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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/053286

[1] REPORTABLE: YES

[2] OF INTEREST TO OTHER JUDGES: YES

[3] REVISED: NO

SIGNATURE

DATE: 16 October 2024

In the matter between:

RED OAK PROPERTIES (PROPRIETARY) LIMITED

Applicant

and

**THE UNLAWFUL OCCUPIERS OF UNIT [...], DOOR 1[...],
PEARLBROOK COMPLEX, 3[...] B[...] STREET, HILLBROW,
JOHANNESBURG**

First Respondent

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Second Respondent

JUDGMENT

SUMMARY – Statutory Interpretation – meaning of “person in charge” as used in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (“PIE”).

Whether the purchaser of immovable property at a sale in execution is the “person in charge” for purposes of an eviction application in terms of Section 4 of PIE made prior to transfer.

Sales in Execution - The Sheriff in carrying on a sale in execution does so as executive of the law. The Sheriff is not the registered owner or person in charge of the property when conducting a sale in execution and grant express or tacit consent to a purchaser at a sale in execution to occupy the property concerned.

PULLINGER AJ

INTRODUCTION

[1] This application came before me in the unopposed motion court. It concerns the important question as to whether the purchaser of an immovable property at a sale in execution is the “person in charge” as contemplated in the Prevention of Illegal Eviction from Land, 1998 (“**PIE**”).

[2] This question arises so frequently in this Court that the dearth of any authority on the point is surprising.

[3] The question arises as follows:

[3.1] On or about 26 September 2022 the applicant purchased the immovable property known as Unit [...], Door 1[...], Pearlbrook Complex, 3[...] B[...] Street, Hillbrow, Johannesburg at a sale in execution (“**the Property**”).

[3.2] The transfer of the Property into the name of the applicant is pending.

[3.3] In terms of the conditions of sale:

"6.1 The property shall be at the risk and profit of the Purchaser [a reference to the applicant] after the fall of the hammer and the signing of the conditions of sale and payment of the initial deposit.

6.2 The Purchaser shall be liable to keep insured all buildings standing on the property sold for the full value of same from the fall of the hammer and the signing of the conditions of sale and payment of the initial deposit to date of transfer. Failing which the Sheriff may affect the insurance at the Purchaser's expense.

6.3 The execution creditor and Sheriff give no warranty that the Purchaser shall be able to obtain personal and/or vacant occupation of the property or that the property is unoccupied and any proceedings to evict the occupier(s) shall be undertaken by the Purchaser at his/her own risk, cost and expense."

[3.4] The conditions of sale provide further:

"7.2 Notwithstanding any of these provisions the Purchaser shall be solely responsible for rejecting [sic] any person or other occupier claiming occupation, including a tenant, at the Purchaser's cost. No obligation shall vest the Sheriff and/or the execution creditor."

[3.5] The Sheriff certified that the Property was duly sold to the applicant on 26 September 2022.

[3.6] Given the time delay between the sale in execution and the launch of this application, there is no reason to believe that the payment of the initial deposit as contemplated in the conditions of sale was not paid or, in the absence thereof, the Sheriff would have been obliged to

approach this Court seeking an order cancelling the sale and thereby preclude the pending transfer.¹

- [4] The applicant now applies for the eviction of the occupiers of the Property as the “person in charge”.

IS THE APPLICANT “THE PERSON IN CHARGE” AS CONTEMPLATED IN PIE?

- [5] The “person in charge” is defined in section 1 of PIE as follows:

“... a person who has or at the relevant time had **legal authority** to give permission to a person to enter or reside upon the land in question”
(emphasis added)

- [5] In addition to the registered owner of land, the “person in charge” may apply in terms of section 4(1) of PIE for the eviction of an “unlawful occupier”.²

- [6] The principles of interpretation of documents are uncontroversial. A Court undertakes a unitary, purposive and objective exercise by giving the words used their ordinary grammatical meaning, in their correct contextual setting, and construed consistently with the Constitution³ together with admissible background circumstances.⁴

- [7] The phrase “legal authority” implies a right in law to permit a person entry upon or to reside upon the land or building in question. When the ordinary grammatical meaning of the words in the phrase is considered, purposively,

¹ Rule 46(11)(a)(i) of the Uniform Rules of Court provides
“If the purchaser fails to carry out any obligations due by the purchaser under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the attached immovable property may be put up for sale again.”

² Section 4(1) of PIE provides
“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.”

³ **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC) at [28]

⁴ **The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association** 2019 (3) SA 398 (SCA) at [61]

and through the lens of the Constitution,⁵ the meaning of the phrase is uncontroversial. It asks whether a person, who is not the owner of the said land or building erected on the land, has the right, in law, to allow another person to enter land or a building situated thereon and to reside there.

[8] Various people who fall within the class who enjoy the aforesaid right. These include a lawful tenant that is permitted to sub-let or a registered owner's agent (for example a letting agent). Then, there are those who enjoy a registered servitude of *usus*, *usufruct*⁶ or *habitatio*.⁷ Each of these examples are holders of limited real rights which confer upon the holder the legal authority PIE contemplates to be the "person in charge". But the position is less clear in the instance of property acquired at a sale in execution. I have been unable to find any reported judgments where this has been considered.

[9] In the unreported **Red Stripe**⁸ judgment, Gildenhuys J held that an applicant, in the position of the applicant herein, lacks *locus standi* to apply for the eviction of an unlawful occupier of land or the buildings erected on such land prior to becoming the registered owner. The learned judge applied the common law principles applicable to the *rei vindicatio* in reaching the conclusion aforesaid.

[10] In relation to the *rei vindicatio*, the requirements are long settled. In the *locus classicus* decision in **Graham**,⁹ Greenburg J (Barry J concurring) held that:

"One of the rights arising out of ownership is the right to possession; indeed Grotius *Introd.* 2.3.4., says that ownership consists in the right to recover lost possession. *Prima facie* therefore proof that the appellant is owner and that the respondent is in possession entitles the appellant to an order giving him possession, i.e. to an order for ejectment."

⁵

⁶ **October N.O and Another v Hendriks and Another** 2016 (2) SA 600 (WCC) at [15]

⁷ **Hendricks v Hendriks and Others** 2016 (1) SA 511 (SCA) at [6] to [11]

⁸ **Red Stripe Trading 68 CC v Khumalo** (31039/04) [2005] ZAGPHC 31 (23 March 2005)

⁹ **Graham v Ridley** 1931 TPD 476 at 479; approved in **Chetty v Naidoo** 1974 (3) SA 1 (A) at 21A - E

[11] The applicant herein does not approach this Court in terms of the *rei vindicatio* (nor did the applicant in **Red Stripe** either). In both instances the applicants approached the Court for relief in terms of section 4 of PIE *qua* “person in charge”. **Red Stripe** addresses rights of possession in terms of the common law for purposes of the *rei vindicatio*. The Supreme Court of Appeal in **Changing Tides**¹⁰ pointed out, in the context of onus in an eviction from residential property in terms of PIE, an applicant must satisfy the court that an eviction order is just and equitable in the circumstances. In **Occupiers, Berea**¹¹ the Constitutional Court held that the just and equitable enquiry is more expansive than a determination of rights of occupation as it would under the *rei vindicatio*. PIE is therefore a departure from the narrow examination of the common law right of possession in terms of the *rei vindicatio*. As such, the question as to what it means to be the “person in charge” as contemplated in PIE was left unanswered in **Red Stripe**.

[12] In the course of my research, I found reference to a full bench decision in **Khaka**¹² in this division. Notwithstanding my best endeavours and those of the library staff at the High Court, I have not been able to obtain a copy of this judgment.

[13] From what I have been able to piece together, **Khaka** was an appeal against a decision of Moshidi J, who had granted an eviction order in favour of White Rock Property Trading (“**White Rock**”) on the basis that it was the “person in charge” of the relevant property. The property in question had, similarly to the property in the instant case, been acquired at a sale in execution and transfer of ownership was, as in the case before me, pending. By the time the replying affidavit was delivered, transfer of the relevant property had taken place.

¹⁰ **City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others** 2012 (6) SA 295 (SCA) at [34]

¹¹ **Occupiers, Berea v De Wet NO and Another** 2017 (5) SA 346 (CC) at [65]

¹² **Khaka v White Rock Trading (Pty) Ltd** case number A5003/2016 (GLD)

- [14] In a subsequent application for eviction, this court, per Opperman J,¹³ recorded that the full bench dismissed the earlier application on the basis that “...as the applicant [a reference to White Rock] was not the registered owner at the time that the first eviction application was instituted, thus the appeal had succeeded on the basis that the applicant then lacked locus standi.”¹⁴
- [15] It appears that the appeal turned on the fact that White Rock had not taken transfer of the property concerned at the time it launched the first eviction application.¹⁵ I infer the appeal court held that White Rock was not the “person in charge” as contemplated in PIE. While Opperman J’s decision in White Rock records what the full bench decided. The rationale underpinning that decision appears to be lost in time.
- [16] Subsequent to the hearing of this matter, Ms Lombard, who appeared for the applicant, provided me with helpful heads of argument in which she referred to the an unreported decision of the full court of the Free State Division, Bloemfontein in **Motete**.¹⁶
- [17] In **Motete**, the full bench gave some content to the meaning of “person in charge” as contemplated in PIE. It said,

“[16] At common law, one needed to be either an owner or lawful occupier in order to be clothed with the authority to initiate eviction proceedings. **The definition of "a person in charge" has therefore extended the category of persons or entities that could qualify to bring eviction proceedings, without being necessarily an owner or someone already in occupation.**

This opened room for persons or entities who are not owners and have never been in occupation of the property to be able to bring

¹³ **White Rock Property Trading v Khaka and Another** an unreported judgment per Opperman J under case number 19602/16

¹⁴ At [2]

¹⁵ At [10]

¹⁶ **Motete v Mogorosi** 2014 JDR 2167 (FB)

eviction proceedings, subject to one qualification: such person or entity must have the legal authority to allow or refuse entry or occupation of such property. In other words, as long as the person or entity has some legal basis or entitlement (whatever the source) to have the said authority. An owner obviously has such authority. The same goes for a lessee who occupies in terms of a valid lease or who has been conferred with the authority by the owner or landlord, or is subleasing lawfully in terms of a valid lease agreement, although not in occupation then or was never in occupation before.” (emphasis added)

[18] The full court, which was not addressing the consequences of a sale in execution, found that the applicant was not the “person in charge” as contemplated in PIE. It said, “... even if the Deed was found to be valid, which it is not as already stated above, in the absence of a written agreement to deliver *vacuo possessio* on an earlier date than upon transfer of the property, the respondent would have no right or entitlement to occupy the property, and thus cannot qualify as a person in charge (as a lawful tenant or lessee) in terms of the Deed”.¹⁷ This must be seen in the context of a contractual provision that “[p]ossession and vacant occupation of the property shall be delivered to the Purchaser on transfer or such earlier date as mutually agreed upon by the parties, from which date it shall be at the sole risk, loss or profit of the Purchaser.”

[19] The decision in **Motete** holds, albeit *obiter*, that in an ordinary sale of immovable property, absent a contractual right to possession, the purchaser has no right of possession until registration of transfer. This appears consonant with the principle that property which has been sold, but not delivered, remains that of the seller¹⁸ because the bundle of rights accruing to an owner of property, being possession and the right to recover possession,¹⁹

¹⁷ At [19.6]

¹⁸ **Harris v Buissine’s Trustees** 2 M 105; **van Aardt v Hartley’s Trustees** (1845) 2 Menzies 135; **Cornelissen N.O v Universal Caravan Sales (Pty) Ltd** 1971 (3) SA 158 (A) at 179 B to H

¹⁹ G. 2.3.4

use and enjoyment²⁰ and disposition,²¹ remain vested in the seller. In **Chetty**,²² the Appellate Division affirmed that one of the incidents of ownership as the right to exclusive possession of the property. As owner of immovable property, the seller has the right to possession until registration of transfer save for an express contractual agreement to the contrary.

- [20] It is in this context that I examine sales in execution and the sheriff's duties and powers to pass transfer of immovable property to a purchaser at a sale in execution.

THE DUTIES AND POWERS OF THE SHERIFF

- [21] Pursuant to a judgment being entered against a debtor, a creditor sues out a writ of attachment instructing the sheriff to attach the judgment debtor's property.

- [22] Upon the attachment of the judgment debtor's property, a *pignus judiciale* come into being. In **Liquidators Union**,²³ Kotze JA stated the position as follows:

“... an arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly, a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgment debtor... the dominium remains in the debtor, who can, up to the last moment before actual sale, redeem his attached property: that is to say, the property subject to the *pignus judiciale*, for while the *pignus* lasts he remains the owner of the pledge (*dominus pignoris*, Dig. 20.5.12: Cod. 4.24.9).”

²⁰ Voet 7.1.3

²¹ v.d.L., 115

²² **Chetty v Naidoo** 1974 (3) SA 13 (A) at 20 B - C

²³ **Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co** 1922 AD 549 at 558-9

- [23] At common law, the sheriff's duty is to take care of the attached goods until ownership is transferred.²⁴ In my view there is no difference between a judicial pledge and any other form of pledge in this regard.²⁵
- [24] In the same way, there is no difference between the sheriff's right to use and enjoyment of the attached property and the rights of a pledgee under another form of pledge. Use and enjoyment of the pledged property is not a right accruing to the pledgee.²⁶ The effect of the judicial arrest is to create security for the satisfaction of the judgment debt²⁷ subject to certain limitations.²⁸ Although custody and control of the attached property passes to the sheriff, the sheriff *qua* pledgee, does not acquire the right to beneficial use and enjoyment as the object of a judicial pledge is to establish security over the asset of the judgment debtor. And, just like under another form of pledge, the pledgor may redeem the pledged property by paying the debt secured by the pledge,²⁹ the judgment debtor may redeem the property until registration of transfer.³⁰
- [25] At a sale in execution, the sheriff acts as the executive of the courts, not the agent of the judgment debtor.³¹ The sheriff's duty is to carry out the order of court.
- [26] Upon the fall of the hammer at a sale in execution, a contract comes into being between the Sheriff, *suo nomine*³² and the purchaser in respect of the

²⁴ *Hackwell Mackeurtan's Sale of Goods in South Africa*, 5th ed at 252

²⁵ **S A Breweries v Levin** 1935 AD 77 at 84; **Retmill Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and others** [2013] 3 All SA 337 (WCC) at [30]

²⁶ **Freeman Cohen's Consolidated Ltd v General Mining & Finance Corporation Ltd** 1906 TS 585 at 591

²⁷ *Brits Real Security Law* at 478 and the authorities cited in *fn* 666. In **Maasdorp's Institutes of South African Law**, Volume II, 8th ed, the learner authors refer, at 192, to this form of security being a "lien over other creditors who have not obtained a judgment against the debtor".

²⁸ *Ibid* at 479

²⁹ **Darling v Registrar of deeds, Cape Town** 1929 AD 28 at 35; **McCullough & Whitehead v Whiteaway & Co** 1914 AD 599 at 626

³⁰ **Liquidators Union** *supra*

³¹ **Sedibe and Another v United Building Society and Another** 1993 (3) SA 671 (T) at 676 A – C overturning **South African Permanent Building Society v Levy** 1959 (1) SA 228 (T) which held, at 230 B, that "[w]hen the Sheriff carries out the duties imposed upon him in the sale of attached property, he does not sell as a principal but acts as a statutory agent on behalf of the *judgment debtor* who is being compelled to sell the particular attached asset." (emphasis added)

³² **Sedibe** at 675 I; **Haralal v Naicker and Another** 2009 (1) SA 636 (D) at [12]

attached property. The terms of the contract are set out in the Conditions of Sale stipulated in the Uniform Rules of Court.³³

- [27] It is the sheriff's duty to perform in terms of that contract and pass transfer of ownership of the property to the purchaser upon fulfilment of the conditions in that contract. Concomitantly, it is the purchaser's duty to fulfil those obligations before transfer can take place failing which the sheriff is obliged to apply to court for an order setting the sale aside.
- [28] One of the express contractual provisions of the Conditions of Sale, is that risk and benefit to the execution purchaser. As such, the purchaser at a sale in execution is entitled to the benefit of the purchased property. Benefit relates to the fruits and not possession.³⁴ These benefits have been held to include dividends (in the case of shares) or rent.³⁵
- [29] In the Conditions of Sale signed by the applicant, there is no such express contractual provision to possession of the Property ahead of transfer.
- [30] Thus, the sheriff does not acquire the legal authority to permit a person to reside in the subject immovable property or to apply for the eviction of an unlawful occupier of such property, *ex lege* by virtue of the *pignus judiciale* created by the attachment of the property. Having not acquired such rights, the sheriff cannot transfer such rights to an execution purchaser on application of the *nemo plus iuris ad alium transferre potest quam ipse haberet* principle and the execution purchaser does not acquire such rights *ex contractu* in terms of the Conditions of Sale.

³³ Rule 46(8)(g)(a)(i)

³⁴ **Shackell v Lippert** 7 SC 75; **Meintjies v Manley** 1922 CPD 151; **Mulder v van Eyk** 1984 (4) SA 204 (SECLD) at 207 C

³⁵ **Nel v Bornman** 1968 (1) SA 498 (T) at 499 A citing **Fincham v De Kock and Bolus**, 9 H.C.G 120 at 123 and **De Kock and another v Fincham** 19 SC 126 at 145

CONCLUSION

[31] On the strength of the conclusion that I reached above, the purchaser of immovable property at a sale in execution is not the “person in charge” for purposes of section 4(1) of PIE. PIE contemplates that those persons who have a right in law to possession of immovable property being used for purposes of a “home” by an “unlawful occupier” may, in addition to the registered owner to approach a court seeking the eviction of an unlawful occupier.

[32] In the result, I make the following order:

The application is dismissed.

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties’ and/or parties’ representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 16 October 2024.

DATE OF HEARING: 13 September 2023

DATE OF JUDGMENT: 16 October 2024

APPEARANCES:

COUNSEL FOR THE APPLICANT:	N LOMBARD (Ms)
ATTORNEY FOR THE APPLICANT:	DU TOIT BURGER INC
COUNSEL FOR THE RESPONDENTS:	n/a
ATTORNEY FOR THE RESPONDENTS:	n/a