

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal Number : A448/07

In the appeal between:-

KHOETE CHURCHILL KHOETE

Appellant

and

JUDITH NOMATHEMBA DIMBAZA

Respondent

CORAM:

VAN ZYL, J *et* MOCUMIE, J

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON:

12 NOVEMBER 2009

[1] The respondent approached the Thaba 'Nchu Magistrate's Court as applicant for an eviction order in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998 (hereinafter referred to as "PIE"), against the current appellant in his capacity as respondent in that application, who opposed the application. The Mangaung Local Municipality was cited as second respondent in that application, but did not oppose the relief sought and is therefore not a party to the current appeal. On 4 September 2007 the Court *a quo* granted an eviction order against the appellant in the following

terms:

- “1. Khoete Churchill Khoete and all other persons in possession of the property situated at 1849 Unit 1 Selosesha, who hold possession through or under Khoete Churchill Khoete are ordered to vacate the said property by not later than 31\10\2007.
2. Failing compliance by the respondent and all other persons in possession of the said property, the Sheriff is authorised and directed to evict Khoete Churchill Khoete or any such persons from the said property.
3. The respondent is ordered to pay the costs of the application.”

[2] This appeal is directed against the aforesaid order. For the sake of efficacy I am going to refer to the parties as they were in the Court *a quo*.

[3] Applicant based her entitlement to the residential property known as Erf 1849 Unit 1, Selosesha, Thaba 'Nchu (hereinafter referred to as “the property”) on a written Deed of Sale, embodied in an Offer to Purchase, dated 6 May 2005, addressed to the North-West Housing Corporation. This Offer to Purchase was accepted by North-West Housing Corporation in that the Offer to Purchase was signed on behalf of the

corporation on 14 November 2005. The agreed purchase price was R50 000.00. This Offer to Purchase specifically determines that upon acceptance it forms a Deed of Sale. A copy of the said Deed of Sale was attached to the founding affidavit as annexure "A". On 9 November 2005 the applicant paid R10 000.00 in pursuance of the agreement and alleged that the balance of R40 000.00 would be paid off in monthly instalments of R632,62. A deposit slip dated 9 November 2005 reflecting a payment by applicant in favour of the North-West Housing Corporation in the amount of R10 000.00, was attached to the founding affidavit as annexure "B". After signing of the agreement the applicant however found the respondent to be in occupation of the property. She informed the North-West Housing Corporation accordingly and during June 2006 they advised her that she should consult with her attorney to obtain an eviction order against the respondent. Later during 2006 when the applicant again went to the property, accompanied by the police, to collect some of her personal items that were still in the house, she again informed the respondent and his wife that they will have to evacuate the property due to the fact that she bought the house from the North-West Housing Corporation and that in terms of the

agreement she is entitled to occupation of the said property. Respondent informed her that he was aware of the fact that he will have to vacate the property. However respondent remained in occupation of the property. The applicant therefore contended that the respondent was (and still is) in unlawful occupation of the property.

- [4] Although the respondent opposed the application on a number of grounds, the respondent persisted on appeal only with the grounds that the applicant did not and still does not have *locus standi in judicio* as she is neither the owner nor the person in charge of the property and furthermore that the respondent denies that his occupation of the property was and is unlawful. In his opposing affidavit the respondent contended that the said property is not the property of the North-West Housing Corporation but that of the Government of the Republic of South Africa. According to him the South African Government took over ownership of all property belonging to the then Government of Bophuthatswana. In support of this allegation a copy of a deeds search was attached to the answering affidavit as annexure “KGO1”, which document reflects that “town name or erf number or erf portion does not exist”. According to

respondent's contention the North-West Housing Corporation was therefore not authorised to transfer any right of ownership to the applicant and therefore the applicant is neither the owner nor the person in charge as defined in PIE.

In addition to the aforesaid, the respondent alleged that because the Deed of Sale was only concluded on 14 November 2005 when the corporation accepted the offer, the alleged payment by applicant of R10 000.00 to the corporation could not have been made in pursuance of the agreement. The applicant also questioned the monthly repayment of R632,62 because the Deed of Sale does not make provision for such an arrangement.

The respondent pointed out that the applicant was previously evicted from the property by one Mr. Tshikare by means of a court order dated 19 August 2005. A copy of this court order was attached to the answering affidavit as annexure "VAL2". (It should however be mentioned that it appears from paragraph 8 of the judgment of the Court *a quo* that this order had been rescinded.) He furthermore contended that he was renting the property from the said Mr. Tshikare. An

affidavit by Mr. Tshikare was also attached to the answering affidavit. In this affidavit Mr. Tshikare based his alleged right to occupancy on a Certificate of Occupation, issued by the Department for the Interior of the former Bophuthatswana Government Service, which certificate is dated 23 February 1994. I pause to mention that this certificate was attached to an affidavit of one Mr. Molawa, being a former Area Manager of Thaba 'Nchu Municipality, and which affidavit was attached to the affidavit of Mr. Tshikare as annexure "VAL1", together with the aforesaid certificate. However, from a reading of this affidavit it is evident that this affidavit was apparently filed in the previous eviction application brought by Mr. Tshikare against the current applicant and therefore the learned Magistrate, in my view correctly so, found in paragraph 13 of her judgment that this affidavit does not take the case of the respondent any further. Having said that, I return to the affidavit of Mr. Tshikare.

[5] According to Mr. Tshikare he rented the property to the applicant during or about 1999 in terms of a Lease Agreement. The applicant paid the agreed monthly rental of R280.00 until December 2001, whereafter she stopped paying without

providing any reason whatsoever. On 3 April 2002 he instituted an action against the applicant for payment of rent and her eviction from the property and on 19 August 2005 judgment was granted in his favour. On 23 August 2005 a warrant for the eviction of the applicant was issued and the applicant was evicted by the Sheriff on 27 September 2005. He, being Mr. Tshikare, then took possession of the premises on 27 September 2005. The respondent thereupon took occupation of the property after the applicant's eviction on 27 September 2005. This possession of respondent is in terms of a verbal Lease Agreement that Mr. Tshikare, as lessor, entered into with the respondent.

[6] In her replying affidavit the applicant alleged that it is clear from the respondent's affidavit, read with the supporting affidavit of Mr. Tshikare, that neither respondent nor Mr. Tshikare have a right to occupy the property, because:

6.1 The certificate provided Mr. Tshikare the right to occupy, together with the members of his family, the property for residential purposes only. Mr. Tshikare was therefore not entitled to rent out the premises to

the respondent.

6.2 The Certificate of Occupation lapsed when the Bophuthatswana Government was incorporated into the Republic of South Africa.

[7] In my view it is necessary to deal with two further documents which were accepted as exhibits and considered by the Court *a quo*, although it did not form part of any of the affidavits. These are the documents which were sent to Court via facsimile on 4 June 2007, appearing on the appeal record on pages 46 and 47. The first document is dated 5 May 2005, being a letter addressed to Mr. Tshikare in terms of which he was advised that in April 2005 the board of directors of the North-West Housing Corporation ascertained that he was no longer residing in the property and that he was renting the property out to the applicant without their permission. They consequently advised Mr. Tshikare that the Lease Agreement between themselves and Mr. Tshikare will be terminated within a period of thirty days from date of receipt of the letter. Mr. Tshikare was furthermore instructed not to collect any occupation rental from the applicant as the property does not belong to him, but to the North-West

Housing Corporation and that the applicant has been regularised as a legal occupant of the property and that she will be liable to the North-West Housing Corporation for occupational rent as from 1 June 2005.

The second document is a statement of account issued by the North-West Housing Corporation addressed to the applicant, dated 7 May 2007, which reflects payments that she has made in favour of the North-West Housing Corporation with regard to the property, *inter alia* reflecting the R10 000.00 payment made by herself on 9 November 2005, as originally alleged by herself in the founding affidavit. In terms of this statement, the outstanding balance with regard to the purchase price of R50 000.00, was R1 874.10 as at 30 April 2007.

It is evident from the judgment of the Court *a quo*, as reflected on page 49 of the record, that the aforesaid documents came to the attention of the Court *a quo* two days preceding 17 August 2007, being the date upon which the matter was argued. The Court then apparently held that those two documents are admissible as evidence and were

marked as Exhibits A and B respectively, as reflected in the judgment on page 51 of the appeal record. One of the grounds of appeal reflected in the notice of appeal on page 56 of the record, paragraph 4, is the following:

“The Learned Magistrate misdirected herself in taking into consideration Exhibit A and Exhibit B in her adjudication of the dispute in this matter.”

In paragraph 7.4 of the applicant’s heads of argument, page 12 thereof, the following was stated:

- “7.4.1 The judgment of the Court *a quo* creates a misleading picture regarding the admission of these two exhibits.
- 7.4.2 The exhibits were not simply accepted after being faxed to the Court.
- 7.4.3 During the hearing of the application respondent applied for the documents to be accepted.
- 7.4.4 The matter was argued and the Magistrate ruled in favour of admitting the exhibits.
- 7.4.5 The reasons for this decision are set out on page 51 of the record.
- 7.4.6 It is submitted that the Magistrate was correct in admitting the documents as it was in the interest of justice towards equitable finalisation of the matter.”

[8] Considering the reasons for the Court *a quo* to have admitted these exhibits, as set out on page 51 of the appeal record, and having regard to the factors set down in section 3(1)(c)(i) to (vii) of the Law of Evidence Amendment Act, 45 of 1988, as the Court *a quo* did, I am of the view that the Court's finding cannot be faulted on the record as it stands before us. The oral arguments that were presented to the court *a quo* in regard to the question whether these exhibits should be admitted as evidence or not, have not been transcribed and put before us, which, if the respondent (appellant) wished to rely thereon, should have been done by the respondent (appellant). Therefore I can only consider the reasons provided by the Court *a quo* itself, which reasons, as I have already indicated, in my view cannot be faulted. There appears to have been no misdirection in her acceptance of these documents in evidence as alleged by the respondent in paragraph 4 of his notice of appeal.

[9] As eviction orders in relation to residential property must be sought in terms of the provisions of PIE, applicant made use of the correct procedure and it is not disputed that the applicant

conformed with all the procedural requirements determined in section 4(2) to 4(5) of PIE.

[10] However, what is in dispute, is the question whether the applicant is the “owner” or the “person in charge” of the property, as section 4(1) of PIE determines that only an owner or person in charge of such a property may apply for the eviction of an unlawful occupier. In section 1 of PIE “owner” is defined as follows:

“Means the registered owner of land, including an Organ of State.”

A “person in charge” is defined as follows:

“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] It is my view that in the current instance it is appropriate to consider the aforesaid question with regard to the applicant’s *locus standi* in conjunction with the question whether the respondent is an “unlawful occupier” for purposes of PIE. In section 1 of PIE “unlawful occupier” is defined as follows:

“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).

[12]It is trite that the applicant bears the onus to show her *locus standi*, in this instance being an onus to show that she was, at the time of the institution of the application, a “person in charge” as defined in PIE as she could not have been the “owner” of the property as the property is not yet registered in her name. The Court *a quo* also rightly adjudicated this matter on this basis. See the judgment of the Court *a quo*, p. 53.

[13]Insofar as the respondent relies on consent of the owner of the property, being a different owner than the applicant, for his lawful occupation of the property (in this instance in the form of the alleged Rental Agreement with Mr. Tshikare), there appears to be contradictory views as to whether the respondent bears the onus to prove the validity of this consent (See **BARNETT**

AND OTHERS v MINISTER OF LAND AFFAIRS AND OTHERS 2007(6) SA 313 (SCA) at 324 D to E) or whether the respondent bears a mere evidential onus (“weerleggingslas”) to the effect that the applicant also bears the onus to prove the absence of any valid consent (See **BARNETT AND OTHERS v MINISTER OF LAND AFFAIRS AND OTHERS**, *supra*, at 324 G). I am however willing to adjudicate this appeal on the favourable basis for the respondent to the effect that the applicant bears the onus to also prove that respondent is in unlawful occupation of the property. See **PORT ELIZABETH MUNICIPALITY v VARIOUS OCCUPIERS 2005(1) SA 217 (CC)** at 235 G.

[14] It is now necessary to turn to the history of the ownership of and entitlement to the current property. It should be accepted that this property forms part of land formerly administered by the South African Native Trust, which came to be called the South African Development Trust or SADT. See **The State as Trustee of Land**, T.W. Bennett and C.H. Powell, **South African Journal on Human Rights**, 2000, vol. 16, at p. 601 to 603. On 30 June 1991 and by means of the Abolition of Racially Based Land Measures Act, No. 108 of 1991, and more

specifically section 11(1)(a) thereof, the SADT was dismantled in that the Development Trust and Land Act, 18 of 1936, was repealed. On 31 March 1992, by means of Proclamation No. R.28 of 1992, published in Regulation Gazette No. 4852, Government Gazette No. 13906, all land within the self-governing territories was transferred to the governments of the territories concerned and remaining land in South Africa was placed under the control of the Minister of Regional and Land Affairs. Section 1(d) of the said proclamation reads as follows:

“(d) I hereby transfer with effect from 1 April 1992 –

- (i) all land, ... vested in, or acquired by, the South African Development Trust (hereinafter referred to as the Trust) ... and situate in any area (hereinafter referred to as self-governing territory) declared under the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), to be a self-governing territory within the Republic, subject to any existing right, charge or obligation on or over sight land; and
 - (ii) any moveable assets of the Trust used exclusively in connection with the development of such land,
- to the Government of the self-governing territory concerned.”

[15] In view of the aforesaid proclamation, it must be accepted that the property and all rights thereto, then vested in the (then) Bophuthatswana Government. This is in actual fact also the respondent's case, considering that he bases his consent to occupy the property on a Certificate of Occupation issued to Mr. Tshikare by the Bophuthatswana Government on 23 February 1994. Moreover, it will be evident from the further developments that I will deal with hereunder, that it must be accepted that as a result of the aforesaid proclamation, the Bophuthatswana Housing Corporation became vested with the rights to this property in terms of the Bophuthatswana Housing Corporation Act, Act 24 of 1982.

[16] With effect from 27 April 1994, being the date of commencement of the interim Constitution of the Republic of South Africa, Act 200 of 1993, the former homelands were abolished and provincial boundaries were redrawn. Land that had been situated in the homelands and held by the heads of the homelands as trustees then reverted to the President of South Africa. The Self-Governing Territories Constitution Act, 1971, which was referred to in the aforesaid Proclamation R28 of 1992, was therefore also specifically repealed in terms of

schedule 7 to the interim Constitution, read with section 230(1) thereof.

[17]Section 229 of the interim Constitution provided as follows:

“Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.”

Subsequent to the commencement of the interim Constitution, the North-West Housing Corporation Amendment Act, 9 of 1994, commenced on 2 September 1994. In terms of this Amendment Act, the name of the Bophuthatswana Housing Corporation Act (“the principal Act”) was changed to the North-West Housing Corporation Act, 1982, in addition to the further amendments set out in the aforesaid Amendment Act. From a reading of this Amendment Act, read with the the principal Act, it is evident that the rights to the current property which previously vested in the Bophuthatswana Government and the Bophuthatswana Housing Corporation, now vested in the

province of North-West and more specifically in the North-West Housing Corporation. Section 20(1)(f) of the Act, as amended, specifically provides as follows with regards to the North-West Housing Corporation:

“(f) In pursuance of this object, to provide accommodation housing, to sell or lease out any houses, buildings and land of the Corporation, and to manage, maintain and exercise final control over any form of dwelling owned and utilised by the Corporation for the purpose of providing shelter, accommodation or housing.”

[18]Before I deal with the further history of the property, it is essential to point out that it is evident from the Certificate of Occupation issued by the Bophuthatswana Government to Mr. Tshikare, read with his application for allotment of a letting unit for residential purposes, that both the application and the certificate as such were subject “to the terms and conditions set out in Proclamation No. R293 of 1962”. It is furthermore evident from both the aforesaid documents that occupation of the property is for residential purposes. I will return to this aspect later.

[19]In terms of section 235(8)(a) of the interim Constitution the President assigned the aforesaid Proclamation, R.293 of 1962, to the North-West by means of an assignment published in Government Gazette 15813 on 17 June 1994. The relevant part of the assignment provided as follows:

“I hereby –

- (a) assign the administration of the laws specified in the schedule, excluding those provisions of the said laws which fall outside the functional areas specified in schedule 6 to the Constitution or which relate to policing matters referred to in section 235(b) or to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution, to a competent authority within the jurisdiction of the government of the province of the North-West designated in respect of each such law by the Premier of that province ...”

The schedule to the proclamation indicates that the whole proclamation was assigned.

[20]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.

[21] 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.

[22] 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.

[23]Considering that the rights that vested in the North-West Housing Corporation in terms of the amended section 20 of the North-West Housing Corporation Amendment Act, the North-West Housing Corporation was, subsequent to the cancellation of the Certificate of Occupation, 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". That such an agreement was in fact concluded, is confirmed by the payment of R10 000.00, in terms thereof, proof of which is attached to the founding affidavit as annexure "B", read with the statement of account received by the Court *a quo* as Exhibit B, reflected on page 47 of the record. 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.

[24]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 an unlawful 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.

[25]The respondent has occupied the property in question for more than six months since the time when the proceedings were initiated by the applicant. In terms of section 4(7) of PIE a Court may then 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 those referred to in section 4(7). It is evident from the papers that the respondent is a teacher and can afford to arrange alternative accommodation for himself and his dependants. See Founding Affidavit, p. 10, par. 8, read with Answering Affidavit, p. 23, par. 8. In these circumstances and in the absence of any allegations from any of the parties to the contrary, I am of the opinion that it was in fact just and equitable for the Court *a quo* to have granted an order of eviction.

[26]There is consequently no merit in the appeal.

[27]With regard to costs, there is no reason why the costs should

not follow the outcome of the appeal.

[28]The only remaining issue is that from a practical point of view, the date which the Court *a quo* determined as the date on which the respondent had to vacate the property, will have to be re-determined in view of the lapse of time as a result of the appeal proceedings. Considering the date on which the Court *a quo*'s judgment was delivered and the date she ordered the respondent to have vacated the property, it is clear that she granted the respondent a couple of days short of two months to have vacated the property. Considering all the relevant factors in this instance, including the period the respondent and his wife/family have resided in the property, I also consider it just and equitable to grant the respondent approximately two months to vacate the property.

[29]Consequently the following order is made:

29.1 The appeal is dismissed, with costs.

29.2 The order of the Court *a quo* is varied with regard to the date stated therein to read as follows:

“Khoete Churchill Khoete and all other persons in possession of the property situated at 1849 Unit 1, Selosesha, who hold possession through or under Koete Churchill Khoete are ordered to vacate the said property by not later than Friday, 8 January 2010.”

C. VAN ZYL, J

I concur.

B.C. MOCUMIE, J

On behalf of appellant:

Mr. M. Litheko
On instructions of:
Litheko Motsoeneng Inc.
c/o Majola Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv. J.M.C. Johnson
On instructions of:
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