FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A77/2009

In the case between:

LEANA STEENKAMP **Appellant**

and

SIMANGA WILSON STUURMAN **1st Respondent**
MARGARET NODA STUURMAN **2nd Respondent**

CORAM: EBRHAHIM *et* MOCUMIE, JJ

HEARD ON: 23 NOVEMBER 2009

JUDGEMENT: MOCUMIE, J

DELIVERED ON: 27 NOVEMBER 2009

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[1] This an appeal against the judgment of the Magistrate of Bloemfontein in which she made the following order against the appellant (who was the respondent in the court a quo) on 12 December 2008:

> *"1. Evicting the Respondent 353 Dr Belcher street, Heidedal, BLOEMFONTEIN, Free State Province in terms of section 4(1) of Act 19 of 1998 9301 is in unlawful occupation of the said property.*

> 2. *The Respondent shall vacate the property on or before 22 January 2009 at 17h00.*
> 3. *Should the respondent fail to comply with prayer 2,the Sheriff is authorized and ordered to remove/evict the respondent and any of the occupants forthwith.*
> 4. *Respondent to pay the cost of this application."*

[2] In her reasons for the above order supplied in terms of Rule 51(1) of the Magistrates Court Rules on 2 February 2009 the Magistrate found that

> "…the respondent did not discharge the onus of proving 'relevant circumstances' [set out in s4(7) of PIE] to show why the owner should not be granted an order of eviction. Therefore, prima facie evidence adduced on behalf of the applicants (annexures B and C) became conclusive evidence that the applicants are the legal owners of the property. No convincing evidence was adduced on behalf of the respondent to proof the contrary. Only allegations of fraud were made by the respondent, but this court is not entitled to cancel the Deed of Transfer issued by the Deeds Office. Consequently the respondent is correct in lodging an application in the High court for setting aside the Deed of Transfer, if so proved."

[3] In her written Notice of Appeal the following three grounds are advanced by the appellant:

> *"The Honourable Magistrate erred in fact and/or Law by:*
>
> *1.1 Failing to apply her mind and to find that the respondents' answering affidavit raised new matters which entitled the appellant to replicate;*
>
> *1.2 Refusing to accept and or/to consider the appellant's replication;;*
>
> *1.3 Failing to apply her mind to the facts on which the alleged or purported ownership was based;*
>
> *1.4 Failing to apply her mind and to consider the legal position with regard to the appellant's option and/or pre-emptive right;*
>
> *1.5 Considering irrelevant and failing to consider relevant facts*
>
> *2. Further, the Honourable Magistrate erred in law and fact by failing to apply her mind and to consider the summons under case No 687/08 challenging the validity of the purported Title Deed after requesting and accepting the said summons.*
>
> *3. All in all, the Honourable Magistrate erred both in law and fact by upholding the respondents' application eviction with costs."*

[4] The short history of this case is the following. The respondents allege that they bought the property in dispute from Mr Petrus Matela Shata who has since passed away on 12 May 2006 for R40 000, 00.During 2008 they became aware that the appellant and others were occupying the property. The respondent approached the court for an eviction order which application was dismissed on 5 October 2006 on the basis that the property was never registered in Mr Shata's names after he bought it from a Mrs Maria Fischer who had also passed away.

[5] On advice of the municipality the respondents approached Mr Fisher who had been married to Mrs Fisher in her life and knew about the sale of the said property. The respondents and Mr Fischer concluded another deed of sale and transferred the property to the respondents. The property has since 24 April 2008 been registered in the respondents' names as reflected in the Title Deed attached as annexure C to the respondents' affidavit. On 10 October 2006 the property was registered in their names. The

appellants have since demand refused to vacate the premises and claimed to have leased the property from Mr Shata with the first option to buy.

[6] In her opposing papers the appellant states that she entered into a lease agreement in respect of the same property with Mr and Mrs Shata in 2006. The lease was concluded on the basis of pre-emptive rights whereby the owner agreed to give her first option should they decide to sell. This lease agreement is not attached to the papers before us.

[7] The appellant contends that in any event Mr Fischer did not have the authority to sell the property as he was divorced from the said Mrs Fischer in 1994, almost 13 years ago. They allege that the respondent bought the property fraudulently whilst knowing that the property was on lease.

[8] The appellant alleges that when the respondents replied they raised new issues which prompted her to seek leave to file a replicating affidavit. It is not in dispute that the appellant approached the court on the day of the hearing, 14

November 2008, a month after the respondents had filed their replying affidavit, with an application from the bar for an admission of a replicating affidavit. As conceded by the appellant the indulgence was sought from the bar and was not substantive. The respondents objected to the application and the application was dismissed. In other words the fourth affidavit was not admitted.

[9] It is trite law that all the necessary facts upon which a litigant relies must appear in his or her affidavit. What authors **Van Winsen et al The Civil Practice of the Supreme Court of South Africa, 54** refer to as "an affidavit of merit." He or she will as a general rule not be allowed to supplement the affidavit by adducing supporting facts in a later affidavit. See **Ferreira v the Premier, Free State** 2000 (1) SA 241 (O) at 254A. The admission of any further affidavit(s) is clearly an indulgence resting on the discretion of the court faced with such an application. Such discretion can only be exercised when a proper case for condonation setting out sufficient facts and information why the affidavit should be admitted at such a late stage is made out. Taking into

account of course the prejudice that may be caused to the other party. I can find no fault in the court a quo's approach and decision in dismissing such application. See Rule 25(1); Rule 25(2); Rule 26 and 27 of the High Court Rules of Practice; **Levine v Rix** 1926 CPD 242; **Dalhouzie v Bruwer** 1970 (4) SA 566 (C); **Broadley No v Stevenson** 1973 (1) SA 585 (R).

[10] In terms of s4(7) of PIE read with s26(3) of the Constitution of the Republic of South Africa 108 of 1996 ,it is not necessary for an applicant, in proceedings to evict an unlawful occupier from such applicant's property, to place more before the court by way of evidence than that such applicant is the owner of the property in question and that the respondent is in unlawful occupation thereof. It is then up to the occupier to disclose to the court relevant circumstances to show why the owner should not be granted an order for the eviction of the occupier. See **FHP Management (Pty)Ltd v Theron No and Another** 2004 (3) SA 393 (C) at 401G-H with reference to **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003 (1) SA 113(SCA);

Silberberg and Schoeman's The Law of Property, 250-255.

[11] What is immediately very clear is that from the date of registration of the property into the names of the respondents they are the owners of the said property. Anyone who was in occupation thereafter was so unlawfully. Those are the facts which the magistrate was faced with and had to bring a decision upon. Nothing else. That is what this Court of appeal must also confine itself to. The magistrate cannot be faulted in any manner in her approach and her application of the law in terms of PIE.

[12] Having come to this conclusion I find it unnecessary to deal with other arguments which the appellant raised.

[13] A fundamental issue is that the respondents have title to the property because it remains registered in their names. See section 16 of the Deeds Registries Act, 47 of 1937; **<u>Ex parte Menzies et Uxor</u>** 1993(3) SA 799(C) at 803-806; **Silberberg et al** *supra*. In any event in our law there's an

assumption that the property registered in the Deeds register is legal until the contrary is proven. The appellant's case as presented is one which cannot be entertained on appeal. Correctly so as accepted by the magistrate and the appellant the right approach to adopt is to approach the High Court to address the issue of the validity of the deed of sale. The appeal must therefore fail.

[14] **In the circumstances I make the following order:**

ORDER

The appeal is dismissed with costs.

B. C. MOCUMIE, J

I agree.

S. EBRAHIM, J