

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 2024-024491

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 17/9/2024

SIGNATURE

In the matter between:

SEPANKI JOHANNES PHETO

APPLICANT

And

LETSEPE MPHELA PHAHLANE

FIRST RESPONDENT

CINDY MAKWENA PHAHLANE

SECOND RESPONDENT

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

THIRD RESPONDENT

JUDGMENT

SCHEEPERS AJ

1. This is an application in terms of which the applicant seeks relief in the form of an eviction order together with certain ancillary relief. This application proceeds on the opposed roll after an initial urgent application was heard by Potterill J on 26 March 2024.

2. In terms of the order granted by Potterill J, it was ordered that the Notice of Motion stands as A Section 4 notice of the Prevention of illegal eviction and occupation of land act (PIE).¹
3. The matter then served before Gwala AJ, on the 8th of May 2024 where it was ordered that the third respondent file a report on the availability of alternative accommodation, and the matter was postponed for hearing to the 19th of August 2024.
4. The issues in this application are to a large extent, common cause. The applicant purchased the property occupied by the first and second respondent from the first respondent and, on 29 February 2024, became the owner thereof. In terms of the purchase agreement he became entitled to occupation on the date of registration.² The Second Respondent, who occupied the property with her children prior to the registration of transfer, remained in occupation of the property and still occupies the property. This seemingly as the result of a dispute between the first and second respondents, married to each, and their separation or divorce, and /or dispute relating to maintenance and / or a failure by the first respondent to provide alternative accommodation to the second respondent and the minor children.
5. Second respondent claims, *inter alia* as a result of the inability and or non-cooperation of the first respondent to contribute towards maintenance, that she and the minor children, would be left destitute and without accommodation, should an eviction order be granted.
6. The law is clear on the issue of the entitlement to an eviction order and in this regard there is no dispute that the applicant is entitled to occupation and use of the property in question. The second respondent has no right of occupation of the property.
7. It then follows that the applicant is entitled by law to an order of eviction, and

¹ Caselines 000-1 dated 28 March 2024

² Caselines 002-25 Clause 3 of the Offer to Purchase

subject to the consideration of all relevant circumstances, including those of the occupants, the availability of alternative accommodation, I have a discretion to delay the upon which the property should be vacated by the second respondent and her children.

8. In *City of Johannesburg v Changing Tides 74 Pt Ltd* 2012 (6) SA 294 (SCA) at paragraph it was stated:

"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 in order to accommodate the immediate needs of the occupiers."

9. In *Occupiers of Erven 87 & 88 Berea V Christiaan Frederick de Wet* N.O. [2017] ZACC 18, at Para 21, the court per Mojapelo AJ remarked as follows:

"...This legislation was enacted to give effect to section 26(3) of the Constitution." It reads thus "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

10. When considering all the circumstances it is apparent that there has been considerable delay with great detriment to the Applicant's right to use and utilise his property. This included considerable financial and emotional hardship.

11. In this eviction application there are two sets of competing rights. On the one hand that of the applicant and his wife, together with their minor children who are not able to live as a functioning family unit as a result of the continued occupation of the property by the Second Respondent. This ,despite the

applicant having to make monthly payments in respect of the mortgage bond that was registered to enable him to pay the purchase price for the property.

12. The situation faced by the Applicant is so dire that the applicant's family unit is broken up and some of the children resides with family members as a result of the non-availability of space in the temporary accommodation occupied by the applicant.
13. It is undisputed that the property was sold for R 3 3750 000-00 (Three Million Three Hundred and Seventy-Five Thousand Rand).
14. On the other hand is the rights of the Second Respondent and her minor children. She remained in occupation of the Applicant's property since February 2024 when the transfer of ownership was registered. The information disclosed by her under oath regarding her circumstances are scant and does little to set out circumstances that would enable a Court to exercise a discretion regarding the time to be afforded to vacate the property unlawfully occupied by her and her children. This is exacerbated by her continuation of her preferred life style in an expansive property, which on the facts, neither she, nor her husband (the first respondent) can afford.
15. No corroborated evidence of steps taken by the Second Respondent to seek relief relating to maintenance either in the form of a Rule 43 application of an application for Maintenance, in terms of the Maintenance Act has been placed before me. I had to solicit information during argument which offered little to no assistance on additional factors to be considered regarding the financial position of the second respondent and the children who occupy the property.
16. The Court is not confronted with a basic housing need or are dealing with parties that are indigent. Any assistance relating to emergency housing by the municipality would most certainly not meet the standard of the property currently occupied.
17. Although the Court has sympathy for the plight of the Second Respondent,

the factors disclosed to me , in particular the plight of the Applicant as the owner of the property weighs heavily in resolving his right to occupation of his property for his family as expeditiously as possible.

18. The court cannot in the exercise of its discretion apply principles that would amount to mundane sympathy and has to consider the objective facts when exercising its discretion.

19. During argument counsel on behalf of the second respondent was requested to indicate what steps have been taken by the second by the second respondent to obtain relief in the form of interim maintenance from the first respondent in order to address the plight experienced by the second respondent and minor children.

20. It was disclosed that no formal steps pertaining to the finalisation of it the divorce or interim maintenance have been taken despite the lapse of some five months since the urgent application served before Potterill J, and seemingly with the lack of spousal support being a problem as far back as 2019.

21. Although the situation faced by the second respondent is unfortunate , I cannot close my eyes to the plight of the applicant who pays for the property in question since registration after he purchased it from the first and the second respondent. Applicant is now frustrated in enjoying the fruits of the asset that he paid for, as a result of the second respondent's inability to vacate the property and the apparent failure by the first respondent to provide sufficient support and maintenance to the second respondent and their children.

22. As a result of the aforementioned having considered all the facts I can find no reason why the eviction order should not be granted.

23. Having requested counsel to address me on the position of the children and the potential impact of a move on the schooling of the children, it was submitted that there is a school holiday from the 21st to 28 September.

Having regard to the aforementioned factors and the fact that the least adverse impact on the minor children plays a role, I hold the view that a date during the September school holidays would constitute a fair and just date for the property to be vacated by the second respondent and her family.

24. Considering that 24 September 2024 is a public holiday and falls in the middle of the school holiday and having considered all the circumstances of both the owner and the occupants, I find that 24 September 2024, is the appropriate time for the property to be vacated, and if not vacated for the ejectment to follow by the Sheriff.

THE CLAIM FOR AN AUTOMATIC RENT INTERDICT AND ATTACHMENT

25. Applicant alleges in the founding affidavit that occupational rent is payable by the occupier in terms of Clause 3 of the Purchase agreement.

26. I do not agree with the interpretation afforded to the agreement by the Applicant and interpret the agreement relating to occupational rent only applicable if the occupation date agreed upon, did not coincide with the date of registration.

27. No occupation date other than upon date of registration of transfer was agreed and the reliance on this clause for a claim of occupational rent payable is misplaced.

28. There is no provision similar to that provided for in the Magistrate's Court for an automatic rent interdict in the High Court.

29. The relief sought in prayers 5 and 6 follow upon each other.

30. The relief in prayer 5 is framed as follows:

*"5. Declaring that the Applicant holds an automatic rental interdict regarding the movable property **contained in or situated at the property**, to the value of R 23 000,00;:*

31. Prayer 6 reads as follows:

6. Authorizing the relevant sheriff or his deputy to simultaneously attach and re- move the aforesaid movable property pending the finalization of the Applicant's intended. action against the First and Second Respondents for the recovery of the aforesaid sum of money (or the sum of money as may be due by then), which action shall be instituted within 20 (twenty) days of date hereof;

32. If prayer 5 cannot be granted, prayer 6 will similarly fall away. The relief in prayer 6 refers to the “aforementioned movable property”. The aforementioned movable property cannot only be the movable property being present on the occupied property.

33. In argument, Mr Elliot on behalf of the Applicant requested me to consider an order, authorising the attachment of the proceeds of the sale of the property , currently held by the transferring attorney.

34. This , in the light of the fact that a conditional undertaking was provided by Tim Boshoff, the transferring attorney , but subject to the following condition:

“1. We conditionally undertake to keep the seller balance proceeds in Trust pending further instruction from the seller.”³

35. This was not part of the relief sought in the notice of motion, and no such case is a case made out in the founding affidavit for such relief.

36. Relief as requested during argument is akin to a so-called Mareva- injunction and is aimed against the Second Respondent only. None of the requirements set out in *Knox D’Arcy v Jamieson* 1994(3) SA 348 at 371-372, have been met. This relief is a specific type of interlocutory application and amongst others requires evidence that assets will be disposed of with the intention to defeat a claim. It can not be granted as an afterthought or without the

³ Annexure “D” to the founding affidavit

requirements having been dealt with in the founding affidavit.

37. The relief, supported by the First Respondent in his confirmatory affidavit, did not contain the relief now requested by Mr. Elliot and would amount to an amendment of the relief that was initially sought in the Notice of Motion.

38. Although the Second respondent was in favour of such relief, she is not a party to the sale agreement and the party adversely affected by such relief would be the First Respondent.

39. Although the undertaking was provided subject to the condition, I cannot, absent consent by the first respondent, grant the relief in the form suggested during argument by Mr Elliott.

40. The relief sought in prayers 5 and 6 of the Notice of Motion is accordingly dismissed.

THE COSTS

41. I now proceed to deal with the issue of costs and the impact of the notice to abide that was filed by the first respondent.

42. Due to the undisputed facts placed before me that first respondent, as the party responsible for at least in the interim, maintenance of the second respondent and the minor children, the issue of who should pay the costs of the application, is in my view impacted in part, by the First Respondent's failure, to act diligently and provide at least interim maintenance and / or shelter, not only to the children, but also to the first respondent. The offer to let the children stay with him, is not sufficient having regard to the duty that rests upon him, within his means, to support his children and the second respondent.⁴

43. Although I have some sympathy for the position of the second respondent, the applicant was entitled to occupation of the property since the date of

⁴ At least pendente lite the finalisation of the divorce

registration in terms of the purchase agreement..

44. Both respondents failed to do so. First respondent by failing to comply with his contractual obligation, and second respondent in knowing that her right to reside on the property was dependant on first respondent's ownership of the property.
45. Having regard to the continued occupation unlawful occupation of the property after the registration of the property in the name of the applicant the costs should follow the result. In as far as the relief sought in prayer 5 and 6 is concerned, I believe that a cost order should not be made against the Applicant, as he remains substantially successful in the application.
46. The scale of costs sought in the Notice of Motion was on a scale as between attorney and client.
47. I was not referred to any clause in the purchase agreement dealing with the scale of costs in the event of a breach of the terms of the agreement and I could not find such a clause upon perusal. This would in any case only apply to a costs order against the first respondent as the seller based on the agreed scale of costs in the agreement.
48. I do however have a general discretion regarding the scale of costs. Having regard to the facts of this case, it would be manifestly unjust to leave the applicant further out of pocket as a result of the failure to receive occupation of the property and the lack of specific factors and details regarding the continued occupation of the property by the Second Respondent.
49. Tindall JA has dealt with the awarding of attorney and client costs in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* [1946 AD 597](#) as follows:

“[T]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a

particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

50. Having regard to the circumstances of this case and the amount of money that has been set aside dealing with occupational rent with the transferring attorneys, I proceeded to consider how the cost order should be enforced in line with an argument that was developed in Court during the hearing of the application, namely that the costs order, ought to be executed against the retained money, held by the transferring attorney.

51. I hold the view that having regard to the circumstances of this case and the discretion that I have pertaining to costs, that the first and second respondents are jointly and severally liable for the costs of the application on a scale as between attorney and client.

52. How the Applicant seeks to enforce and execute this costs order, having regard to the existing undertaking, is his decision.

ORDER:

1. The First and Second Respondents, and all those holding occupation of the property through them are forthwith evicted and ejected from 2021 Diana Street, Newmark Estate, Pretoria (Erf 1[...], N[...] Estate) ["the premises"].
2. It is ordered that the first and/or second respondent and all those who occupy the property through them shall vacate the property on or on or before 24 September at 17h00.
3. Should the first and / or second respondent and anyone who occupies through or on their behalf not vacate the property by 17h00 on the 24th of September 2024, the Sheriff and his lawful deputy are authorised and directed to take such steps as are necessary to evict the first and/or second respondent and all those who occupy through on their behalf without delay.

4. The first and second respondent respondents are ordered to pay, jointly and severally, the one to pay, the other to be absolved, the costs of the eviction application on a scale between attorney and client.
5. Should the Sheriff be required to take steps in paragraph 3 above, first and second respondents are ordered to pay, jointly and severally, the one to pay, the other to be absolved, the costs incurred in that regard on a scale between attorney and client.

G J SCHEEPERS
Acting Judge of the High Court
Gauteng Division, Pretoria.

HEARD ON: 20 AUGUST 2024

DELIVERED: 17 SEPTEMBER 2024

APPEARANCES:

FOR THE APPLLCANT : MR KR ELLIOT

INSTRUCTED BY : ELLIOT ATTORNEYS INC

FOR THE SECOND RESPONDENT : PRINCE MUDAU & ASSOCIATES