



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 048177/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

9 July 2024

DATE

SIGNATURE

In the matter between:

ESTATE LATE: MARGARET WOOD

Applicant

And

NADONIX (PTY) LTD

First Respondent

DEWALT RYAN

Second Respondent

DORIS RYAN

Third Respondent

OTHER OCCUPANTS OF PORTION

Fourth Respondent

MADIBENG LOCAL MUNICIPALITY

Fifth Respondent

JUDGMENT

MOGOTSI AJ

Introduction

1. The plaintiff seeks an order for the eviction of the respondents from Portion Bultfontein NR 475 J. Q. Meyerton ("the property"). The application was brought per the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹ (herein after referred to as "PIE"). The notice required in terms of section 4(2) of PIE was duly served.
2. The matter against the first respondent was postponed sine die. The second respondent appeared in person and had the proxy to appear on behalf of the third respondent. They oppose the relief claimed by the applicant, alleging that the applicant committed forgery and fraud at the time of the conclusion of the Agreement of Sale and that they have a lien over the property regarding certain improvements.

The legal principles

3. The grant or refusal of an application for eviction in terms of PIE (once the applicant's *locus standi* has been determined) is predicated on a threefold enquiry:
 - 3.1. First, it is determined whether the occupier has any extant right in law to occupy the property, that is, is the occupier an unlawful occupier or not. If he or she has such a right, the matter is finalised and the application must be refused.

¹ 19 of 1998.

- 3.2. Second, it is determined whether it is just and equitable that the occupier be evicted.
- 3.3. Third, and if it is held that it is just and equitable that the occupier be evicted, the terms and conditions of such eviction fall to be determined².

Locus standi

4. The onus to prove *locus standi* for the institution of these proceedings is on the applicants³.

5. Section 4(1) of PIE provides that:

"notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier". "Owner", insofar as is relevant, is defined in PIE as "the registered owner of land". "Person in charge", in turn, means "a person who has or at the relevant time had legal authority to permit a person to enter or reside upon the land in question".

6. According to Windeed Property Search, the property was registered in the names of the applicant and her erstwhile husband. After the demise of her husband, his

² *Transcend Residential Property Fund Ltd v Mati and Others* 2018 (4) SA 515 (WCC) at para 3.

³ see *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at para 10.

half-share was transferred to her. Therefore, the applicant is the registered owner of the property as contemplated in section 1 (the definitions section) of PIE and her *locus standi* is beyond question.

Unlawful occupation

7. Coupled with the first issue (as is clear from section 4(1)) is whether the respondents are in fact “unlawful occupiers” in terms of PIE, in other words, persons “*who occupy 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, ...*”

8. The Supreme Court of Appeal in *Wormald NO and others v Kambule*⁴, a matter involving eviction articulated at para [11] that:

“an owner is in law entitled to possession of his or her property and to an ejection order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis. *Brisley v Drotsky*⁵ In terms of s 26(3) of the Constitution, from which PIE partly derives (*Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*⁶ ... at 1229E ..), ‘no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances’. PIE, therefore, requires a party seeking to evict another from land to prove not only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the procedural provisions and that on a

⁴ 2005 (4) All SA 629 (SCA) at page 634.

⁵ 2002 (4) SA 1 (SCA).

⁶ 2001 (4) SA 1222 (SCA).

consideration of all the relevant circumstances (and, according to the Brisley case, to qualify as relevant the circumstances must be legally relevant), an eviction order is 'just and equitable'

9. On 30 March 2017, the applicant's husband, who is no more, and the erstwhile first respondent duly represented by the second respondent, concluded a written Sale of Agreement in which the latter purchased the property. The terms of the agreement were, inter alia, that the respondents should be given occupation of the property on 1 June 2017, subject to the respondent paying an occupational rental of R8 000,00 per month for the first six months and thereafter R10 000,00 per month which will increase annually by R1000,00. The parties further agreed that if the respondents fail to pay the purchase price and/or occupational rent and continue with such failure for seven days after written notice from the applicant, the latter may cancel the agreement without further notice and recover the damages.
10. It is common cause that respondents took occupation of the property on 1 June 2017 and have failed to pay the rental occupation. On 7 January 2022, the applicant served the respondents with a letter of demand allowing them to remedy to situation to no avail. The respondents, on the other hand, assert that the agreement was void *ab initio* because of fraud and forgery committed by the applicant relating to the Agreement of Sale.

11. In the circumstances, failure by the respondents to remedy the default after the applicant allowed them to comply with the terms of the Agreement of Sale and lawfully cancelled the said agreement as per the clause stated supra.
12. The respondent's assertions that the Agreement of Sale was void ab initio because of fraud and forgery committed by the applicant at the conclusion thereof imply that no agreement was ever entered into.
13. In the premises, I find that the respondents had no contractual right to occupy the property and were *ex-lege* unlawful occupiers.

Eviction

14. PIE enjoins the Court to order an eviction only if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances as contemplated in section 4(6) and (7), and section 6(1).
15. In terms of section 4(7) of PIE (which applies because the respondents have been in unlawful occupation for more than 6 months), the Court has to have regard to several factors including, but not limited to, whether the occupants include vulnerable categories of persons such as the elderly, children and female-headed households, the duration of occupation; and the availability of alternative accommodation by a municipality or other organ of State instances where occupiers can obtain accommodation for themselves.

16. Section 4(8) of PIE provides further that:

“if the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)”.

17. Although the Courts, in determining whether to grant an eviction order, must exercise discretion based on what is just and equitable, and although special consideration must be given to the rights and needs of vulnerable occupants, this cannot operate to deprive a private owner of its property arbitrarily or indefinitely. If it did, it would mean that occupants are recognised as having stronger title to the property, despite the unlawfulness of their conduct. An owner would in effect be deprived of his property by a disguised form of expropriation. As was highlighted in the case of *Mainik CC v Ntuli and others*⁷:

*“If the rental is not being paid, such ‘expropriation’ will also be without compensation. The result would be not a balance of the rights of the respective parties, but an annihilation of the owner’s rights*⁸*”.*

⁷ [2005] JOL 16307 (D).

⁸ Ibid at page 8.

18. The respondents gave scanty information relating to their background. The first and second respondents allege that they are pensioners reliant on Government Old Age Pension Grants. They do not provide any useful details of their health and their ability to rely on family and friends for assistance save to state that it will be difficult to leave the property they lived in for 7 years and that they have spent their entire savings on the property. They appear to have adult children who are no longer dependent on them and in my view, might not be rendered homeless should they be evicted.
19. According to the applicant, the respondents are generating income from the property by renting it out over the weekends and are proprietors of a nudist resort from which they generate a lucrative income. The respondents failed to gainsay these assertions in their answering affidavit and I have no reason to doubt the same. Consequently, I find that they might not be rendered homeless should they be evicted and have the means to find alternative accommodation.
20. The Supreme Court of Appeal held as follows in *Modderfontein Squatters, Greater Benoni CC v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the RSA v Modderklip Boerdery (Pty) Ltd*⁹:
- "Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law, while s 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. As appears from para 1.6.4 of the order, De Villiers J found that Modderklip*

⁹ 2004 (6) SA 40 (SCA).

was not treated equally because, as an individual, it has to bear the heavy burden, which rests on the State, to provide land to some 40,000 people. That this finding is correct cannot be doubted. Marais J, in the eviction case, said that the 'right' of access to adequate housing is not one enforceable at common law or in terms of the Constitution against an individual land owner and in no legislation has the State transferred this obligation to such owner¹⁰."

21. In the *City of Johannesburg v Changing Tides 74 (Pty) Ltd*¹¹ the court articulated as follows:

"The position is otherwise when the party seeking the eviction is a private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property to accommodate the immediate needs of the occupiers.¹²"

22. In the premises, I find that the procedural and substantive provisions of section 4 of PIE have been complied with.

¹⁰ Ibid at 57C-E.

¹¹ 2012 (6) SA 294 (SCA).

¹² Ibid at para 18.

Lien

23. Having found that the respondent's occupation of the property is unlawful, the issue of whether or not they have a retention lien over the property becomes academic. I shall however proceed to discuss the same because they are lay people and are unrepresented. The applicable legal principle pertaining to the lawfulness of the defendant's occupation of the property was succinctly summarized in *Beukes and Another*¹³ as follows:

"It is trite that a bona fide possessor who has preserved or made improvements to another's property at his or her expense has a right of retention against the property to secure compensation for his or her necessary and useful expenses. This is a real right and an absolute defence against eviction by the owner or any future owners of the property. The exceptions are where ownership is acquired through a sale in execution where the purchaser was unaware of the right of retention and the retentor, with full knowledge of the sale fails to inform the purchaser of this right and sales in insolvency.

*Where it is the previous owner of the property who has been enriched (as in this case the Visagies) at the expense of the lien holder it is to him that the lien holder should seek redress for purposes of a possible enrichment claim, but the right of retention can be held against the new owner (even though he or she has not been enriched) until the lien holder has been duly compensated. In *Pheiffer v Van Wyk and Others*, the SCA held:*

¹³ (CA&R 60/2018) [2020] ZANCHC (23 March 2020)

'A real lien (an enrichment lien) is afforded a person who has expended money or labour on another's property without any prior contractual relationship between the parties. The lien holder is entitled to retain possession until his enrichment claim has been met. It is an established principle of our law that the owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt.'

24. Given my earlier finding that the respondent's occupation of the property was *ex-lege* unlawful the issue of whether or not they were *mala or bona fide* occupiers is a *res ipsa loquitur*. Therefore, I find that the respondents, at the time the improvements were effected, were *mala fide* occupiers and did not have retention lien over the property.

Conclusion

25. In all of these circumstances, and having made a finding that the procedural and substantive provisions of section 4 of PIE have been complied with, and did not have a retention lien over the property, there is no reason why the eviction of the respondents should not be ordered.
25. Nevertheless, I intend to provide the respondents with more time to vacate than the property with the hope that the additional time will assist them in investigating the possibilities of other accommodations.

Costs

26. Because both the second and third respondents are pensioners and have a burden of finding alternative accommodation, this is not, in my view, an appropriate matter to make a costs order. Therefore, there is no order as to costs.

The following order is made:

2. An eviction order is granted against the second and third respondents, inclusive of other persons who occupy or hold the immovable property known as portion 84 of Bultfontein 475 JQ, (hereinafter referred to as "the property") under the respondents.
3. The second and third Respondents, and any other person who currently occupies or holds the property under the respondents, is ordered to vacate the property within 14 (fourteen) days from the date of this order.
4. The Sheriff of the High Court for the district in which the Property is situated, is hereby authorized to forthwith eject and remove the second and third respondents, and such other persons from the Property in the event of the respondents, and/or any other persons who currently occupy or hold the property under the respondents, fail to vacate the property as stipulated in paragraph 3 *supra*.


MOGOTSI PJM

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances:

Counsel for Applicant: CFJ BRANDT SC, D A DE KOCK instructed by Langenhoven

Pistorius Modihapula

Counsel for 2nd Respondent: In Person

Date heard: 31 May 2024

Date of Judgment: 9 July 2024