

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 128/2007

In matter between:

TSHEGOFATSO BOTSALA MOILOA 1st Applicant
OTSHEGO TSHIAMO MOILOA 2nd Applicant

and

PASCAL DICHABE NONAMODI NYOKONG 1st Respondent

JEANETTE GAETLALE NYOKONG 2nd Respondent

MANGAUNG LOCAL MUNICIPALITY 3rd Respondent

HEARD ON: 24 May 2007

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 30 May 2007

[1] This is an application for the eviction of the first and second respondents. The applicants seek the following order:

“2.1 that First and Second Respondent be evicted from the premises known as Erf 1785, Selosesha, Unit 1, district THABA NCHU, Province Free State, in extent 1057 square meters and that First and Second Respondents be ordered to vacate the aforementioned property within one (1) month after date of this order, by failure of which the sheriff of Thaba Nchu be authorised and ordered to evict First and Second Respondents immediately from the aforementioned premises

2.2 that First and Second Respondents be ordered to pay the costs of this application.”

The first and second respondents are married to each other. The third respondent is the Mangaung Local Municipality. A copy of the notice of motion was served on all three respondents.

[2] It is common cause that;

2.1 the first and second applicants are the lawful owners of the premises known as Erf 1785 Selosesha Unit 1, district Thaba Nchu, Free State Province. (the

property).

2.2 that the first and second respondents are occupying the said property since March 2001 pursuant to a verbal lease agreement that the respondents shall pay R400.00 per month rent and also be responsible for the water, electricity and rates levy on the property.

2.3 that during June 2004 first and second applicants instituted an eviction action against the first and second respondents claiming their eviction from the property and for payment of R12 791.29 in respect of alleged arrear rental and outstanding water and rates accounts.

2.4 that the first and second respondents are an educator and a nursing sister respectively.

2.5 that first and second respondents can afford alternative accommodation.

[3] The action to recover the arrear rental and service charges was postponed sine die on 2 February 2005 at the Thaba Nchu Magistrate's Court (case number 697/2004). The

eviction application was removed from the roll in the same court on 10 February 2005 (case no 958/2004). The parties decided to endeavour to settle these matters out of court.

[4] On 13 April 2005 the respondents' attorney wrote to the applicants' attorney that:

“We refer to the above and to the discussion the writer hereof had with you on the 7th April 2005 and we attach hereto a copy of the state guarantee in favour of the prospective purchasers.

The attached state guarantee expired in December 2004 as the purchasers did not proceed to obtain a home loan in the light of the pending action between the parties. It can still be applied at any time if it is based the agreed purchase price of R150 000.00.

We shall appreciate to hear from yourselves regarding the above matter.”

[5] On 11 May 2005 the applicants' attorney responded as follows:

“With reference to the above as well as your settlement proposal.

We confirm that we have consulted with our clients and is the offer accepted.

We (condition) that the offer is accepted on condition that:

1. Your client will stand in for the rates and taxes as from date of occupation; and
2. That the purchase agreement between our client and the third party regarding the house () duly cancelled.

We trust you will find the above in order and will revert to you in due course.”

[6] On 29 June 2005 the respondents’ attorney wrote to the applicants’ attorney and sent them a signed deed of sale and stated that:

“With further reference to the above matter we send under cover hereof for your attention a contract of sale duly signed by the purchasers.

We shall appreciate it if you would peruse same and, if so instructed, have it signed by the sellers and proceed with the registration process.

The purchasers’ application for a home loan has been approved and details

thereof will be furnished once the sellers have instructed you to proceed in accordance with the attached contract of sale.”

[7] The response to that letter was on 6 July 2005 to the following effect:

“We refer to the above mentioned matter as well as your letter dated the 29th of June 2005.

We have instructions from the sellers not to proceed with the Agreement of Sale regarding your client, due to the fact that our client is still awaiting (furthermore) offers regarding the property.

We will obtain (furthermore) instructions from our client in due course and will keep you posted.”

[8] I deliberately don't deal with the issues prior to February 2005 because it is clear from the letters quoted above that the parties at least between 13 April 2005 and 6 July 2005 wanted to settle the matter amicably. It is clear that the respondents made an offer to purchase the property and that their offer was not accepted. There is no further written

communication from the applicants' attorney to the respondents' attorney in relation to this matter. There is also no written demand that the respondents should vacate the premises.

[9] The applicants aver that the respondents are unlawful occupiers of their property. The respondents on the other hand aver that they had tacit consent to occupy the property at the time of the launching of these proceedings.

[10] Section one of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**, No. 19 of 1998 (PIE Act) defines an unlawful occupier as follows:

“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).”

- [11] The applicants must therefore prove that at the time of launching these proceedings the respondents occupied the property unlawfully. **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003 (1) SA 113 (SCA) at 120 D –E. If the applicants as owners succeed in doing that it would then be up to the unlawful occupier to disclose relevant factors why the Court should not exercise its discretion in favour of the applicant and grant an eviction order. **FHP Management (Pty) Ltd v Theron NO and Another** 2004 (3) SA 392 (C).
- [12] In applications where there are factual disputes, like in this matter, it is trite that a final order, as sought in this matter, may be granted if those facts averred in the applicants' affidavits which have been admitted by the respondents together with the facts alledged by the respondents together justify such an order. If however the respondents deny a fact that denial should not be far fetched or clearly untenable. Vide **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) 623 (AD) at 634 H – 635 C.

[13] It is clear that the lease agreement between the parties came to an end in November 2003. Whether the respondents stopped paying rent during 2002 or 2003 is irrelevant to determine this dispute. The applicants can always institute action for the recovery of their arrear rent money. What is clear is that during 2004 the applicants showed unequivocally that they do not want the respondents on the property. They went to the magistrate's court Thaba Nchu to seek an eviction order. They also claimed arrear rental and service charges. As stated above the one matter was removed from the roll and the other was postponed, by agreement, sine die.

[14] The parties' legal representatives started negotiations in order to settle the matter. From the missives by the attorneys it is clear that the main offer on the table was that respondents buy the house for R150 000.00. Whilst these negotiations took place and clearly driven by the respondents nothing was said about the respondents

occupation of the house. In fact the respondents were made to believe that their offer has been accepted. The letters clearly support the respondent's contention that they may remain in the house; buy the house at R150 000.00 but that they would be liable to pay all the arrear rates and taxes in order to effect transfer.

- [15] The applicant's contention that their mother does not recall ever instructing Mr CJ Dippennar of Honey Attorneys to conclude an agreement of sale with First Respondent is simple not true and very hollow. It is clear from the letters that Dippenaar indicated that he had the necessary instructions and where necessary that he would revert to his clients. In fact on the applicants own case they concede that there were negotiations to sell the property to the respondents. The first applicant states in her replying affidavit (paragraph 23.4).

“As far as our mother can recall the attempts to sell the property to First Respondent was (sic) done out of pure frustration since

she had so much difficulty in evicting First and Second Respondents from our property.”

Whatever drove her or whatever her reasons or motives were is irrelevant. The fact of the matter is that there were attempts to sell the property to the respondents.

[16] When the applicants rejected the respondents’ offer to purchase they deliberately attempted to leave the back door open. Instead of saying unequivocally that the respondents offer is rejected and that the negotiations in relation thereto has deadlocked or will not be proceeded with they decided to inform the respondents that they “will obtain furthermore (sic) instructions from our client in due course and will keep you posted.” This letter was written on 6 July 2005. They knew that the respondents were still staying on the property. They did nothing between then and when they served these papers on the respondents on 23 January 2007.

[17] The respondents deny that the applicants’ mother requested

them to vacate the premises during May 2005 and June 2005. This denial is plausible, because the respondents' attorney sent a signed offer to purchase on 29 June 2005 to the applicants' attorney. On 6 July 2005 the applicants' attorney rejected the offer but did not request the respondents to vacate the property.

[18] It is clear from these facts that the respondents defence that the applicants at least through their attorney showed their acquiescence with the state of affairs. Moreover since July 2005 to January 2007 the applicants have done nothing to show their disapproval. One would have expected some express act to show that the negotiations have finally failed and that the respondents must vacate the property. Acquiescence or tacit consent can only be destroyed by an express act. It is that express act after 6 July 2005 that is missing in the applicants' case. The applicants can therefore not succeed.

[19] I am constrained to add the following. This is yet another

case which illustrates how difficult, frustrating, time consuming and costly it can become for the lawful owner of the property to evict a person in terms of PIE. The situation in this matter was compounded by the legal representatives of the applicants. Firstly, by not putting a proper application before the magistrate at Thaba Nchu and having the matter removed from the roll. Secondly, by failing to take obvious steps and thereby opening the door for the respondents to take technical but legal points which could have been avoided had the applicants' legal representatives been more vigilant. On the other hand one must emphasise, again, that PIE is not a way to expropriate the landowner and that it cannot and should not be used to expropriate someone indirectly. **Wormald NO and Others v Kambule** 2006 (3) SA 562 at 569 F. PIE is also not a way of forcing a landowner to sell his/her property to the occupier. The owner of land can lawfully refuse to sell his/her land to the occupier. Worst still when the occupier wants the property to be sold on his terms. I can only express the hope that the applicants in pursuing this matter will make sure that they

follow the law (substantive and procedural).

[20] In relation to the cost in this matter, the applicants instituted eviction proceedings in the magistrates' court. Those proceedings were removed from the roll. The applicants, wrongly, thought that their application was dismissed. They suspected, without any course or substance, that the magistrate colluded with the respondents, whereas they did not have their house in order. They lodged an application for the magistrate's recusal and later withdrew the application. They argue that the reason why they launched the proceedings in this court is because of their unsubstantiated fear of bias. There are three magistrates at Thaba Nchu. One of the two others could have dealt with this case. If they feared bias from all three, they could have requested that a magistrate from an adjacent district preside over this matter. They dragged the respondents to this court based on this spurious and unsubstantiated allegation against the magistrate. I considered making a punitive cost order to show my displeasure but due to the facts and circumstances

of this case I decided against it. The respondents as successful parties, are entitled to costs on this court's scale.

[21] I accordingly make the following order:

- (a) The application is dismissed.**
- (b) The applicants are ordered to pay the respondent's costs jointly and severally, the one paying the other to be absolved.**

C.J. MUSI, J

On behalf of the Applicants: Adv. H.J. Cilliers
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Mr. M.S. Litheko
Instructed by:
Majola Attorneys
BLOEMFONTEIN

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