

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A205/2014

In the matter between:

MONICA RAMOKHETI

APPELLANT

and

MMAMPHO EMILY CALEM N.O.
(in her capacity as executor in the estate
of William Petrus Calem)

RESPONDENT

CORAM:

LEKALE, J et REINDERS, AJ

HEARD ON:

17 AUGUST 2015

JUDGMENT BY:

C. REINDERS, AJ

DELIVERED ON:

10 SEPTEMBER 2015

- [1] This is an appeal against an order of eviction granted by the Bloemfontein Magistrate's Court for the District of Bloemfontein against the Appellant in relation to a premises located at 35536 Mangaung, Bloemfontein ("the property"). For ease of convenience I will refer to the parties as cited in this court.

- [2] I do not find it apposite to deal extensively with the history of this matter since launching of the application by the Respondent in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) during August 2012, until granting of the order for eviction on 5 December 2013. Of importance is the fact that Appellant was permitted to file a supplementary affidavit to her opposing affidavit.
- [3] Respondent averred that she is the executrix in the estate of her late husband and thus in charge of the property. During November 2009 she concluded a verbal lease agreement with Appellant in the amount of R 400, 00 monthly. Appellant paid rental for only two months, where after she ceased effecting payment. Despite several requests Appellant refused to vacate the property.
- [4] In opposing the application Appellant raised two points in *limine*, namely that Respondent lacked the necessary *locus standi* to bring the application for eviction, and that Respondent was not the owner of the property and thus not the person in control thereof. The first point *in limine* was abandoned by Appellant, whilst the second point was argued and dismissed by the court a quo.

- [5] The application for eviction was furthermore challenged by Appellant on the basis that an improvement lien exists between Appellant and Respondent, and that there had been an oral agreement for the lease of the property between herself and the descendants of the deceased spouse of the Respondent. The latter argument was apparently not pursued by the Appellant.
- [6] The magistrate was not impressed with the argument that Respondent did not have the necessary *locus standi* or is not the person in control of the property. Neither am I. Annexed to the founding papers is a letter of authority by the Master of the High Court confirming Respondent's control over the property. The content thereof is uncontested.
- [7] Even the Appellant realised the relevance of this document. I say so because in her supplementary opposing papers Appellant abandoned her original defence of having substituted the lease agreement that she had with the Respondent with that of a lease agreement with the beneficiaries. Appellant in the supplementary affidavit avers that she was of the intention to purchase the property and not to rent same with occupational rental to be paid by her. I am satisfied that the magistrate was correct in finding not only that the Respondent has the necessary *locus standi*, but furthermore for purposes hereof, is the person in control of the property.

- [8] A registered owner merely has to prove ownership of the property where after it is for the respondent to establish a right to be on the property, failure whereof entitles the owner to an eviction order.

**See: De Villiers v Potgieter and Others NNO
2007 (2) SA 331 SCA at 316 par [12]-[13]**

In casu the Respondent is the person in control of the property. In my view the position of the established person in control does not differ in this regard from that of the owner.

- [9] The change in Appellant's version in her supplementary affidavit from a lease agreement with the beneficiaries to that of a purchase agreement which includes occupational rent is not the only discrepancy that influenced her credibility. The magistrate took into account that Appellant advanced different versions in respect of other facts put by her under oath. Initially Appellant averred that the property was vacant when she took immediate occupation thereof. In the supplementary affidavit Appellant stated that, even though she had to pay occupational rent, the property was occupied by another lady and she could not occupy the property for another month. In an attempt to put forward the defence that a lien existed, appellant stated that shortly after moving into the property she discovered that it was dilapidated and had been vandalized, needing serious and necessary renovations. However, in her supplementary affidavit Appellant stated that contractors started with renovations during

October 2009, at which time certain vandals entered the property and totally vandalised it.

[10] The magistrate dealt fully with the Appellant's defence that she had a lien against the Respondent in terms of an agreement that repairs would be conducted by Appellant on the property, and that the cost thereof would be set off against rental. This was denied by the Respondent and the versions put forward in Appellant's opposing and supplementary opposing affidavits were evaluated. In passing judgment the magistrate emphasised that in the initial opposing affidavit receipts were attached to the value of R 3 386, 29, whilst in the supplementary affidavit additional receipts were attached bringing the total amount to R 25 010,31. An additional quotation for alleged damage to furniture for R 45 999, 92 was also annexed.

[10] The court a quo was aware that the additional purported proof of damages that should, according to Appellant, be set off against rentals payable in terms of the alleged agreement between herself and Respondent, was a mere quotation and not a receipt. No date was reflected thereon, and no dates were reflected on some of the other annexures purportedly indicating damages.

[11] The magistrate was well apprised of the conflicting versions tendered by Appellant, and the blame therefor was put by

Appellant on her former legal representative. In her supplementary affidavit Appellant merely indicated that her legal representative erroneously placed emphasis on the locus standi of the Respondent, and upon signing the affidavit she noticed that some of the facts “were not quite in the correct order”. The magistrate found it difficult to believe that material facts can change so drastically, even where a legal representative had erred on his understanding of the law.

[12] In my view the magistrate (although not expressly stating so) rejected the version of the appellant, and rightly so. The Appellant was thus an unlawful occupier of the property. In any event none of the defences could hold water. In the original affidavit reliance was placed on an agreement with the “beneficiaries”. Until transfer has taken place they only have, in our law, a *spes* and thus in the absence of an agreement with the Respondent the magistrate would have been entitled to evict the Appellant.

[13] In the supplementary affidavit reliance is placed on a deed of sale and the consequential occupational rent. It is trite law that an agreement of sale in respect of immovable property must be in writing to comply with Section 2(1) of the Alienation of Land Act 68 of 1981, failure whereof the agreement is void. I might mention, in passing, that I consider it in any event to be highly untenable and far-fetched that Respondent would be amicable

to pay “damages” in respect of the furniture whilst the property has been sold.

[14] In five years no agreement of sale has been concluded and the Appellant will not be able to compel the Respondent to enter into such an agreement. That no agreement of sale exists or has been concluded is confirmed on the Appellant’s own version.

[15] The Respondent indicated that she repeatedly requested Appellant to vacate the property, but that Appellant refused. Mr Roux on behalf of Respondent argued that, even if it was not expressly stated by Respondent that the lease agreement was cancelled by her, the actions of Respondent in dealing with the matter is indicative of this fact. Not only did she attempt already in 2010 to have the Appellant evicted in the Tshepong Crisis Centre, but she proceeded to apply for an order of eviction in the court a quo. To my mind there can be no doubt at this stage after almost six years that the Respondent had the intention, and Appellant could not reasonably possibly harbour any doubts about such intention, that the initial verbal lease agreement had been cancelled and did not exist at the time when the application was issued. After all the Respondent had an election, as the lessor, to either cancel the lease and evict the Appellant or to enforce the agreement by claiming specific performance when the latter stopped effecting payment of rental. The Respondent effectively elected to cancel the lease

when she persistently required the Appellant to vacate the premises.

[16] In as far as reliance was placed upon the existence of a lien, even on the Appellant's own version the rental due to Respondent would, by a mere mathematical calculation, undoubtedly already have exceeded the alleged incurred expenses by far. The Appellant has for almost six years not paid any amounts to Respondent in respect of the property.

[17] When entertaining an application in terms of PIE, the court is faced with two enquiries, the first relating to the granting of an eviction order and the second to the determination of the date of eviction and other conditions.

See: City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA).

[18] The 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.

See: Section 4 (7) of PIE

[19] These relevant circumstances include, amongst others, the rights and needs of children, and require a balance between the interests of the unlawful occupiers as well as the lawful owner.

See: Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at 233F

- [20] Respondent indicated in her founding affidavit that Appellant is occupying the property with her minor child. In her initial answering affidavit Appellant merely stated that she and her “children” are staying in the house. Mr Johnson on behalf of Appellant conceded that Appellant, even after having a second chance to put forward any information about the children, possible alternative accommodation or any relevant factors, chose not to do so.
- [21] No mention is made by the magistrate that the date of eviction is just and equitable. However, it is clear that more than a year had lapsed from the time that the application was launched until the final order was granted on 5 December 2013. Even from this date Appellant was granted just over a month to vacate the property and I therefore do not think that the magistrate erred in this respect.
- [22] The magistrate was satisfied that the appellant should be evicted and I am satisfied that she was correct in coming to that conclusion. I would accordingly dismiss the appeal. It is trite law that costs follow suit. I do not find any reason to deviate therefrom.
- [23] Since the eviction date, as ordered by the magistrate (9 January 2014), has passed through effluxion of time, a new date for eviction should be considered by this court. It is clear

from the papers that Appellant is employed and thus ostensibly not indigent. This also leaves me to believe that in the absence of any evidence to the contrary, Appellant would be in a position to rent an alternative property for her and the minor children. Respondent, on the other hand, is an elderly lady who is unemployed and dependent upon others for food and accommodation. She has been without her property or any income for the past six years. In light of all the aforementioned I find it just and equitable that Appellant should vacate the property as indicated below.

[24] Accordingly and for sake of clarity the following orders are made:

1. The appeal is dismissed.
2. The Appellant is ordered to vacate the property at 35536 Mangaung Bloemfontein not later than 30 September 2015 with all her belongings.
3. The Sheriff of Bloemfontein is ordered to evict the Appellant (and her belongings) if Appellant refuses or neglects to vacate, or is still present on the premises, on 1 October 2015.

4. The Sheriff of Bloemfontein is ordered, should it become necessary, to request the South African Police Services to assist in carrying out the order as in prayer 3 above.

5. Appellant is ordered to pay the costs.

C. REINDERS, AJ

I concur and it is so ordered.

L.J. LEKALE, J

On behalf of Appellant:

Adv. J M C Johnson
Instructed by:
Kramer Weihmann & Joubert Inc
BLOEMFONTEIN

On behalf of Respondents:

Adv. L A Roux
Instructed by:
Webbers Attorneys
BLOEMFONTEINram