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

Case Number: A250/24

George court case number: 1440/2023

In the matter between

NATACHIA SMITH

APPELLANT

and

HELENA CHARLOTTA SMITH

FIRST RESPONDENT

ANY OTHER OCCUPIERS OF THE PROPERTY

SECOND RESPONDENT

THE GEORGE MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

Date of hearing: 28 February 2025

Date of judgment: 4 March 2025

Coram: Slingers J, Bhoopchand AJ

BHOOPCHAND AJ:

1. The Appellant appeals the judgment and eviction order granted by the George Magistrate's Court on 2 August 2024. The eviction application initiated by the First Respondent was based on an oral agreement that permitted the Appellant and her children to occupy the First Respondent's newly acquired property in 2009.¹ The First Respondent claimed the agreement concluded with the Appellant was a lease agreement, whereas the Appellant asserted a personal right that entitled her to lifelong, rent-free occupation. Thus, there was a material dispute of fact between the parties relating to the agreement. The dispute was referred to oral evidence, and both the Appellant and the First Respondent gave evidence. The Appellant alleges, among other grounds, that the Honourable Magistrate erred and misdirected herself in her determination of the nature of that agreement. The resolution of this ground is pivotal to the outcome of the appeal.

2. The Appellant was married to the First Respondent's son. That marriage ended in divorce in 2009. Following the divorce, the First Respondent and her husband allowed the Appellant and her twenty-two-month-old twins to occupy their newly acquired property at 2[...] L[...] C[...], George ('the property'). The twins were

¹ The First Respondent was the Applicant in the Court a quo and the Appellant, the First Respondent. It is common cause that the Second Respondent is the Appellant's mother and the Third Respondent, the George municipality, neither have participated in the application or this appeal. They shall be referred to as the Appellant's mother and the George Municipality, respectively.

temporarily removed from the Appellant's care in 2016, restored to her care in 2019, and placed permanently in their father's care in Gqeberha in 2022. When the Magistrate heard oral evidence, the Appellant was not occupying the property as she had moved in May 2024 to Saudi Arabia on a two-year employment contract. The Appellant's mother occupies the property and runs an aftercare business from the house.

3. The record presented on appeal includes the affidavits underlying the application, the transcript of the oral evidence, and the judgment. The parties presented written and oral arguments. The First Respondent alleged in her founding affidavit that she had an oral agreement in which the Appellant and her grandchildren could occupy the property without paying rent or any taxes and were only responsible for paying the municipal charges. She gave the Appellant notice to vacate the property on 23 January 2023, as the Appellant had failed to pay the monthly municipal charges, which had accumulated to R7 663.63.

4. The First Respondent's testimony accorded with the allegations in her founding affidavit, including her underlying intention that she provided accommodation for the Appellant and the two children as a collective, to ensure that her grandchildren enjoyed a stable home. After the children were removed from the Appellant's care at the end of 2016, the First Respondent applied successfully to evict the Appellant in 2017. The First Respondent had also succeeded in evicting the Appellant's father from the property when he joined his daughter there. When the children's care was restored to the Appellant in 2019, the order of eviction granted against the Appellant was rescinded. The application that is the subject of this appeal followed once the children

were placed in their father's care. The application for eviction included the eviction of the Appellant's mother, who had joined the Appellant to live on the property.

5. The Appellant alleged in her answering affidavit that the accommodation offered to her and her children was to recompense her for the investment she made in the marital home she shared with the First Respondent's son. The Appellant abandoned any reliance on this alleged agreement after she was advised that it was irrelevant to the application for her eviction. The Appellant alleged that the First Respondent had assured her that she and the children could stay on the property for as long as she wished. She was under the *bona fide* impression that she had lifelong use of the property as a *bona fide* possessor. The Appellant asserted that she could not be evicted from the property as she had a right of habitation. The First Respondent denied these allegations in reply. Elsewhere in the answering affidavit, the Appellant asserted that she is not an illegal occupant as she is occupying the property under an oral lease agreement.²

6. During the initial argument in the Court *a quo*, which included whether the Magistrate should refer the matter to oral evidence, the nature of the Appellant's alleged right to occupy the property crystallised. The Appellant contended that she had a personal right of *habitatio* to occupy the property. In its simplest iteration, the holder of a *habitatio* has the lifelong right to live in the house of another.³ A *bona fide* possessor is a person who genuinely but mistakenly believes she is the property

² Paragraph 35 of the Answering Affidavit

³ *Spangenberg and Others v Engelbrecht NO and Another* (717/21) [2023] ZASCA 100 (14 June 2023) at para 20

owner.⁴ A *bona fide* occupier believes in good faith that they have a legitimate right to occupy or use a property, for example, through a usufruct or a lease agreement, and is unaware that they do not have a right to do so.⁵

7. In oral evidence, the Appellant disavowed reliance on a lease agreement but admitted that she was required to pay for water and electricity. She could not surmount the First Respondent's contention that accommodation was provided for her and her children as a collective and not for her alone. She could not establish that she was the holder of a *habitatio*.

8. This Court reminded the Appellant's Counsel that the dispute concerning the nature of the agreement to accommodate the Appellant and her children was referred to oral evidence at the Appellant's request. The Magistrate made a factual finding that the parties entered into an oral lease agreement. A Court of Appeal is slow to interfere with a trial Court's factual findings except where there is an apparent misdirection or the record reveals one.⁶ This Court could not fault the Magistrate's findings on fact or her reasoning concerning the nature of the agreement.

9. The Appellant argued that the nature of the agreement could not be one of lease as the First Respondent had failed to satisfy the essential requirement of an undertaking by a lessee to pay rent, and the Appellant did not pay rent while she occupied the property.⁷ She argued further that municipal charges were for services

⁴ Van Der Merwe: Sakereg. Second Edition, Butterworths, p54, Silberberg and Schoeman: The Law of Property, Fifth Edition, Badenhorst, Pienaar and Mostert. Lexis Nexis, Butterworths, p311

⁵ Sakereg suora at p54, the Law of Property supra at p311

⁶ *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706

⁷ Amler's Precedents of Pleadings, Harms, 6th edition, Lexis Nexis Butterworths, at page 218. The two other essentials of a lease agreement include the undertaking by the lessor to deliver a

provided by the local authority, while rent was the agreed amount paid for using the property. Whether municipal charges are part of the rental or a separate charge depends on the terms outlined in the lease agreement. The First Respondent testified that the Appellant did not have to pay rent, but she was responsible for the water and electricity charges. In her answering affidavit, the Appellant denied that she was responsible for municipal charges but reneged during testimony when she admitted she was responsible for them. The Magistrate found that the municipal charge was rent payable for the use of the property; it was ascertainable and determined by the local authority.⁸

10. Appellant's Counsel was invited repeatedly to refer this Court to evidence which showed that the Appellant had a right to live lifelong on the property without the children. This Court may have attached some credence to her claim that she held a personal right of *habitatio* were she able to do so. The Appellant consistently testified that the accommodation was provided for her and her children. Any reliance on a personal right of *habitatio* or *bona fide* right to possess or occupy the property were impressions she formed and were not as a result of any communication and/or agreement with the First Respondent. She conceded that the First Respondent never expressly conveyed or implied any lifelong right of use over the property. The cases relied upon by the Appellant were cases where the holder of the right was clearly defined.⁹ The Appellant's counsel could not identify any evidence to support the

thing to the lessee and an agreement between the parties that the lessee will temporarily use and enjoy the thing.

⁸ *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) at 746 G-H, *Storm & Co v Durban Municipality* 1925 AD 49, *Kamaludin v Gihwala* 1956 2 SA 323 (C) 327G-328A

⁹ *Spangenberg and Others v Engelbrecht NO and Another* (717/21) [2023] ZASCA 100 (14 June 2023), *Hendricks v Hendricks and Others* 2016 (1) SA 511 (SCA), *Cameron and Another v Wessels and Others* (2842/2022) {2022 ZAFSHC 302 (7 November 2022)

Appellant's contention that she enjoyed any rights to the property once the children departed and had to concede that he could not take the matter any further.

11. Once the Court *a quo* established from the credible evidence that the nature of the agreement in 2009 was one of lease, it found that the lease agreement was correctly cancelled on reasonable notice. The cancellation was not based on the Appellant's failure to pay municipal services. There was thus no obligation to place the Appellant in *mora*. In determining a just and equitable date for the Appellant's eviction, the Magistrate considered the position of the Appellant's elderly mother. The Appellant testified that she would find alternative accommodation for her mother if the Magistrate ordered eviction.

12. Much of the twenty grounds of appeal raised by the Appellant concerned the Magistrate's credibility findings on the Appellant. Although this Court does not have the advantage of observing the witness testify, a review of the transcript indicates that the Magistrate's findings concerning the Appellant were properly made. Her evidence was poor and riddled with material inconsistencies and contradictions. She tailored her evidence and claimed ignorance when cornered in cross-examination. The First Respondent found favour with the Magistrate as her evidence was even-handed and sincere. The Appellant appealed the Magistrate's costs order because there was no merit to the application for eviction and not for any error in the scale of costs granted. As this Court has found otherwise, there is no reason to interfere with the costs ordered by the Court *a quo*. This judgment, then, covers the grounds of appeal raised by the Appellant.

CONCLUSIONS

13. The Appellant failed to prove that any right of habitation was offered to her or that she alone was the holder of any personal right to the property. Once the Magistrate found that the agreement between the First Respondent and the Appellant was one of lease and only subsisted whilst the children occupied the property with the Appellant, the Appellant had no right, let alone a lifelong one or one free of rent, to occupy the property on her own. The lease was properly cancelled, the Appellant and her mother were unlawful occupiers of the property, and the order and date of eviction were beyond reproach. The appeal must fail.

14. The Magistrate considered the position of the Appellant's mother as a vulnerable person under PIE. The Magistrate was assured that the Appellant would obtain alternative accommodation for her mother and arrange to move her aftercare business if the Court a quo ordered her to vacate the property. The Appellant's aftercare attended to primary school children. Counsel were invited to make submissions on a just and equitable date to order the Appellant's eviction from the property after the finalisation of this appeal. There was a consensus that the Appellant should vacate the property during the school holidays. The Appellant proposed the June recess, whereas the First Respondent recommended the Easter break. This Court has considered the submissions, and its decision is reflected in the following order.

ORDER

In the premises, I propose the order that follows:

1. The Appellant's appeal is dismissed with costs
2. The Appellant shall vacate the property, 2[...] L[...] C[...], George, by Monday, 31 March 2025, failing which, the Sheriff is ordered to evict her and all other unlawful occupiers on Friday, 4 April 2025.

Bhoopchand AJ

I agree, and it is so ordered.

Slingers J

Judgment was handed down and delivered to the parties by e-mail on 4
March 2025

Appellant's Counsel: T E Lotz, J Green

Instructed by Goussard Attorneys

First Respondent's Counsel: A F Schmidt

Instructed by Natascha Pretorius & Associates