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

CASE NO: 39065/09

In the matter between:

PRISESHELF 11177CC

APPLICANT

AND

F D JOUBERT

RESPONDENT

TLHAPI AJ:

[1] The applicant seeks an order for the eviction of the respondent and of (all persons who occupy through her) from certain property known as [.....] ('the property')

THE FACTS:

[2] During February 2002 Mr Henry Ingram King Angelo ('Mr Angelo'), sole member of the applicant entered into an oral agreement of rental with the respondent and her deceased husband. The respondent was expected to pay a monthly rental of R3000.00 per month, and be responsible for the payment of municipal rates and taxes, and monthly water and electricity accounts.

[3] Mr Angelo loaned a sum of R300000.00 from the respondent, payable in monthly instalments, and the final payment had been made on the 10 October 2007. In the year that the lease was to terminate, he gave the Respondent notice by letter during May 2007 that the lease would terminate end of October of that year and that she would be expected to evacuate the property by the 1 November 2007. According to Mr Angelo, the respondent failed to evacuate the property. Furthermore, she had no consent to occupy the property, and had since failed to make any payment towards rental, municipal rates and taxes and, water and electricity. The amounts of R33000.00 and R38075.00 respectively remained outstanding at the launch of this application. Preceding this application, he sued the respondent in the Magistrate's Court sitting in Pretoria, for outstanding rentals, outstanding rates and taxes plus interest. Then, during September 2008 the applicant obtained an order authorising a notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998, ('the Act') to be served on the respondent and all other persons occupying the property and, this notice was not served on the municipality having jurisdiction.

[4] The respondent confirmed the loan and that the loan amount plus interest had been paid off by him during October 2007. She however denied the existence of a lease agreement. She stated that besides having made monthly payment towards water and electricity, there was agreement that she and her late husband would live on the property free of charge and that they would be entitled to a lifelong use of the property.

[5] In the answering affidavit the respondent raised three points in limine:

- (a) the applicant being aware that the Act was applicable in the circumstance, failed to disclose a cause of action, in that this application was not brought by him as registered owner of the property or as the person in charge of the property, as required by the Act;
- (b) the applicant failed to show that he had the necessary locus standi to bring the application;

(c) as a result of certain previous litigation still pending before the magistrates court the applicant should have been aware of the disputes of fact that could result in him bringing this application;

[6] In his reply Mr Angelo attached an extract from the Registrar of Companies stating the correct name of the applicant thereby correcting the mistake on the notice of motion, a certificate proving that he was the sole member and, a resolution from the applicant dated the 7 October 2008 authorising him as member to litigate in the name of the applicant. Furthermore, he drew the courts attention to the contradictory statements in this application and in the respondent's plea relating to the respondent's version of the dispute between them.

SUBMISSIONS

[7] For applicant:

(a) It was submitted that there had been compliance with Rule 4 (2) the Act in that an order dated the 15 September 2008 had been served on the respondent;

(b) that the first and second points in limine raised in the respondent's answering affidavit be dismissed with costs in that applicant had provided proof that it was a duly registered closed corporation and that a resolution authorizing Mr Angelo to act on behalf of the applicant had been produced;

(c) the court is not obliged to look into every instance where a dispute of fact is alleged to have arisen; that the dispute of fact should be a genuine one and the court in appropriate instances should follow the 'robust common sense approach'

For the respondent:

In addition to the points in limine raised in the answering affidavit, it was submitted that:

(a) the relevant municipality had not been joined as a party as required by the Act;

(b) that the hearing of this matter was premature in that the applicant had failed to comply with section 4(2) of the Act;

THE LAW

[8] It is proper for this court to also deal with those points in limine which were not raised by the respondent in her answering affidavit and which were only raised by her counsel in heads of argument. The said points in limine relate to the application and the interpretation of the law . The legality of the eviction sought by the applicant is in my view reliant on a proper compliance with those provisions of the Act, especially those provisions which are peremptory.

Joinder of the relevant Municipality

[8] The provisions of section 4(2) of the Act are peremptory. An application for the eviction must be preceded by service of a notice of the proceedings 14 days before the hearing, on the unlawful occupier and on the municipality having jurisdiction. This should occur before any argument on the merits of the case is heard by the court. Although there is an undertaking in paragraph 13 of the founding affidavit that a notice will be served in compliance with this section, the deponent failed to mention the municipality having jurisdiction. It is common course that the municipality having jurisdiction was neither joined as a party, nor served with a section 4(2) notice as required by law. The order issued by the above court on the 10 September 2008 only affected the respondent and it was therefore not in compliance with section 4(2). (my underlining)

[10] It is trite that before granting an order to evict, all the relevant circumstances need to be considered and an order be granted which is just and equitable to the applicant and unlawful occupier. Having regard to the duration in which the respondent was resident on the property and, in pursuance of an order which would be just and equitable to her, in the light of her rights as enshrined in the Constitution,

the municipality having jurisdiction had to be enjoined in order to establish and reasonably facilitate alternative relocation for the respondent (the unlawful occupier in the event that the decision did not favour her), and to report to the court before the order is granted in this regard, so that the court in dealing with the matter is appraised of all facts. The Occupiers of Erf 101,102,104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd (SCA) Case 245/08 paragraphs 4, 5, 11 (unreported and delivered 3 July 2009). In Cashbuild (South Africa) (Pty) Ltd v Scott and Others 2007 (1) SA 332 (T) Poswa J Stated at paragraph 28:

“ Sight must not be lost of the purpose for which the PIE Act was enacted, and, inter alia why municipalities were given the role in that Act. In the Bill of Rights, the Constitution provides the background in. inter alia, ss 25(1) and 26(3).. ”

It is my understanding that even before this court can determine whether there is a dispute of fact in the matter, or whether there was contradiction in the respondent's version in this application and in her plea in the action before the magistrate, the issue of joinder of the municipality has to be insisted upon.

Locus standi of Mr Angelo

[11] In terms of section 4(1) of the Act, the application for eviction is to be brought lby the owner or person in charge of land for the eviction of an unlawful occupier'. The resolution gives Mr Angelo the authority to represent the applicant in his capacity as a member of the applicant and, to litigate in the name of the applicant, in respect of the property which is the subject of this application. The founding affidavit was lacking in the averment to establish the cause of action as required by the Act.

The issue of locus standi becomes important to establish in order to chart the way forward. It is my view, that having regard to the resolution, and the founding affidavit, the legal status of the applicant and Mr Angelo are not interchangeable. Even if this application could be postponed to allow proper joinder and service upon the municipality having jurisdiction, the founding affidavit does not establish proper locus

standi which stipulates that he is to litigate only in the name of the applicant and not in his personal capacity. The respondent has therefore in my view made out a case for the dismissal of the application with costs.

[12] In the premises, the following order is given:

“The application is dismissed with costs”

V V TLHAPI

(ACTING JUDGE OF THE HIGH COURT)

FOR THE APPLICANT: ADVOCATE R F DE VILLIERS

ADVOCATE JH SULLIVAN

FOR THE RESPONDENT: ADVOCATE PJ VERMEULEN