

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE	DATE: 30 January 2025
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Case No. 2022/3947

In the matter between:

KOOSHEN NAIDOO

First Applicant

VANESSA LEE NAIDOO

Second Applicant

and

KHOLEKA NKOMBI

First Respondent

NOMALANGA SHIRLY NKOMBI

Second Respondent

CITY OF JOHANNESBURG

Third Respondent

JUDGMENT

WILSON J:

1 On 3 July 2021, the applicants, the Naidoos, purchased ERF 2[...], situated at 1[...] H[...] Road, N[...] Ext. 20, Johannesburg (“the property”). The Naidoos bought the property from the first and second respondents, the Nkombis. The sale was facilitated by the property’s erstwhile mortgagee, Standard Bank. The Nkombis had fallen into arrears on the loan agreement secured by the mortgage bond. Standard Bank had taken judgment on the bond in 2015, but stayed execution for long enough to allow the Nkombis to sell the property to the Naidoos. The advantage of doing so was that the purchase price provided for in terms of the sale agreement – some R1.2 million – was much more than either Standard Bank or the Nkombis could reasonably expect to obtain at a forced sale held in execution of the judgment.

2 The Naidoos became the registered owners of the property on 9 November 2021. The second respondent vacated the property and now lives in KwaZulu-Natal. However, the first respondent, Ms. Nkombi, became dissatisfied with the sale agreement. The source of her dissatisfaction appears to have been that the purchase price was insufficient to extinguish her indebtedness under the loan agreement, and left her without the surplus she thought necessary to relocate from the property. The Naidoos say that Standard Bank then offered to pay up to R100 000 to assist Ms. Nkombi to relocate. The Naidoos, too, offered to pay R48 000 to allow Ms. Nkombi to leave the property. Nevertheless, convinced that an injustice had been done, Ms. Nkombi refused to vacate.

3 On 1 February 2022, the Naidoos instituted proceedings for Ms. Nkombi’s eviction. Ms. Nkombi defended those proceedings (albeit in an answering affidavit filed some six months late). This meant that the eviction application had to be placed on the opposed roll.

4 The consequent delay left the Naidoos in an unsustainable situation: they were paying rent to live at a townhouse in Roodepoort while at the same time servicing the bond they had taken out to purchase the Northcliff property. The Naidoos fell behind with both their lease and bond payments. On 1 March 2023, the Naidoos’ Roodepoort landlord terminated their lease. They were told to leave the

Roodepoort property by no later than 31 March 2023. On or about 2 April 2023, the Naidoos quit the Roodepoort property and moved into the Northcliff property with Ms. Nkombi, who still refused to vacate.

5 The situation at present is that the Naidoos occupy the living rooms in the main house on the property with their infant son. The Naidoos' other son, a ten-year-old, was sent to live with a relative. Ms. Nkombi lives in one of the bedrooms. On 13 April 2023, two further individuals: Warren and Chantal Ellie, moved onto the property with their newborn baby. They were invited to do so by Ms. Nkombi. The Naidoos say that they introduced themselves as Ms. Nkombi's "backup".

6 There is a dispute about whether the Naidoos' occupation of the property in April 2023 constituted an act of spoliation. An application to eject the Naidoos as co-spoliators failed in the Magistrates' Court, and they have remained ensconced at the property since early April 2023. Accordingly, whatever the lawfulness of the Naidoos' conduct in taking occupation of the property, their possession of their portion of it has now endured for nearly two years.

7 The current eviction application was re-enrolled before Bezuidenhout AJ on 6 February 2024, but was postponed, apparently in order to permit Ms. Nkombi to obtain legal representation. On 6 May 2024, Wright J postponed the application again, this time to permit the filing of supplementary affidavits. On 10 October 2024, Mudau J authorised the substituted service of a notice under section 4 (2) of the Prevention of Illegal Eviction Act 19 of 1998 ("the PIE Act"), and the matter was subsequently enrolled in my opposed motion court on 28 January 2025.

8 On the eve of the hearing, Ms. Nkombi's erstwhile attorneys withdrew, and Ms. Nkombi filed a notice removing the matter from the roll without the Naidoos' consent. She was of course not entitled to do so, and the matter proceeded before me on its merits. Ms. Nkombi represented herself. She did so ably, making fluent and relevant submissions. Ms. Cheethai appeared for the Naidoos.

Unlawful occupation

9 There is no serious dispute that Ms. Nkombi is an “unlawful occupier” of the property under the PIE Act. The validity of the sale agreement is not in dispute. The transfer of the property to the Naidoos is not impugned. Ms. Nkombi appears intent on rescinding the judgment Standard Bank obtained against her in 2015, but there is no basis on which the rescission of that judgment could affect the Naidoos’ title to the property. The Naidoos’ title to the property flows from the sale agreement.

10 There can accordingly be no doubt that the Naidoos own the property. It is equally clear that Ms. Nkombi has neither the Naidoos’ consent to remain at the property nor any other right to hold the property against their will.

Justice and equity

11 Much of the argument before me revolved around the question of whether an eviction would be “just and equitable” within the meaning given to that term under section 4 of PIE. It has long been held that evictions that would lead to homelessness are not just and equitable (see, for example, *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA), paragraph 16), but this case is not of that type. In the answering affidavit, there is a solitary one-line assertion that an eviction would leave Ms. Nkombi homeless. However, the affidavit discloses no primary facts from which that inference could reasonably be drawn.

12 Indeed, at the hearing, Ms. Nkombi did not argue that she would be left homeless if she had to leave the property. Ms. Nkombi rather suggested that she should be permitted to hold on to the property while she pursues her rescission application against Standard Bank. I cannot see how that could be just and equitable. The rescission application has nothing to do with the Naidoos’ title to the property.

13 Leaving the rescission application aside, the injustice of an eviction could only be established if it were shown that the Naidoos had been responsible for some unfairness so egregious as to justify depriving them of possession of the property. No such unfairness has been shown. In truth, the scales of equity tip the other way.

Ms. Nkombi sold the property to the Naidoos. While she did so to avoid execution on her mortgage bond, she clearly benefitted from the sale. She was not coerced into it, at least not in the legal sense, and any complaint she might conceivably have about her situation lies against Standard Bank. It is as well to point out that Ms. Nkombi has in fact pursued such a complaint with the banking ombudsman. The complaint was dismissed.

14 On the other hand, the Naidoos have been put through an ordeal they did nothing to incite. They approached Ms. Nkombi and contracted with her on terms which strike me as perfectly fair. They did not seek a quick bargain against an unsuspecting homeowner at a forced sale. They were fully entitled to expect Ms. Nkombi to vacate the property, as her erstwhile co-owner did. There was no excuse in law or in equity for Ms. Nkombi to have remained behind. The fact that she has remained entrenched at the property for years since the sale agreement was executed compounds the injury.

15 The Naidoos and Ms. Nkombi each accuse the other of lamentable conduct. These accusations flow from the understandably contentious situation that has evolved at the property since April 2023. I do not know how any of parties has been able to put up with living in the same dwelling in the circumstances of this case – especially since, on the face of it, Ms. Nkombi could have moved out at any time. Whatever criticism might be levelled at the Naidoos' conduct, it seems to me that the Naidoos were more sinned against than sinning. In any event, there is nothing alleged against them on the papers that would justify withholding an eviction order.

The Ellies

16 That leaves the question of what happens to the Ellies and their infant child. I was originally concerned that the Ellies had not been joined to the proceedings in their own right. Nor did the Naidoos' attorneys take the step of joining the Ellies as part of a catch-all group of unlawful occupiers, as is the practice in this division. Ms. Cheetai submitted they need not have done so, since the Ellies occupy the property "through or under" Ms. Nkombi.

17 In this case, it seems clear that Ms. Cheetai is right. The Ellies occupy the property “through or under” Ms. Nkombi, because they moved onto the property at her invitation after the eviction proceedings against her were instituted. The nature of the arrangement between Ms. Nkombi and the Ellies is unclear, but there is obviously an agreement between them in terms of which the Ellies are permitted to occupy the property in return for some consideration, even if that consideration is merely the provision of “backup”, as the Naidoos allege. It matters not that Ms. Nkombi was herself an unlawful occupier at the time that invitation was taken up, since a lessor need not themselves own the property they lease. They need do no more than warrant the lessee against eviction from it (see *Mpange v Sithole* 2007 (6) SA 578 (W), paragraph 24 and the cases cited there).

18 Under the common law, an ejectment order that covers an unlawful occupier and those in occupation “through or under” them may be executed without joining the secondary occupiers in their own right (see *Nthai v Vereeniging Town Council* 1953 (4) SA 579 (A) at 583 to 585). However, in my view, courts should be reluctant to accept that the eviction of one person necessarily covers that of another without a clear factual basis having been laid for that proposition. In the past, wives and children with their own statutory rights of occupation have been evicted as occupiers “through and under” their husbands and fathers. The Constitutional Court has disapproved of this practice (see *Klaase v Van der Merwe* 2016 (6) SA 131 (CC), paragraphs 49 to 66). In addition, where eviction orders are sought against large communities of people, it will not normally be accepted that the community occupies a property “through or under” a smaller number of named individuals. Each occupier must usually be joined in their own right, if only as part of a catch-all group identified as all the unlawful occupiers of a particular property.

19 But this case is not of that nature. The Ellies moved onto the property after the eviction application was instituted. They did so, at least in part, to thwart the Naidoos’ attempts to obtain exclusive possession. They would not have moved onto the property without Ms. Nkombi’s express permission. They have no rights of occupation, save through her. If Ms. Nkombi is an unlawful occupier, then so are they. While the Ellies did not appear before me, they have been given written and effective notice of this application, and every opportunity to adduce evidence of their

circumstances. There is no indication anywhere on the papers that they would struggle to find alternative accommodation. Accordingly, they fall to be evicted as occupiers “through or under” Ms. Nkombi.

20 Section 4 (8) of the PIE Act requires me to set a “just and equitable” date for Ms. Nkombi’s eviction and that of those who occupy the property through or under her. The exercise of that discretion in this case entails balancing the length of time Ms. Nkombi has been present at the property against the need to bring the plainly untenable situation there to an end as soon as reasonably possible. I would ordinarily have given someone with Ms. Nkombi’s length of occupation three months to vacate, but the circumstances of this case justify shortening that period to two months.

Costs

21 Ms. Cheetai asked for a punitive costs order against Ms. Nkombi. I do not think that is justified. Ms. Nkombi represented herself before me. She did so amicably and appropriately. While her case on the merits is untenable, she has not committed the sort of litigious misconduct that would justify a punitive costs order. However, having pressed a plainly unsustainable case to the bitter end, she ought, in my view, to bear the costs of this application on the ordinary scale.

Order

22 Accordingly –

22.1 The first respondent, and all those occupying through or under her, (“the occupiers”) are evicted from ERF 2[...], 1[...] H[...] Road, N[...] Ext. 20, Johannesburg (“the property”).

22.2 The occupiers are directed to vacate the property by no later than Monday 31 March 2025, failing which the Sheriff may evict them, assisted, if necessary, by the South African Police Service or a private security company contracted by the sheriff and acting under the sheriff’s control.

22.3 The first respondent is directed to pay the costs of this application.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 30 January 2025.

HEARD ON: 28 January 2025

DECIDED ON: 30 January 2025

For the Applicants: N Cheethai
Instructed by Fouche Attorneys

For the First Respondent: In person