

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. 2278/12

In the matter between:

MOKHA REUBEN NGCOBO

Applicant

and

THEMBA ETHEL MDUNGE

Respondent

JUDGMENT Delivered on 13 June 2013

STRETCH AJ:

[1] This is an application in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") in terms of which the applicant seeks an order evicting the respondent and all other persons occupying under or through her, from the property described as erf 96, Thornville (near Thornville Garage), Richmond, KwaZulu-Natal ("the property").

[2] The application came before me as an opposed motion on 8 May 2013. There was no appearance for the respondent.

[3] The applicant had, in compliance with this court's practice directives, delivered his heads of argument and a practice note well in advance of 30 April 2013, being the due date for compliance.

[4] The respondent's heads of argument and her practice note, which were due on 3 May 2013, have not been delivered at all.

[5] When the respondent originally opposed the application, she was represented by attorneys Khanyile and Associates from Pietermaritzburg. When the matter came before me the applicant's counsel advised that the applicant's attorneys had, on 6 May 2013, received a transmission, purportedly from "Mlilo Attorneys" advising that they had been informed that the respondent had been hospitalised on 2 May 2013 and that they were requesting a postponement of the hearing. The applicant's attorneys refused to agree to this, pointing out (and this is admitted by Mlilo Attorneys) that the notice of set down had been served as far back as 14 January 2013, and that the applicant had, in the circumstances, been afforded ample opportunity to prepare.

[6] The matter in any event stood down for the applicant's attorneys to make further enquiries. When the matter was recalled, Mr Mnikathi (the author of the correspondence from Mlilo Attorneys) advised me that they were not representing the respondent. I mention that the papers reflect that the latest formal correspondence on this aspect is the respondent's notice of intention to oppose the

application (dated 2 April 2012) which is not only addressed by Khanyile & Associates on her behalf, but wherein she also appoints Khanyile & Associates as her duly authorised agents, and to whom the notice of set down had accordingly been addressed.

[7] In the premises I am satisfied that the defendant, despite having delivered a notice of opposition and an opposing affidavit, has failed to prosecute her case to its ultimate conclusion. This means that this court can (if it is of the view that a case has been made out for the relief sought on the applicant's papers), grant judgment in his favour without any recourse to that contained in the answering papers.

[8] In the exercise of my discretion however, I intend in any event to consider the applicant's grounds of opposition as set forth in her affidavit as if they had been specifically traversed in argument before me.

[9] The respondent has raised as her first point *in limine* that there are proceedings pending in the magistrates' court. It is common cause that these proceedings were instituted against the respondent's spouse who is now deceased. There is accordingly no *lis* pending between the parties in that court. Even if it is the respondent's contention that she occupies the property by or under the authority of the deceased, such authority ceased to exist upon his death. See:

Botha N.O. v Deetlefs and Another 2008 3 SA 419 (NPD)

[10] The respondent's second point *in limine* (that the applicant has failed to comply with the provisions of section 4(2) of PIE) insofar as it may have been a valid point at the time that she deposed to the affidavit, has ceased to be so by virtue of this court's order on 10 April 2013, causing notices which give proper effect to the provisions of PIE to be re-issued. There is accordingly no merit in either of the points raised *in limine*.

[11] The respondent's main ground of opposition is that she is in lawful occupation of the property (having taken such occupation in May 2002) after she and her deceased spouse had entered into an oral agreement with one K.E. Ngcobo that her daughter would purchase the property from its owner, Ngcobo Brothers Proprietary Holdings CC for R150 000,00. She avers that certain sums of money were paid to K.E. Ngcobo both towards the purchase price and for occupational rental pending the finalisation of the sale. She categorically admits that the property was never transferred into her daughter's name because the full purchase price had not been paid. Significantly, the respondent admits that the applicant is the registered owner of the property, having acquired it in terms of a deed of sale concluded on 19 March 2008 with the erstwhile registered owner, Ngcobo Brothers Proprietary Holdings CC. She also admits that the property was registered in the applicant's name in the office of the registrar of deeds on 24 June 2008 under deed of

transfer no. T29808/2008, copies of which are annexed to the applicant's affidavit. This title deed (duly confirmed by a deeds office report describing the applicant as the registered owner of the land) is sufficient for the applicant to establish that he is the lawful owner of the land in terms of the definition of "owner" in the Alienation of Land Act 68 of 1981 (being "the person in whose name the land is registered in the deeds office concerned"). Notwithstanding this, the respondent dismisses the title deeds as being "invalid" because, so she contends, this sale took place after her oral agreement with K.E. Ngcobo had been entered into. The applicant's counsel has raised a number of valid challenges to this claim. In my view the undisputed proof of registration of transfer into the applicant's name by virtue of the title deed is sufficient proof of ownership, particularly when the challenge thereto is based on an alleged oral agreement which does not comply with the formalities in respect of alienation of land set forth at section 2 of the Alienation of Land Act.

[12] I am accordingly constrained, having carefully considered the papers before me, to find that the applicant has:

- a) established his *locus standi* (by virtue of the title deed annexed to his papers);
- b) established that the respondent is in wilful, persistent and unlawful occupation of the property which he lawfully owns (by virtue of his uncontested averment that the respondent is in occupation of the land without his express or tacit consent and also by virtue of the

respondent having failed to establish that she has any other right in law to occupy the land which makes her an “unlawful occupier” as defined in section 1 of PIE);

c) established that he has duly fulfilled all the procedural requirements of PIE (in particular those set forth at section 4 of PIE) in order to secure the respondent’s eviction.

[13] The foregoing having been established, section 4(7) of PIE sets forth what this court should then take into consideration in deciding whether or not to grant an order for the respondent’s eviction. It reads 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, 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, 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 women.’

[14] The papers before me are not lacking in averments pertaining to such relevant circumstances, as would, for example, be the case where an application has proceeded entirely without challenge and it is evident that the applicant has made no effort whatsoever to establish the personal circumstances of the occupiers and whether alternative accommodation can be made available for them.

[15] In the matter before me, the applicant caused the relevant notice in terms of section 4(2) of PIE to be served on the municipal manager of the municipality within whose jurisdiction the property is situated, more than three weeks before the application was heard. This not being an eviction at the instance of a public body where public land is unlawfully occupied by potentially homeless and destitute people, I do not deem it necessary for the applicant to have taken any further steps to involve arms of government to make land available. The applicant, being a landowner with his own right to property in terms of section 25 of the Constitution is not, by virtue of this application, attempting to sterilise property which he has no need for. He has made it clear in his founding papers that:

- a) the respondent's deceased spouse of the respondent used to lease the property from the applicant's predecessor in title;
- b) he gave the deceased generous notice to vacate in October 2008 after ownership had been lawfully transferred to him;
- c) the respondent and her deceased spouse before her, have refused to vacate not because they would be rendered homeless otherwise, but because they claimed that it was their right to occupy the property as lawful owners, a claim which the respondent persisted in pursuing in her answering papers;
- d) the deceased was evicted by virtue of an order in the magistrates' court granted in his absence. This order was

subsequently rescinded, not on grounds of justice and equity, but because the deceased resurrected his claim of lawful entitlement;

e) the respondent's daughter is gainfully employed and occupies her own home in Pietermaritzburg (not only is this admitted but the respondent herself mentions a second daughter who occupies a second home);

f) he, as the owner, not only has a right to the use and enjoyment of his own land and vacant occupation and possession thereof, but that he envisages making the property available to tenants who are prepared to pay rental (unlike the respondent who not only declines to pay rental, but also allows those who occupy the property through her to live rent-free).

[16] The respondent does not seriously challenge these averments. She maintains that she is entitled to occupy the property as the rightful owner thereof. Her claim of a significant amount of money having been paid to a third party to secure ownership, is not a valid ground upon which this court should find that it would be unjust and unequitable to evict her. She has separate commercial and financial rights of recourse in that regard, and by her own admission enjoys financial assistance from her two daughters who each occupy separate properties. It seems to me that her averment that she and her three grandchildren will be left destitute should this order be granted is an opportunistic one which has been tagged onto her main claim as a convenient alternative plight. The respondent has, in any event, not elected to disclose

why her three grandchildren are living with her, and not with their natural mothers who ought to be their primary carers.

[17] In the premises am satisfied, particularly in that the respondent has failed to seriously pursue her opposition to this application, that the applicant has demonstrated that it is just and equitable for the respondent to be evicted, and that he has placed sufficient information before this court to justify the granting of such an order, insofar as the recent judgment of the Supreme Court of Appeal may also be interpreted to apply to private landowners with respect to the question of *onus*. See:

City of Johannesburg v Changing Tides 74
2012 (6) SA 294 (SCA) at 314B-G

[18] The respondent has been in occupation of the premises since 2002. However, it is common cause that she has been aware of the real prospect of eviction (particularly in that such an order was previously granted) since June 2009, and that she has alternative support systems at the very least in the form of two of her children. I am accordingly of the view that it would be just and equitable to grant an order determining that the respondent and those who occupy with her, should vacate the premises by the end of July 2013, which allows her in excess of six weeks' notice.

In the premises I make the following order:

ORDER:

- (a) The respondent and all persons occupying under or through her are hereby evicted from the property known as erf 96, Thornville (near Thornville Garage), Richmond, KwaZulu-Natal.
- (b) The respondent and all persons occupying under or through her are consequently directed to vacate the aforesaid property and to ensure that all their movable belongings have been removed from the property by no later than 16h00 on Wednesday, 31 July 2013, failing which the sheriff of this court is directed to forthwith carry out and give effect to the aforesaid orders for eviction and removal.
- (c) The respondent is directed to pay the applicant's costs of this eviction application.

STRETCH AJ

Appearances /

Appearances

For the Applicant : Mr. C. Pretorius

Instructed by : Lister & Lister
Pietermaritzburg

For the Respondent : Not represented
No appearance in person

Instructed by : Not applicable

Date of Hearing : 08 May 2013

Date of Filing of Judgment : 13 June 2013