

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : A20/2014

In matter between:

LAZARUS TUMELO MOTETE First Appellant

KEDIBONE MARTHA MOTETE Second Appellant

And

LENTIKILE CAMPBELL MOGOROSI Respondent

CORAM: RAMPAL, AJP *et* MOTLOUNG, AJ

HEARD ON: 11 AUGUST 2014

DELIVERED ON: 18 SEPTEMBER 2014

JUDGMENT BY: MOTLOUNG, AJ

Introduction

[1] This is an appeal against an eviction order. The respondent, successfully applied for an eviction of the appellants from a residential property. The appellants were aggrieved by the said order and now seek an order whereby the occupation of the property is restored to them plus ancillary relief.

Facts briefly

[2] In his founding affidavit, the respondent (applicant in the magistrate's court) alleged that he based his claim on an alleged purchase and sale agreement of a house (4126 Unit 1, Selosha, Thaba Nchu) that was concluded between him and the North West Housing Corporation (NWHC) on the 21 September 2011, annexed to his founding affidavit as annexure "A". He alleged that the couple was occupying the property unlawfully since August 2010 (before he bought the property) in terms of an oral lease agreement with an unknown person, in respect of which they were paying a monthly rental of R500.00. He further alleged that he was *"the contractual purchaser and person in control of the property"*, and *"was not aware of any person with better rights to the premises than [himself] in terms of annexure "A"*. He concluded by stating that the appellants did not have his permission to occupy the property, and were thus illegally occupying it.

[3] The first appellant (first respondent in the magistrate's court) deposed to the opposing affidavit (to which the second appellant's confirmatory affidavit was annexed) in which he stated the following, amongst others: He has been occupying the the property together with the second appellant *"since around January 2004 when the previous occupants, namely Mr and Mrs Tubane vacated same. We occupied the property with their knowledge and consent and since then we have been in peaceful and undisturbed possession thereof. I have made a deed search at the deeds office and I was advised that the property ...has never been registered in the name of any person, natural or juristic. I submit therefore that the instance referred to as the seller [NWHC] in what purports to be a deed of sale annexed ...does not have the authority to dispose of the said property as it is neither the owner nor the agent of the owner of the property"*. He denied that he and the second appellant were occupying the property illegally. He also denied that the property belonged to the respondent. He further denied that annexure "A" conferred any rights on the respondent. He pointed out the respondent has never been in occupation of the property, and asserted that he did not require the respondent's permission to occupy it as the respondent was neither the owner or person in charge thereof.

[4] The respondent filed no replying affidavit.

[5] This being an application within the purview of the PIE Act, the respondent also cited the relevant municipality, which did not oppose the application.

[6] The parties were legally represented when the matter was heard in the magistrate's court on the 24 April 2013. The magistrate found that the Deed of Sale (annexure "A", referred to hereafter as "the Deed") was valid, that the respondent was the person in charge and consequently had the *locus standi* to bring the eviction proceedings against the appellants, and made an order for the eviction of both appellants, together with some ancillary relief. It is that order that has come before us, on appeal. The appellants appeal the whole of the magistrate's judgment and state a number of grounds for their appeal, appearing in their notice of appeal filed on the 11 July 2013, appearing on pages 32 to 33 of the record. The appellants also filed applications for condonation for non-compliance with the various time frames (which I do not deem necessary to list for purposes of this judgment) regarding the prosecution of the appeal and the said applications were granted by the court before the parties could argue the merits of the appeal, after the respondent indicated that there was no objection thereto.

Other facts necessary to complete the appeal record

[7] There were no issues raised between the parties regarding the procedural requirements prescribed by the PIE Act, but the court *mero motu* pointed out that the section 4 (1) notice seemed to be defective as it was signed by the respondent's attorney instead of by the clerk of court - as the notice is actually a notice by the court, and that annexures B and C alleged to be annexed to the founding affidavit to the eviction proceedings were not attached to the record, and the NWHC was not cited as a party to the

proceedings, despite it apparently having a substantial interest in the matter. The court, however, indicated that it would proceed to hear the appeal on the merits, having noted the said points so that the parties could deal with them if necessary, and reserved its right to deal with these points later in its judgment if necessary.

[8] In the heads of argument and during argument, Mr Litheko, on behalf of the appellant, raised a whole range of grounds of appeal. These grounds were:

8.1. The allegation that the magistrate only afforded the parties an opportunity to address him on the *points-in-limine* that had been raised by the appellants (both pertaining to the validity of the Deed) but failed to afford them an opportunity to address him on the merits, before proceeding to deliver the judgment.

8.2. The magistrate erred in finding that the Deed was valid despite having being signed by one official or representative of the NWHC (instead of two in terms of section 22 of the NWHC Act), and despite not specifically mentioning the name of the single person who signed on its behalf.

8.3. The magistrate erred in finding that the NWHC was the owner of the property and thus had the authority to dispose of it, by selling it to the respondent.

8.4. The magistrate erred in finding that the respondent was the person in charge of the property as a result of having purchased it from the NWHC.

8.5. The magistrate erred in finding that the appellants were in unlawful occupation of the property.

8.6. The magistrate erred in finding that an eviction order should have been authorized against the appellants. In this respect the appellants mentioned a number of grounds on the merits, which I do not deem necessary to mention in this judgment because of the reasons I have used to come to my judgment.

8.8 Mr Litheko submitted that the court has to determine, in the main, whether the Deed of Sale between the NWHC is valid or not, and related to that, whether the respondent has the *locus standi* to bring the eviction proceedings (i.e. whether the respondent is an owner or person in charge).

[9] On the other hand, Mr Mazibuko, on behalf of the respondent, submitted that:

9.1. Even though section 22 of the NWHC Act 24 of 1982 requires signatures of the General Manager or Chairman of the Board and any other member of the Board duly authorized thereto by the Board, or if so authorized by the Board, any two members of the Board or the General Manager and any officer of the NWHC, the court should find that the Deed of Sale is valid because both parties to the agreement have performed in full.

9.2. The title of the NHC to the property, which previously fell under the Bophuthatswana Housing Corporation, now vests in the NHC as previously decided by this court in the unreported judgment of *Khoete Churchill Khoete v Judith Nomathemba Dimbaza* in the appeal case number A448/2007.

9.3. On the strength of the *Khoete* decision, the NHC is entitled to conclude the Deed of Sale, and once concluded, the purchaser becomes the person in charge, and consequently endowed with the *locus standi* to institute the eviction proceedings.

9.4. On the merits of the matter, the magistrate was correct in finding that the eviction was just and equitable. He provided a number of reasons for this submission, which I do not deem necessary to mention here because of the reasons I used to come to my judgment.

The issue to be decided

[10] Counsel for both parties spent most of their time arguing the question of whether or not the respondent had the *locus standi* to initiate the eviction proceedings against the appellants, in terms of PIE Act, and I am of the view that this is indeed the main question to be decided by this court, after which it may or not become necessary to examine other issues raised on appeal.

Some of the applicable legal principles

[11] The requirements to be met before a court may order an eviction from a residential property in terms of the PIE Act are found in the Act itself. I deem the following provisions of the PIE Act (regarding the requirements for eviction) to be relevant to the determination of this matter:

11.1. Section 4 (1) states the following:

*“Notwithstanding anything to the contrary contained in any law or the common law, **the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier**”* (my emphasis).

11.2. The other subsections of section 4 state what the procedural requirements are for an application for eviction.

11.3. Section 2 states that the Act applies in respect of all land throughout the Republic of South Africa.

11.4. Section 11 (3) states that:

*“Any law in force in those parts of the Republic which formerly constituted the national territories of the entities known as Transkei, **Bophuthatswana**, Venda, Ciskei, Gazankulu, KaNgwane, KwaZulu, KwaNdebele, Lebowa and QwaQwa, is hereby repealed to the extent that such law is inconsistent with or deals with any matter dealt with by this Act”* (my emphasis).

11.5. Section 1 provides the definitions applicable to the Act and the following are the ones relevant to subsection 4 (1) referred to above:

11.5.1. ***“Owner” means the registered owner of land, including an organ of state”.***

11.5.2. ***“Person in charge” means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.***

11.5.3. ***“Unlawful occupier” means 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 Land Rights Act, 1996 (Act No. 31 of 1996) (my emphasis).***

11.5.4. Section 22 of the North-West Housing Corporation Act 24 of 1982 requires signatures of the General Manager or Chairman of the Board and any other member of the Board duly authorized thereto by the Board, or if so authorized by the Board, any two members of the Board or the General Manager and any officer of the NWHC for a binding disposition of the property of the NWHC.

Applying the above legal principles to the facts of this case

[12] None of the parties addressed the court as regards the points mentioned by the court *mero motu* mentioned above, and I am satisfied that nothing turns on them and that the appellants were not prejudiced by the defective section 4(1) notice as regards the signature thereof, especially because the appellants have not claimed prejudice from such non-compliance. Therefore, this matter will be decided without any further reference to the points initially raised *mero motu* by the court. I will thus approach this matter on the basis that all the procedural requirements of the Act are deemed to have been complied with and this aspect can be regarded as closed.

[13] The first question to be answered is whether the respondent is either the owner or the person in charge of the property in question, as defined in the PIE Act. If the respondent is neither nor, then the respondent cannot qualify as a person or entity entitled in law to bring eviction proceedings in terms of the Act, and that should be the end of the enquiry regarding whether the magistrate's eviction order was valid or not. In legal parlance, it would mean that the respondent lacks the necessary *locus standi* to bring the eviction proceedings. However, if the respondent has the *locus standi*, the court must proceed to check whether all the substantive requirements of the Act have been met for the respondent to be entitled to an eviction order.

[14] An owner is defined as the person or entity in whose name the property is registered. This means registered in the deeds registry. On the facts of this case, there is no dispute regarding the fact that the property is not registered in the name of the respondent (or the NWHC, which was never a party to this case). Even if there was a valid purchase and sale agreement between the owner of the property and the respondent (i.e. a valid Deed), the respondent would not have qualified as an owner unless and until transfer of the property to his name had been effected, by registering such transfer in the deeds register. This means that the respondent has *no locus standi* as an owner of the property, and thus cannot use PIE Act to evict the appellants in that capacity.

[15] This takes me to the second level of the enquiry, being whether the respondent qualifies, in the alternative, as a person in charge of the property as envisaged by the PIE Act. A person in charge is defined in the Act as one who has legal authority (meaning the authority or power at law, whatever the source thereof, be it from contract or a statutory provision etc) to give permission or allow another to enter or occupy the property, or conversely, who has authority to refuse another permission to enter or occupy the property.

[16] At common law, one needed to be either an owner or lawful occupier in order to be clothed with the authority to initiate eviction proceedings. The definition of “a person in charge” has therefore extended the category of persons or entities that could qualify to bring eviction proceedings, without being necessarily an owner or someone already in occupation.

This opened room for persons or entities who are not owners and have never been in occupation of the property to be able to bring eviction proceedings, subject to one qualification: such person or entity must have the legal authority to allow or refuse entry or occupation of such property. In other words, as long as the person or entity has some legal basis or entitlement (whatever the source) to have the said authority. An owner obviously has such authority. The same goes for a lessee who occupies in terms of a valid lease or who has been conferred with the authority by the owner or landlord, or is subleasing lawfully in terms of a valid lease agreement, although not in occupation then or was never in occupation before.

[17] A fairly recent appeal decision in this division, of **Khoete Churchill Khoete v Judith Nomathemba Dimdaza (unreported) Appeal Number A448/07**, a decision delivered on the 12 November 2009, by Van Zyl J, a judgment in which Mocumie J concurred, is very instructive. The facts of that case were almost similar to those of this case, although distinguishable in a number of material respects, as appears later in this judgment. Just like in this case, the applicant in that case initiated eviction proceedings against the respondent, relying for his entitlement to the property on a written Deed of Sale concluded with the NWHC (a government entity in the former Bophuthatswana homeland). The applicant had subsequent to concluding the agreement, found the respondent in occupation of the property. Although the respondent opposed the application on a number of grounds, on appeal the respondent only persisted with the grounds that the applicant did not have the *locus standi* as she was neither the owner nor the

person in charge of the property, and the respondent also denied that he was in unlawful occupation of the property. The respondent had further contended that the property was not the property of the NWHC but that of the government of the RSA, as the government of the RSA had taken over ownership of all property belonging to the then Bophuthatswana government. On the basis hereof, the NWHC was not authorized to transfer any right of ownership to the applicant as it was neither the owner nor the person in charge as defined in the PIE Act, so contended the respondent. The respondent also stated that he was renting the property from some Mr Tshikare who in turn based his right to occupy on a Certificate of Occupation issued to him by the Department of the Interior of the former Bophuthatswana government, who had in turn leased the property to him in terms of a verbal agreement.

[18] After an extensive investigation of the history of the succession to the title of the said property, the court stated the following at paras [20] to [24]:

“The result of the aforesaid, in my view, is that the North-West Housing Corporation was now vested with the authority to deal with the current property in terms of the North-West Housing Corporation Amendment Act, 9 of 1994, read with the principal Act, and furthermore in terms of the terms and conditions set out in Proclamation No. 293 of 1962.

Regulation 11 of the aforesaid Proclamation prohibits the subletting of the property without the permission of the landlord, in this instance the North-West Housing Corporation, whilst section 23(1)(a)(iii) prohibits an occupant to abandon or to fail to occupy a unit referred to in the Certificate of Occupation for a period in excess of two months, unless he / she shall have obtained prior permission in writing from the landlord. Because of the aforesaid reasons, regulation 23(1) entitled the management of the landlord, in this instance the North-West Housing Corporation, to terminate the lease agreement that was granted to Mr Tshikare in terms of the Certificate of Occupation.

This is exactly what has been done by the North-West Housing Corporation in terms of the letter dated 5 May 2005, exhibit A, page 46 of the record. I therefore find that the cancellation of the Certificate of Occupation was a valid cancellation.

Considering that the rights that vested in the North-West Housing Corporation in terms of section 20 of the North-West Housing Corporation Amendment Act, the North-West Housing Corporation was, subsequent to the cancellation, fully entitled to have concluded a Deed of Sale with the applicant in terms of the Deed of Sale attached to the founding affidavit as annexure "A". ...The applicant's entitlement to the property as a "legal occupant" thereof, was furthermore also confirmed in the last paragraph of the letter dated 5 May 2005, exhibit A, addressed by the North-West Housing Corporation to Mr Tshikare.

In the result I am satisfied, as was the court a quo, that the applicant discharged the onus of proving that she, at the time of the institution of the application, was the person in charge of the property and further discharged the onus of proving that the respondent was and still is a lawful occupier of the property in that he does not have the consent of either the owner (currently still the North-West Housing Corporation) nor the person in charge (the applicant) nor does he have any other right in law to occupy the said property".

The court went on to find that there was no merit in the appeal and dismissed it. I have quoted fairly extensively from the said decision as I am of the view that it is relevant to answering the question whether the respondent qualifies as the person in charge of the property, as will become clear later on in this judgment.

[19] Applying the *Khoete* decision to the facts of this case *mutatis mutandis*, I make the following findings:

19.1. The NWHC is not registered as the owner of the property in the deeds registry. Whilst I take cognisance of the fact that the court in the *Khoete* decision used the word “owner” in respect of the NWHC as regards the property, in the circumstances of this case I cannot find that the NWHC qualifies as owner of the property in this case, as the property is not registered in its name in the deeds register. In my view, on the strength of the *Khoete* decision, the NWHC would qualify as “a person in charge” – as an entity bestowed with legal authority (per statutory promulgations) to either allow or refuse someone entry to or occupation of the property. This means that the NWHC is vested with the authority to deal with the property in terms of the North-West Housing Corporation 24 of 1982, as amended (in particular as amended by the North-West Housing Corporation Act Amendment Act 9 of 1994), read with Proclamation No. 293 of 1962, and thus the NWHC has the authority to dispose of the property.

19.2. One of the ways of disposing the property would be the conclusion of Deeds of Sale with purchasers. Therefore, the NWHC is entitled to conclude a Deed of Sale with the respondent.

19.3. However, the Deed of Sale concluded with the respondent must comply with all other legal requirements for a valid agreement. In particular, the Deed of Sale must comply with the provisions of section 22 of the North-West Housing Corporation Act 24 of 1982, which requires signatures of the General Manager or Chairman of the Board and any other member of the Board duly authorized thereto by the Board, or if so authorized by the Board, any two members of the Board or the General Manager and any officer of the NWHC.

19.4. On the facts of this case, the Deed of Sale (annexure “A”) does not meet the requirements of section 22 as it was signed by only one representative, whose status was not stated or declared, and there is no indication whether such official was duly authorized by the Board to act for the NWHC in respect of the said transaction or not. The magistrate’s finding that the simple signing of the Deed of Sale despite all the shortcomings mentioned above is clearly incorrect. Therefore, the respondent could derive no rights whatsoever from the invalid Deed, just like the NWHC could not dispose of the property or confer any rights to anyone in terms of an invalid Deed.

19.5. The submission made by Mr Mazibuko that the Deed of Sale should be deemed to be valid despite the shortcomings alluded to above, together with the authorities he referred us to, do not assist the respondent’s case, as the principle referred to by him and the said authorities only apply where both parties to the transaction have performed in full. In this respect, the Deed of Sale states the following at clause 5:

*“Delivery and possession of the property: **Possession and vacant occupation of the property shall be delivered to the Purchaser on transfer** or such earlier date as mutually agreed upon by the parties, from which date it shall be at the sole risk, loss or profit of the Purchaser”* (my emphasis).

Clause 12 of the Deed of Sale constituted a non-variation clause, requiring that any change to the Deed be in writing and signed by both parties. As the property had not yet been transferred to the respondent, there was no performance in full by both parties, and thus the respondent cannot find support in the submission of full performance by both parties.

19.6. This also means that even if the Deed was found to be valid, which it is not as already stated above, in the absence of a written agreement to deliver *vacuo possessio* on an earlier date than upon transfer of the property, the respondent would have no right or entitlement to occupy the property, and thus cannot qualify as a person in charge (as a lawful tenant or lessee) in terms of the Deed.

[20] In the light of my findings stated above, I come to the conclusion that the respondent was neither the owner nor the person in charge of the property, and thus had no *locus standi* at the time of instituting the eviction proceedings. This means that the magistrate was incorrect in finding that the Deed was valid and that the NWHC duly conferred the rights of a person in charge to the respondent.

This being so, it becomes unnecessary to even investigate or explore whether the appellants were unlawful occupiers or not. It is even lesser necessary to examine what the rights of the appellants, if any, were to the property or whether the circumstances that must be taken into account before an eviction order may be issued existed or not at the time of initiating the eviction proceedings. This also means that it is unnecessary to examine all other grounds raised by the parties in the appeal (apart from the one I have already dealt with, regarding whether the respondent was either owner or person in charge). Ordinarily, once I have come to the conclusion that the respondent is neither an owner nor a person in charge, that would be the end of the enquiry, as stated above.

[21] I, however, find it necessary to mention that the *Khoete* decision would not have assisted the respondent in any case, as the facts thereof were distinguishable from those of this case. In that case, unlike in this case, there was no challenge to the validity of the Deed of Sale based on whether all the necessary signatures had been attached. In that case the challenge was based on the allegation that the property did not belong to or the NWHC did not have the authority to deal with it, and the court found that the NWHC inherited the authority to deal with the property through a statutory promulgation. I have already stated above that the challenge to the validity of the Deed, in this case, was mounted on non-compliance with section 22 of the NWHC Act. Furthermore, the NWHC had served a letter of termination of the leasehold enjoyed by the respondent in terms of the terms and conditions set out in Proclamation No. 293 of 1962, which is not the case here.

The NWHC had also confirmed the right of the applicant to occupy the property in that case. There were no such allegations or facts in this case. Even in the *Khoete* decision, the court would have most probably found that the “*huur gaat voort koop*” principle would have operated against the NWHC if it had not lawfully terminated the (original) lease by giving due notice of such termination to Mr Tshikare (which would have meant, in this case, that the NWHC should have first terminated the right to occupy of the Tubane’s in this case, which was not alleged or proven).

[22] Because of my reasons for concluding that the magistrate was wrong in granting the eviction order, it is unnecessary to examine the possibility of succumbing to Mr Mazibuko’s alternative prayer during argument, to the effect that if we find that there were insurmountable irregularities with regard to the Deed of Sale, which he finally conceded, that we should remit the matter back to the magistrate, so that he may consider all the relevant factors. No useful purpose will be served by such referral as the respondent’s application was fundamentally defective for lack of jurisdictional facts that would even entitle the court to examine all the factors relevant to an eviction in terms of the PIE Act. This appeal must therefore fail.

[23] There is no reason why the ordinary rule of the costs following the result should not apply. After all, there was no argument to the contrary. These costs should include both the costs in the court below and the costs of this appeal.

[24] In the premises, I propose the following order: The appeal is dismissed, with costs, including the costs in the court below.

I. MOTLOUNG, AJ

I agree.

RAMPAI, AJP

For appellants: Mr Litheko

Instructed by: Litheko Motsoeneng Incorporated
Thaba Nchu

For respondent: Mr MS Mazibuko

Instructed by: Moroka attorneys
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