



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

Case No: 13717/24

In the matter between:

O[...] A[...] M[...]

Applicant

and

B[...] M[...]

First Respondent

**ALL OTHER OCCUPIERS OF 6[...] T[...]
CRESCENT, WELLY PARK, DURBANVILLE**

Second Respondent

CITY OF CAPE TOWN

Third Respondent

HORIZON HOMES (PTY) LTD

Fourth Respondent

Coram: NUKU J
Heard on: 6 February 2025
Delivered on: 24 February 2025

JUDGMENT

NUKU, J

[1] The applicant and the first respondent were previously married to each other, and they owned an immovable property situated at 6[...] T[...] Crescent, Wellway Park, Durbanville (**the Property**). Their marriage was dissolved by a decree of divorce granted by this court on 1 August 2022. For some reason the court, in granting the divorce decree, did not deal with the proprietary consequences relating to the property.

[2] The first respondent remained in occupation of the property post the divorce. Attempts to find an amicable way of dealing with the property failed and the applicant instituted an application for the division of the property which was granted on 27 November 2023. In the relevant part, the order granting the division of the property reads:

- ‘1. The joint ownership of the immovable property described as ERF 1[...], situated at 6[...] T[...] Crescent, Wellway Park, Durbanville, Western Cape (“the property”) be terminated.
2. The property be sold on the open market for a fair and reasonable price of an amount of at least R2 900 000.00.
3. The Respondent be directed to allow potential purchasers and estate agents access to the property at all reasonable times.
4. The parties are directed to sign all documents and to do all things necessary to give effect to the sale and transfer of the property.
5. In the event that either party fails to comply with paragraph 4 above within 3 days of being called upon to do so, then the Sheriff of the above Honourable Court shall sign any documentation to give effect to the sale and transfer of the property, on the defaulting parties behalf.’

[3] The fourth respondent made an offer to purchase the property which was accepted. The transfer of the property was scheduled for 31 May 2024 but there were some delays including the fact that the first respondent had not signed the power of attorney to pass transfer, which she only did on 6 June 2024. The property was intended to serve as a home of the Erasmus family despite the property having been purchased in the name of the fourth respondent, a company.

[4] The Erasmus family had been residing in Durban, KwaZulu-Natal province and it intended to move into the property. The intention was that Mr Erasmus would be the first to relocate with the furniture on 7 June 2024 and thereafter the remainder of the family to move in on 15 June 2024.

[5] The applicant's attorneys had been in contact with the first respondent's attorney regarding the anticipated date of the registration of the transfer of the property. On 20 May 2024. The first respondent's attorney sent the applicant's attorney a voice note confirming that the first respondent would cooperate so as not to frustrate the transfer of the property. This voice note was confirmed, in writing, by the applicant's attorney in a letter dated 23 May 2024 that the first respondent *'agreed to give her full and immediate co-operation not to frustrate the sale of the property ..., and vacant occupation of the said property on the 31st instant.'* In return, the first respondent's attorney also confirmed this in writing on the same day, that is 23 May 2024.

[6] The applicant's attorney made unsuccessful attempts to contact the first respondent's attorney on 30 May 2024 and 4 June 2024 to make arrangements for the signature of the transfer documents. On 6 June 2024, the first respondent signed the transfer documents that the sheriff had brought to her.

[7] In what can only be described as a *volte face*, the first respondent's attorney called the applicant's attorney, on 7 June 2024, suggesting that the first respondent was still residing on the property. The first respondent's attorney also made various demands unrelated to the transfer and giving vacant possession of the property to the fourth respondent.

[8] As a result of the first respondent's changed stance regarding giving vacant occupation of the property to the fourth respondent as well as knowledge of the fact that the Erasmus family had structured their affairs in anticipation of moving into the property on 15 June 2024, the applicant, on 12 June 2024 launched the present application which was set down for hearing in the fast lane on 14 June 2024.

[9] On 14 June 2024, the matter came before Wille J who granted a rule nisi returnable on 25 July 2024 and which required the first respondent to show cause why she should not be ordered to give vacant occupation of the property to the fourth respondent.

[10] No formal notice of opposition was delivered on behalf of the first respondent, but her attorney was in court on 25 July 2024 and sought a postponement of the matter. Kantor AJ postponed the application for hearing in the third division on 28 August 2024, extended the rule nisi accordingly and directed the first respondent to deliver her answering affidavit on or before 8 August 2024. He also ordered the first respondent to pay the costs occasioned by the postponement.

[11] The first respondent did not deliver her answering affidavit on 8 August 2024. It is not apparent from the file when she delivered her answering affidavit, which is dated 11 August 2024. She stated in her answering affidavit that she vacated the property when its transfer was registered in the name of the fourth respondent on 11 July 2024. This notwithstanding, she persisted with her opposition of the application and an order dismissing the application with costs.

[12] The application came before Pangarker AJ on 28 August 2024 who postponed it for hearing on the semi-urgent roll to 16 October 2024 and directed the applicant to deliver his replying affidavit on or before 13 September 2024. In the answering affidavit, the applicant stated that he could not understand the first respondent's continued opposition of the application in circumstances where she had given vacant occupation of the property to the fourth respondent on 12 July 2024.

[13] Heads of argument were filed on behalf of the applicant in anticipation of the application being heard on 16 October 2024, but none were filed on behalf of the first respondent. No judge was allocated to hear the matter on 16 October 2024 and the matter was postponed to 6 February 2025 and the first respondent was directed to file her heads of argument by 31 January 2025.

[14] The matter came before me on 6 February 2025 when Mr Baba appeared on behalf of the first respondent. As no heads of argument had been filed, I sought to establish from him the reasons for the first respondent's failure to deliver heads of argument when she had been ordered to do so. All that Mr Baba could do was to apologise saying that he had forgotten to prepare and file the first respondent's heads of argument, an explanation I found perplexing. He, nevertheless, and in the absence of the first respondent's heads of argument, insisted on the matter proceeding. Asked whether the first respondent was persisting with the defence on the merits or whether the court was only required to deal with costs, he could not give a clear answer.

[15] On my reading of the papers it was, however, clear that but for the allocation of costs, the matter had become moot. I asked the parties' legal representatives to address me on the issue of costs.

[16] The nub of the submissions made on behalf of the applicant was that the applicant was forced by the conduct of the first respondent to institute the application. Reference was made to undertakings to give vacant occupation which were honoured in the breach, the first respondent's continued or feigned occupation of the property beyond the date which she knew that the property had to be vacated, the first respondent's lack of cooperation in signing the transfer documents. These matters had indeed been dealt with in the applicant's founding affidavit.

[17] When the time came for Mr Baba to address the court, he sought to lead evidence from the bar seeking to justify the first respondent's lack of cooperation as well as seeking to suggest that the applicant's legal representatives launched the application at a time when he was away and hence could not deal with same.

[18] This court has a discretion when it comes to the allocation of costs. In matters where the substantive relief that had been sought has become moot for whatever reason, the court in the exercise of its discretion is entitled to consider whether the applicant would have been successful, whether the applicant had been justified in instituting the proceedings as well as the conduct of the respective parties.¹

[19] There can be little doubt that the applicant was justified in commencing these proceedings. Through his efforts, which the first respondent appears to have been intent to frustrate in any manner possible, the applicant obtained an order for the sale of the property. The first respondent was aware that the property had been sold and that they were required to give vacant occupation of the property to the purchasers. The first respondent's legal representative had even given an undertaking that the first respondent would co-operate to ensure that vacant occupation is given to the fourth respondent on 31 May 2024.

[20] Despite all of the above, the first respondent had not only not signed the transfer documents by 31 May 2024 but was also still claiming to be occupying the property. The applicant being aware of the arrangements that the Erasmus family had made in anticipation of taking occupation of the property during the first half of June 2024, found himself obliged to approach this court on an urgent basis as he would not risk losing a purchaser or even worse having to deal with a damages claim from the fourth respondent.

[21] That the first respondent can state, under oath, that she was still in occupation of the property until 11 July 2024, which is more than a month from the date that she had undertaken to vacate the property is another indication that the applicant was justified in commencing this application.

[22] As regards the merits of the application, it is clear that the first respondent had no valid defence to the application and none was pleaded. This is not surprising if one has regard to the fact that the first respondent's legal representative had given

¹ Erasmus v Grunow en 'n Ander 1980 (2) SA 793 (O) at 798 D; Johnson v Minister of Home Affairs and Another 1997 (2) SA 432 (C) at 434B, Thusi v Minister of Home Affairs 2011 (2) SA 561 (KZP) para 64

an undertaking that the first respondent would vacate the property on 31 May 2024, only to make an about turn on 7 June 2024. In my view, the applicant would have succeeded and as such would have been entitled to costs.

[23] As to the conduct of the respective parties, the first respondent's conduct coupled with that of her legal representative has been reprehensible. This is an application that could have been avoided. That it persisted with opposing until argument, in my view, brings it within the extended meaning of vexatious litigation contemplated in *In Re Alluvial Creek Ltd* 1929 CPD 532 at 535 that is deserving of this court's censure. In my view costs on an attorney and client scale are warranted.

Order

[24] In the result, the first respondent is ordered to pay costs on an attorney and client scale.

LG NUKU
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant	:	Adv. J P Steenkamp
Instructed by	:	Abrahams and Gross Inc, Cape Town
For the First Respondent	:	Mr A V Baba
Instructed by	:	A V Baba Attorneys, Cape Town