

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: A374/2013

DATE: 18/6/2015

In the matter between:

**DAPHNE MTHETWA
KELLY CHILOANE**

**FIRST APPELLANT
SECOND APPELLANT**

and

(1) Reportable: **No**
(2) Of interest to other Judges: **No**

THOMAS PRETORIUS

RESPONDENT

HEARD ON: 24 April 2015

JUDGMENT:

STRIJDOM AJ

1. This is an appeal against an eviction order granted by a magistrate evicting the Appellants from a residential property at Erf 490, K..... A....., S....., W..... (the "Property") on the ground that the Respondent is the registered owner of the property and that the Appellants had no right of occupation.

2. The Second Appellant contended that she has a right to occupy the Property as a result of the terms of a will of the deceased (the "Will"). In terms of clause 2 of the Will, the Second Appellant acquired a lifelong usufruct of occupation in and to the Property.
3. The Appellants filed a notice of motion seeking an order that the Court of Appeal accept new evidence as set out in the founding affidavit of Sibusiso Tobias Ian Mbethe in terms of Section 19 of the Superior Court Bill, Act 10 of 2013. The new evidence purported to be a letter from the Master of the High Court confirming that on the 20th of May 2014 an original Will was lodged which was endorsed and accepted as valid by the Master as it complies with the Wills Act.
4. Counsel for the Respondent contended that the application to lead further evidence must be dismissed on the basis that even if the disputed Will is upheld, it does not give the Appellants a right to occupy the Property.

BACKGROUND:

5. The following facts are common cause between the parties:
 - 5.1. The Respondent is the registered owner of the Property.
 - 5.2. He was married to the Second Appellant's mother ("Mrs Pretorius") in community of property.
 - 5.3. She died on 31 March 2010.

5.4. Her estate was administered as an intestate estate.

5.5. The Property was transferred to the Respondent pursuant to the intestate winding up of the deceased estate.

APPLICATION IN TERMS OF SECTION 19 OF ACT 10 OF 2013 TO PRODUCE FURTHER EVIDENCE ON APPEAL:

6. The application to submit new evidence on appeal is not contested by the Respondent. However, it was contended by counsel for the Respondent that even if this court accepts the Second Appellant's version with regard to the disputed will and disregards the concerns regarding its veracity, it does not confer on the Appellants the right to occupy the Property.

7. Subsequent to the judgment of the Court *a quo* the Master of the High Court on the 23rd of September 2014 accepted the Will of the deceased, the late Johanna Ellen Pretorius as valid. A copy of the Master's letter is annexed as **Annexure "M"**, to the founding affidavit of the Appellants' application.

8. The disputed Will purports to:

8.1. Bequeath a half share of the Property to Paul Revier and Sarah Makuse; and

- 8.2. Confer on Paul Revier and the Second Appellant a usufruct, namely the right to occupy the Property for so long as they are alive.
9. The Respondent dispute the validity of the Will.
10. In terms of Section 19 (b) of the Superior Courts Act, Act 10 of 2013 , the Supreme Court of Appeal or a division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law receive further evidence.
11. The Appellate Division has in a series of decisions laid down certain basic requirements. They may be summarised as follows:
 - 11.1. There should be some reasonable sufficient explanation, based on allegations which may be true, why the evidence which is sought to lead was not led at the trial.
 - 11.2. There should be a *prima facie* likelihood of the truth of the evidence.
 - 11.3. The evidence should be materially relevant to the outcome of the trial.
12. The real issue in dispute between the parties is whether the new evidence is materially relevant to the outcome of the trial.

13. Section 15 (1) (a) of the Matrimonial Property Act 88 of 1984 provides that a spouse married in community of property;

"shall not without written consent of the other spouse –

(a) Alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate.

(b) Enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate."

14. Where the Property specified belongs jointly to the testator and to a third person it is clear that the testator cannot override the rights of the co-owner, the testator's will cannot do more than he or she personally could do and the legacy is not binding on the co-owner¹.

15. A beneficiary has merely a personal right, *jus in personam as rem acquirendam*, against the executor and does not acquire ownership by virtue of a will. The heir obtains ownership or a lessor real right, such as a usufruct, only upon delivery or transfer in pursuance of testamentary disposition or intestate succession, consequently succession is merely a *causa habilis*, or appropriate reason, for transfer of ownership².

¹ See: Willes Principles of South African Law.

² See: Booysen and Others v Booysen and Others 2012 (2) SA 38 (GSJ)
Ex parte Estate of The Late J.C. Niemeyer 1902 T'S 20
Kotze N.O. v Oosthuizen 1988 (3) SA 578 (C)

16. In my view the Master's acceptance of the disputed will is not relevant to the correctness of the eviction order. Even if the Will is ultimately upheld, its purported conferral of a usufruct is a nullity and does not confer a right to occupy the Property.
17. Subsequently the application to lead further evidence on appeal is dismissed.

EVICTION UNDER PIE:

18. PIE has to be interpreted, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix. The starting and ending point of the analysis of PIE must be to affirm the values of human dignity, equality and freedom.
19. The Court *a quo* concluded that it was just and equitable that an Eviction order be granted against the Appellants and ordered the Appellants on 8 March 2013 to vacate the premises on or before 28 March 2013.
20. It was submitted by counsel for the Appellants that the Learned Magistrate failed to give due regard to the fact that the Second Appellant is a pensioner in poor health, that the First Appellant is her caretaker and they do not have alternative accommodation.
21. In his reasons for judgment the Court *a quo* remarked as follows:

"The Court was however not brought into speed (sic) as to the personal and financial position of the respondents and their ability to get alternative accommodation. Nothing was placed on record as to the current position of the Second Respondent her ability to get her own accommodation therefore the Court was unable to fully consider their interest."

22. Section 4 (7) of the PIE Act No 19 of 1998 provides that 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:

"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 woman."

23. In determining a just and equitable date on which the unlawful occupier must vacate the land, 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.
24. Counsel for the Respondent conceded that the Court *a quo* did not considered the availability of alternative accommodation for the Appellants.

25. Section 26 (3) of the Constitution requires that all relevant circumstances should be considered but does not itself provide that any circumstances will be relevant.
26. The personal circumstances of the lessee and the availability of alternative accommodation are not without more relevant circumstances as intended in Section 26 (3) of the Constitution³.
27. In my view insufficient evidence was placed before the Court *a quo* regarding the personal circumstances of the Appellants and the availability of alternative accommodation.
28. I concluded that the Court *a quo* did not considered the provisions of Section 4 (7) (8) and (9) of the PIE Act, No 19 of 1998 and did not exercise its judicial discretion properly.
29. I am further of the view that it was not just and equitable for the Court *a quo* to grant an order for eviction without due consideration of the provisions on Section 4 (7), (8) and (9) *supra*.
30. Accordingly, I propose that the Appeal is upheld and the following Order is made:
- 30.1. The application to lead new evidence is dismissed with costs.

³ See: Brisley v Drotsky 2002 (4) SA 1 (SCA) at 3D-E and F-G

- 30.2. The order granted by the Court *a quo* on 8 March 2013 is set aside with costs.
- 30.3. The matter is referred back to the Court *a quo* to receive evidence regarding the personal circumstances of the Appellants, possible alternative accommodation and to consider a reasonable period for them to vacate the premises in case the Court grants an order for them to vacate the premises.
- 30.4. The Court *a quo* is further ordered to comply with the provisions of Section 4 (7), (8) and (9) of Act 19 of 1998.

JJ STRIJDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

DATE:

I agree

JANSEN J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
DATE:

APPEARANCES:

On behalf of the Appellants: **Adv CJC Nel**

On behalf of Respondent: **Adv N Ferreira**