and conditions of the sale" (as opposed to a situation where they are unable to agree as to whether the property should be sold).

the other heirs should have been joined), this point was (in my view quite correctly) not persisted with by Ms Fitzroy.

IS THE APPLICANT ENTITLED TO AN EVICTION ORDER IN TERMS OF SECTION 4(1) OF PIE?

[12] The next question for me to decide, is whether the applicant is entitled to an eviction order in terms of Section 4(1) of PIE?

[13] Section 4 of PIE affords me a measure of discretion as to whether to grant the applicant's request for eviction. In this regard:

[13.1] 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 ... where the 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.

[13.2] I accept that Section 4(7) applies, given that the first respondent has clearly been in occupation of the property for many years.

[13.3] The aforegoing having been said, what is to my mind most remarkable about this matter is the fact that the first respondent

hase the property at an appraised value, without appearing to have ever taken any steps to obtain such an appraisal. As far as I can see, the closest the first respondent comes to an appraisal is his rather bald denial of the correctness of Mr Erasmus' appraisal, as referred to in paragraph [4.2] above.

r
e
l
i
e
s

It does not appear to me that the first respondent has ever made a good faith attempt to give effect to clause 3.3 of his mother's Will. Rather, he has sought to throw up objection after objection to the sale of the property (to anyone but him).

o
n

[13.4] In the premises, and on the papers before me, I am satisfied that an eviction of the first respondent (and those occupying under or by virtue of him) would indeed be just and equitable.

a
n
o

THE FATE OF THE COUNTER-APPLICATION:

p
t

[14] It also follows to my mind from the aforegoing that the first respondent's counter-application cannot be granted. It is in my view simply unfounded. In this regard:

i
o
n

[14.1] The third respondent furnished the Section 47 authorisation on 6 May 2015, and the first respondent will have become aware thereof at the latest on 29 June 2015, when the application was served upon him.

t
o
p
u
r
c

Yet the first respondent has taken no steps to review the third respondent's decision.

[14.2] The suggestion in the counter-application that the first respondent should be afforded an option to offer to purchase the property within thirty days of a sworn evaluation still to be obtained is, as I believe I have made plain above, contrary to the provisions of the Will. The Will gave the first respondent an option which was to be exercised within twelve months of the death of his mother. His mother passed away on 21 June 2003. The option has lapsed.

[15] In the premises, the application must succeed and the counter-application must fail.

COSTS:

[16] The applicant seeks costs on the punitive scale of attorney and client.

I am not disposed to granting punitive costs. It is so that the first respondent has failed, and that I have suggested that he has not acted entirely in good faith. But the length of this judgment shows (I think) that the first respondent put up an argument worthy of consideration, and in addition to that, I am not satisfied with the way in which the applicant in his papers approached the length of his brother's stay in the property, and the transactions (or non-transactions) between the brothers of 30th May 2013.

The estate (represented by the applicant) is entitled to its costs, but on the ordinary scale.

THE ORDER:

[17] In the premises, I grant the following order:

1. The Applicant's application is granted.

2. The First Respondent's counter-application is dismissed.

3. 3.1 The First Respondent (and all persons occupying the property through or under him) is hereby ordered to be evicted from the property known as Erf 4.. Laudium, City of Tshwane Metropolitan Municipality, Gauteng, situated at … Emerald Street, Laudium, Tshwane, Gauteng ("the property").

3.2 The First Respondent (and all persons occupying the property through or under him) is ordered to vacate the property within 14 (fourteen) days from date of service of this order.

3.3 Should the First Respondent (or any person occupying the property through or under him) not comply with paragraph 3.2 above, then the Sheriff is authorised and ordered to evict the First Respondent (and all persons occupying the property through or under him) from the property within 3 (three) days after the expiry of the period of 14 (fourteen) days referred to in paragraph 3.2 above. The Sheriff is authorised to obtain the assistance of the South African Police Services for purposes of complying herewith.

4. The First Respondent is ordered to pay the costs of the application and of the Applicant's opposition to the counter-application, as also the costs of the *exparteapplication* to authorise notice in terms of Section 4(2) of Act 19 of 1998.

ACTING JUDGE,

GAUTENG DIVISION, PRETORIA

HIGH COURT OF SOUTH AFRICA **1 JUNE 2016**