

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 22271 / 2023

In the matter between:

MARCELLA RAIMONDI N.O.

First Applicant

*In her capacity as the executrix of the joint
estate of the late Deon Ungerer and his
surviving spouse, Rouxnel Ungerer*

Estate Number 011490/2018

ROUXNEL UNGERER

Second Applicant

and

DANIEL JACOB BENJEMIN KRUGER

First Respondent

**ALL OTHER OCCUPANTS OF 2[...] R[...]
STREET, GORDON'S BAY, WESTERN
CAPE**

Second Respondent

THE CITY OF CAPE TOWN

Third Respondent

Coram: Wille, J

Heard: 14 August 2024

Order: 16 August 2024

Reasons Requested: 6 September 2024

Reasons Delivered: 9 September 2024

REASONS

WILLE, J:

INTRODUCTION

[1] The first and second applicants sought to evict the first and second respondents from a residential property. The first respondent was unrepresented at the hearing and remains unrepresented. He also purported to act on behalf of the second respondent. The first applicant is the executrix of a deceased estate, and the second applicant is the deceased's surviving spouse. They are co-owners of the subject residential property.¹

[2] About three years ago, the first respondent and his erstwhile business partner offered to purchase the property from the second applicant. This is how the first respondent gained access and took occupation of the property. The

¹ The property is situated at "2[...] R[...] Street" Gordon's Bay (the "property").

underlying agreement of purchase and sale never came into existence, and the sale of the property did not take place.²

[3] The first respondent and all those holding through or under him refused to vacate the property. The first respondent contended that he would only vacate the property upon the payment of a highly inflated amount of compensation to be paid to him by the applicants. He filed a lengthy opposing affidavit. Most of the content of this opposing affidavit was irrelevant and contained a host of vexatious and scandalous allegations. It also did not deal with any lawful reasons why he should be allowed to remain in occupation of the property.³

CONTEXT

[4] Following this theme, the first respondent made a host of complaints about the administration of the deceased's estate administered by the first applicant. This is in circumstances where the first respondent has no interest in the estate. The administration of the deceased estate has no relevance to the validity of the sale agreement or the first respondent's purported shield to the eviction proceedings.⁴

[5] The property is registered in the deceased's name, and the first applicant is the executrix of the deceased's estate. The second applicant married the deceased after the property was registered in the deceased's name. Thus, the first respondent is, through her marriage (in community of property to the deceased), a co-owner of the property.⁵

[6] The first respondent contended for the position that the agreement of sale was valid and binding which contained binding and enforceable terms. In

² The offer to purchase was initially piloted in August 2021.

³ No documents (other than alleged photographs) were presented in favour of the first respondent's alleged claims.

⁴ These defences were difficult to understand as they do not assist the first respondent in any manner.

⁵ The applicants, therefore, both have the requisite *locus standi* to institute these proceedings.

addition (and as an alternative), the first respondent alleged that the applicants had given him consent to occupy the property.⁶

[7] The applicants take the position that the deed of sale could never have come into existence for the following reasons: (a) the deed of sale does not comply with the prescriptive legislative requirements because the first applicant never signed the deed of sale, (b) the deed of sale was not co-signed by the first respondent's wife, to whom he is married in community of property, and (c) there has been no compliance with the specific targeted legislation dealing with the administration of deceased estates.⁷

[8] Thus, there was no valid, binding, or enforceable contract or any instrument justifying the first respondent's continued occupation of the property absent any payment for about three years.⁸

CONSIDERATION

[9] The applicant contended (albeit, in the alternative) that even if the court were to find that a valid deed of sale or some other instrument came into existence (which was binding on the parties and which conferred some contractual rights and obligations on the parties), any such agreement has, in any event, been terminated because of the first respondent's breach thereof.⁹

[10] I agreed with these submissions because; (a) the first respondent and his erstwhile co-purchaser, failed to pay the purchase price for the property, (b) the first respondent and his erstwhile co-purchaser, failed to take any of the required steps to take transfer of the property, (c) the first respondent and his erstwhile co-purchaser, failed to pay the occupational rental for the property, and (d) the first respondent and his erstwhile co-purchaser, failed to pay the municipal accounts for the property.¹⁰

⁶ This is in the form of what the first respondent labels as a "letter of consent".

⁷ Section 42 (2) of the Administration of Estates Act, 66 of 1965.

⁸ This since 8 September 2021.

⁹ The agreement was lawfully cancelled in writing on many occasions.

¹⁰ This was not engaged with by the first respondent.

[11] In addition, the first respondent's contention that, contrary to the terms of the deed of sale, there existed a verbal agreement that he may defer any payment of occupational rental until registration of transfer of the property was far-fetched and in violation of the non-variation clause in the deed of sale.¹¹

[12] Most crucial to the first respondent's case was the fact that his erstwhile partner and the co-purchaser of the property had repudiated the deed of sale after the business relationship between himself and the first respondent soured and is no longer. There simply remained no basis for the first respondent to rely on any contractual possessory right to remain in occupation of the property.¹²

[13] In a final throw of the dice, the respondent asserted a right of retention founded on the alleged improvements made to the property to protect his interests.¹³

[14] This alleged illusory right of retention stems, ostensibly, from the applicant's alleged consent to effect these improvements in anticipation of the transaction envisaged in the deed of sale. This shield may be dealt with swiftly. I say this because the first respondent did not sufficiently engage with or demonstrate the value of his alleged improvements to the property. At best for the first respondent is the allegation that he 'estimated' the value of the improvements to be the sum of three and a half million rand.¹⁴

[15] This notwithstanding, this shield is devoid of; (a) any contractual basis for the right, as the deed of sale and the addendum to the deed of sale provide for the first respondent to effect changes to the property at the first respondent's expense, (b) any substantiating proof of the works completed or the valuation thereof, and (c) any indication of the apportionment of the expenses between the first respondent and his alleged erstwhile partner and co-purchaser. This

¹¹ This allegation was in violation of the non-variation clause in the agreement of sale.

¹² Because of this, the first respondent sought to rely on some kind of improvement lien.

¹³ The first respondent failed to demonstrate how this retention right manifested into a right of occupation.

¹⁴ Not surprisingly, this amount aligns with the purchase price and the occupational rental for the property.

species of lien can only be relied upon by a *bona fide* possessor or occupier. The first respondent's occupation of the property was unlawful, and accordingly, he cannot have enjoyed any retention lien over the property.¹⁵

[16] Again, even if the claim in respect of which the lien is asserted is made in good faith, the court has the discretion to order the first respondent to restore possession of the premises to the applicants, subject to sufficient security being provided by the applicants for the balance of this alleged (albeit heavily disputed) claim. Thus, I was enjoined to determine; (a) whether this case justified the substitution of the lien with security and if answered in the affirmative, (b) what form the security should take. In this case, the applicants advanced and made a constructive tender for security for these alleged unilateral improvements.¹⁶

[17] The applicants demonstrated that the first respondent was in unlawful occupation of the subject property. Absent any consent or an alternative lawful basis on which to retain possession, an occupier of a residential dwelling will be considered to be an unlawful occupier for purposes of the targeted legislation.¹⁷

[18] Turning now for a moment to the just and equitable issue that presented before me for determination. When considering any application for eviction, the court is required to weigh up competing constitutional rights. The rights of the landowner enjoy constitutional protection, which must be weighed up with the interest of adequate housing for the occupiers.¹⁸

[19] I considered, among other things, the following factors; (a) the applicants were the owners of the property, (b) the first applicant had a statutory duty to protect and administer the property as part of the deceased's estate, (c) the first respondent had been in unlawful possession of the property for almost three

¹⁵ Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 1997 (1) SA 646 (CPD) at 654 D.

¹⁶ In any event, the first respondent may file his claim for proof against the first applicant.

¹⁷ The Prevention of Illegal Eviction from and Unlawful Occupation Land Act, 19 of 1998.

¹⁸ Mayekiso and Another v Patel NO and Others 2019 (2) SA 522 (WCC) at par 58.

years, and (d) the respondent had sub-let the property to tenants and was likely to earn an income from the property's rental.¹⁹

[20] The first respondent alleged that he would be rendered homeless if he was evicted from the property. He averred that he received a pension and is dependent on loans from his children. In the same breath, he indicated that he is employed as an estate agent, does consultation work, and assists with the tracking and repossessing of vehicles.²⁰

[21] The thrust of the first respondent's arguments was that his loss of control over the property would negatively influence his negotiation power in his alleged damages claim against the deceased's estate for unsubstantiated compensation which he alleged was due to him.²¹

[22] I took into account that the first respondent had been in possession of the property for almost three years. He did not make out a case on the facts that he would be rendered homeless if he was evicted. Further, there was no evidence of any vulnerable persons residing on the property. The first respondent simply occupied the property while refusing to pay anything in consideration therefor and was also leasing out the property to third parties for a profit.²²

[23] When the order was made I gave the first respondent about a month and a half to vacate the property. The first respondent is thus due to vacate the property at the end of this month. Not surprisingly, the first respondent only three days ago filed a hopelessly defective request for reasons accompanied by a hopelessly defective application for leave to appeal. Self-evidently this is to attempt to employ a delaying tactic to thwart the legal process and remain in unlawful occupation of the property despite the court order and in violation of

¹⁹ This was also a factor that weighed heavily with me.

²⁰ These allegations were destructive of his other allegations about being reliant on his pension and other loans.

²¹ The first respondent wanted to remain in occupation of the property to increase his bargaining power.

²² This latter issue was not a factor that redounded in his favour.

the rule of law. This is precisely why I completed my reasons for my order over the weekend.²³

[24] These are then my reasons for my order and the cost order granted.²⁴

E D WILLE
Cape Town

²³ The “request” for reasons was filed on 6 September 2024.

²⁴ The applicants requested costs on an attorney and client scale which I did not grant to them.