

REPORTABLE



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A325/06

In the matter between:

GEORGE ALLAN GUSTAV KRONEBERG

Appellant

and

ADELAIDE PATRICIA KRONEBERG

Respondent

JUDGMENT : 22 DECEMBER 2006

BOZALEK, J

- 1] This is an appeal against the decision of the magistrate of Wellington dismissing the appellant's application for an order evicting the respondent from certain immovable property ("the property") owned by the appellant being a residential dwelling situated at 6 Kroneberg Street, Wellington.

2] The background facts are briefly as follows. The appellant and respondent were previously married to each other but were divorced by order of the Southern Divorce Court on 14 November 2002. A settlement agreement concluded by the parties was made an order of court at the time that the divorce order was granted.

3] The following provisions of the agreement are relevant to the present dispute, dealing as they do with ownership and occupation of the property:

"3. Verdeling van die Boedel:

3.1 Onroerende Eiendom:

Die onroerende eiendom geleë te Kronebergstr 6, Wellington sal die uitsluitlike eiendom van die Eiser word onderhewig aan die volgende voorwaardes:

- a) Die Verweerderes mag in die woning aanbly totdat die minderjarige kind die ouderdom van 21 jaar bereik het;*
- b) Daarna sal die Eiser aan die Verweerderes billike huisvesting elders of na die Eiser se keuse 'n enkelwoonstel wat die Eiser op die perseel sal oprig, verskaf waarin sy mag woon tot haar dood of hertroue, welke gebeurtenis ookal eerste plaasvind."*

4] Pursuant to this agreement the respondent continued to reside on the property, which was the former matrimonial home, and continues to do so. On 11 April 2005 the condition in clause 3.1(a) was fulfilled when

the minor child born of the marriage attained the age of majority. The appellant duly called upon the respondent to vacate the premises. In terms of clause 3.1(b) he chose to provide the respondent with accommodation in the form of a leased apartment situated in Park Street, Wellington. The respondent refused to vacate the property, however, and, in July 2005, the appellant launched proceedings against the respondent in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE). The application consisted of a founding affidavit by the appellant to which was annexed various documents. No appearance to defend was filed, but when the matter came before court the respondent appeared in person to oppose the relief sought. The hearing took the form of argument delivered by the appellant's legal representative whereupon the respondent testified and was cross-examined. Thereafter the parties presented further argument and judgment was reserved.

- 5] On 11 November 2005 the court handed down judgment dismissing the appellant's application for the eviction of the respondent. The principal reason for the decision was the magistrate's view that clause 3.1(b) of the settlement agreement was *contra bonos mores* in that it vested in the appellant complete power to determine what was reasonable accommodation or not. The magistrate purported to make two further orders: firstly, referring the matter to the High Court for an

interpretation of the relevant clause in the divorce order and, secondly, ordering that the respondent be afforded legal aid in order to secure legal representation before this court.

6] Unfortunately nothing appeared to come of the latter directive and the respondent only secured legal representation when, at this court's request, the Cape Bar Council appointed Mr Budlender to appear on her behalf in terms of the Cape Bar Council's *pro bono* scheme. We are indebted to Mr Budlender for stepping into the breach.

7] As far as the first additional order purportedly made by the magistrate is concerned, there was no basis in law upon which he could refer the matter to the High Court for an interpretation of the clause in the divorce order. His duty was to determine the matter as best he could and then leave it to the parties, if they saw fit, to exercise their right of appeal against his decision.

8] The magistrate clearly erred, furthermore, in finding that clause 3.1(b) permitted the appellant, in his sole discretion, to determine what was or was not "*billike huisvesting elders*" as set out in the said clause. The phrase "*of na die Eiser se keuse*" clearly refers to his right to provide accommodation for the respondent either on the property or elsewhere. It is quite clear, moreover, that the reasonableness of the

accommodation to be provided elsewhere is to be objectively determined.

9] The appellant sought the respondent's ejectment from the property by means of an application in terms of s 4(2) of PIE. In *Wormald NO & Others v Kambule* 2006(3) SA 562 (SCA) at 568E - G it was held that in order to succeed with such an application, the applicant must show that:

- a) he/she owns the land in respect of which the eviction of the respondent is sought;
- b) the respondent is in unlawful possession of that particular land;
- c) the applicant has complied with all the procedural provisions required in terms of PIE; and
- d) that consequently, upon a consideration of all the relevant circumstances, an eviction order is "*just and equitable*".

10] It was held further that an owner is in law entitled to the possession of his/her property and to an ejectment order against the person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or some or other legal basis. In this regard see also *Brisley v Drotsky* 2002(4) SA 1 (SCA) at page 22B - D.

11] In the present matter it is undisputed that the appellant is the owner of the property in question and that he has complied with all the procedural provisions required in terms of PIE. What is in dispute is whether the respondent is in unlawful possession of the particular property and, even if so, whether an eviction order is “*just and equitable*”.

12] In my view the principal issue in this matter concerns the correct interpretation of clause 3.1(b) of the consent paper as incorporated in the divorce order. Mr Möller, who appeared on behalf of the appellant, contended that the respondent was entitled to occupation only in terms of clause 3.1(a) of the consent paper and that a resolute condition terminating her right of occupation was fulfilled when the minor child attained the age of majority. In these circumstances, he submitted, the respondent’s continued occupation of the premises was no longer lawful. His argument continued further, that, upon termination of her right of occupation as aforesaid, the respondent acquired the right to accommodation to be provided by the appellant under different conditions, as described in clause 3.1(b). In the event of the respondent contending that the alternative accommodation tendered to her did not comply with the requirements of clause 3.1(b), e.g. was not “reasonable” accommodation, her remedy was to approach the appropriate court for relief on the basis

of the appellant's alleged contempt of court or his failure to meet his obligations in terms of the court order. As it was put by Mr Möller, the magistrate had misdirected himself in not distinguishing between the termination of one right and the enforcement of a different right under different circumstances and subject to other conditions.

13] I do not agree with this disjunctive interpretation of clause 3.1.

Rather the clause requires to be read as a whole and to be interpreted in the light of the nature, purpose and content of the settlement agreement which the parties concluded prior to their divorce¹. The clause stipulates that the appellant must provide the respondent with suitable accommodation from the date of divorce until her re-marriage or death. The form of this accommodation for the first few years post-divorce was agreed upon. In the event that, thereafter, the appellant chose not to accommodate the respondent in an apartment to be built on the grounds of the property, his obligation was to provide her with reasonable accommodation elsewhere. Given, *inter alia*, the fundamental importance of the right to housing and shelter², I can see no warrant for the narrow interpretation for which the appellant contends, namely that, even if he failed to provide the respondent with reasonable accommodation elsewhere upon their child reaching the age of majority, nonetheless her occupation of the

1 See *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979(1) SA 195 (A) at 202C.

2 See s 26 of the Constitution of the Republic of South Africa Act 108 of 1996 and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 CC.

property would immediately become unlawful leaving her with the remedy of suing him for appropriate relief. On such an interpretation the appellant could tender palpably unreasonable accommodation to the respondent (or none at all!) and then proceed to evict her from the property whilst awaiting her legal suit. There is nothing in the language of the clause to suggest that this was the common intention of the parties, quite the contrary.

14] Seen from a different perspective, the purpose and effect of clause 3.1 is to burden the appellant's ownership of the property by the imposition of two conditions, namely, the respondent's right to remain in occupation thereof until the child became a major and, thereafter, until the appellant provided her with accommodation in accordance with one of the two possible bases set out in the clause.

15] The clear implication hereof is that the respondent is entitled to remain in occupation of the property, notwithstanding the appellant's ownership, until both of these conditions have fallen away.

16] On this interpretation of the relevant clause, and given that the respondent disputed that she had been provided with reasonable accommodation elsewhere, she was entitled to remain in occupation of the property and raise as a defence to eviction proceedings that

she was a lawful occupier.

17] It follows that the second crucial issue in the PIE application was whether the housing or accommodation tendered by the appellant was reasonable and, as such, rendered the respondent's continued occupation of the premises unlawful. Unfortunately this particular issue received scant attention in the magistrate's court. In his founding affidavit the appellant describes the apartment as consisting of one bedroom, a lounge, kitchen and bathroom and being situated near the property occupied by the respondent. The appellant led no evidence at the hearing although his legal representative made submissions regarding the reasonableness of the alternative accommodation. These submissions were, however, generally limited to the argument that the apartment must be considered as reasonable accommodation since the appellant had, together with his second wife and their two minor children, previously occupied it for some time. Little more concerning the nature of the alternative accommodation tendered can be gleaned from the correspondence which was attached to the founding affidavit.

18] In her evidence the respondent also raised what I consider to be the irrelevant arguments and considerations as to why it would be unfair to require her to vacate the former matrimonial home and move into

the newly tendered accommodation. However, scattered amongst her evidence were concrete objections to the new accommodation which, taken separately or cumulatively, amounted to the contention that the accommodation was not reasonable given her needs and circumstances and the appellant's obligations towards her in terms of the consent paper. These obligations included the issue of the long-term security of the proposed accommodation arrangements. In this regard the respondent asked, rhetorically, who would meet the appellant's obligations under the lease agreement relating to the apartment if he were to suddenly pass away. No reply to this question was forthcoming from the appellant and nor were the terms of the lease ever disclosed.

19] Regarding the apartment itself the respondent complained that it was too small to accommodate all of her furniture, that she could not accommodate her children if they wished to stay with or visit her and that her grandchildren would not have adequate place to play if they visited her. In addition she complained that the apartment's lounge could only accommodate a couch, a chair and a cupboard, that the bathroom contained only a shower and not a bath, that she would be required to hang out her washing on the front stoep and, finally, that the apartment was situated alongside a shop.

20] Certainly as far as the respondent was concerned, in contrast to her

present accommodation in an eleven roomed house situated on a double plot, the accommodation being tendered was far from reasonable.

21] Given the broadness of the term “*billike huisvesting*”, it is obviously not a simple matter to define with some precision what such accommodation would constitute in the event that the appellant elected not to build an apartment on the site of the property. Clearly a range of factors will have to be taken into account including, but by no means limited to, what steps, if any, were taken or envisaged to secure the future provision of such alternative accommodation for the respondent, the appellant’s means, the standard of accommodation enjoyed by the respondent at the property and her reasonable needs as determined by her personal circumstances. A further factor of importance determining what constitutes “*reasonable accommodation*” would be the indication in the agreement itself that an apartment, built on the grounds of the property, was agreed upon by the parties as being sufficient and, by implication, reasonable accommodation.

22] It is conceivable that, leaving aside the question of the security of the arrangements, had proper attention been focussed upon the issue of whether the apartment in question constituted reasonable

accommodation, the magistrate may well have found in the appellant's favour. In my view, however, the issue was in effect not addressed by the appellant with the result that he failed to produce proof, on a balance of probabilities, that the accommodation which he was tendering was reasonable.

23] In accordance with the *maxim* that he who asserts must prove, the appellant clearly bore the *onus* of proof in relation to this issue³ and, having failed to discharge it, the eviction application was correctly dismissed since, in the absence of such proof, the respondent remains in lawful occupation of the property. It follows that it is unnecessary to consider the question, of whether it would be fair and equitable to order the respondent's eviction from the property.

24] I need hardly add that, should agreement continue to elude the parties on alternative accommodation arrangements for the respondent, it remains open to the appellant to bring a fresh application for the respondent's eviction from the property upon proof that he has tendered to the respondent the stipulated new accommodation on the property or reasonable accommodation elsewhere.

³ See also *The Law of Contract in South Africa*, RH Christie, Butterworths 5 Edition at page 140 where the learned author states as follows: "*A party claiming on a contract subject to a condition precedent must plead and prove the condition and its fulfilment. No doubt the same applies in the case of a resolutive condition, in the sense that a party whose claim depends upon the fulfilment...*"

25]In the result I find, albeit for different reasons, that the magistrate correctly dismissed the application for the respondent's eviction. I would, therefore, dismiss the appeal but, the respondent having been represented *pro bono*, make no order as to costs.

LJ BOZALEK, J

HLOPHE, JP

I agree and it is so ordered.

JM HLOPHE, JP