REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 19998/2011

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

9/2/2012
DATE

SIGNATURE

In the matter between:

LUNDY, SHAUN RYAN	First Applicant
NIEUWOUDT, DENEYS LEON	Second Applicant
and	
NKOMO, NOMHLWAZI GENETH	First Respondent
THE ILLEGAL OCCUPIERS OF PORTION 3 OF HOLDING 177 PRESIDENT PARK AGRICULTURAL HOLDINGS	Second Respondent
THE CITY OF JOHANNESBURG METROPLITAN MUNICIPALITY	Third Respondent

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J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The applicants seek an order evicting the first respondent and the second respondent from Portion 3 of Holding 177, President Park Agricultural

Holdings situated at Plot No. 3, 177 Kruger Road, President Park, Midrand, Johannesburg ("*the property*"). The applicants also seek certain ancillary relief as set out in the notice of motion dated 24 November 2011.

THE PARTIES

[2] The application, which is brought under the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("*the PIE Act*"), is opposed by the first respondent only. The third respondent is the City of Johannesburg Metropolitan Municipality which has not filed opposing papers. No relief is sought against the third respondent. The second respondent is a group of persons whose names, identities, and personal details are unknown to the applicants but are occupiers of the property with and through the first respondent. The applicants allege that all of these unknown people are adults, and are occupying informal structures which were previously utilised as stables on the property, and that all of them are adults. The first respondent, on the other hand, contends otherwise, as indicated below.

THE FACTS AND HISTORY OF THE MATTER

[3] The facts of this matter are largely uncomplicated but call for a difficult and balanced determination. What is, however, not in dispute, is the following. The first respondent and her husband, Mr N J Ngoma ("*Ngoma*"), were previously the registered owners of the property. They used the property as their home. At the time, the couple entered into a loan agreement with the Standard Bank of South Africa Limited ("*the bank*"), in terms of which

they borrowed an amount of money from the bank. This loan was secured by a first mortgage bond over the property. At a later stage, the couple borrowed further money from the bank, and as security, a second mortgage bond was registered over the property. The property is huge, measuring some 9287,0000 square metres, housing units which were initially built and intended as stables for animals.

[4] It is also not in dispute that the first respondent and Ngoma failed to comply with the conditions of the loans pertaining to the repayment. As a consequence, the bank foreclosed, issued summons, and obtained default judgment for repayment of the loans. The property was declared specially executable in terms of the first and the second mortgage bonds. In the process, the first respondent and Ngoma separated, and they were finally divorced on 6 May 2011. Ngoma is not residing at the property which was put up for sale in execution on public auction by the Sheriff of the Court on 10 August 2010. The first respondent's attempts to stay the sale in execution, and to rescind the default judgment, were unsuccessful.

[5] It is further not in dispute that the first applicant bought the property at a public auction. Prior to taking transfer, the first applicant, in turn, sold the property to the second applicant on 19 August 2010, in terms of a written deed of sale. The property was registered into the name of the first applicant on 24 January 2011, but immediately thereafter on the same date, the property was transferred to the second applicant, who is presently the registered owner thereof. The second applicant bought the property with a

loan from a bank, secured by a bond over the property. He says that he remains liable for the repayment of the bond as well as the rates and taxes pertaining to the property, despite the fact that he cannot occupy the property. He bought the property with the sole intention of providing his family with a home. As a result, the second applicant and his family are currently compelled to arrange alternative interim accommodation. In the answering papers, the first respondent states that from 10 August 2011, she heard that the property was sold. She relied on legal assistance from *pro bono* organisations, which was not effective to stop the sale. She eventually managed to instruct attorneys and counsel, and launched an application for rescission of the default judgment, which was unsuccessful. She intends to launch a fresh application soon.

THE FIRST RESPONDENT'S MAIN CONTENTIONS

[6] The main grounds on which the first respondent is opposing the present application are that she contends that she is still the owner of the property. This is clearly misplaced and incorrect. The first respondent also contends that she is presently occupying the property with her three children, aged 23, 19 and 13, respectively. The last-mentioned child attends school in the area. She has also adopted other major relatives who stay on the property. Significantly, the first respondent proceeds to state that, "*because of the size of the property where I am residing at the abovementioned address, I have employed the following people in order to assist me in the maintenance of the property: Mr Amen Bhebhe (gardener) and his wife (domestic servant) Siboniso Eunice Ndlovu ID No. 770302 0955 08 6, they*

reside with their two minor children ... The abovementioned families are residing in one of the outside buildings with my permission and they are not paying rent. Mr Jabulani Ndlovu is also assisting Mr Amen Bhebhe for the maintenance of the property and looking after my stock ...". The first respondent further contends that the eviction order sought by the applicants will adversely affect the right to education of the children (her minor son and children of her employees), in terms of section 29(1) of the Bill of Rights.

SOME APPLICABLE LEGAL PRINCIPLES

[7] I deal with some applicable legal principles. Counsel for the applicants, correctly in my view, submitted that the essential facts of this case are almost exactly the same as those in *Ndlovu v Ngcobo; Bekker v Jika* [2002] 4 All SA 384 (SCA), where Olivier JA, at para [32] said:

> *"In the second appeal ("Bekker and Bosch"), now reported in 2002 (4) SA 508 (E), the appellants are the registered owners of urban residential property known as 52 Avondale Road, Kabega Park, Port Elizabeth. The respondent is the former owner of that property. He and his family resided there. In order to secure an indebtedness to the First National Bank, respondent passed a mortgage bond over the property in favour of the bank. He allegedly failed to honour his obligations under the bond. The bank issued summons and obtained judgment by default on 9 February 2000. A warrant for execution was issued on 10 February 2000. Pursuant thereto the property was sold in execution on 23 March 2001. On the same day, more than a year after the default judgment was taken against him, the respondent launched an application for rescission of the default judgment. The basis of the application was that the bank had overcharged him in respect of interest. The sheriff conducting the sale was requested by the respondent to notify the prospective purchasers of the property of his pending application. The appellants purchased the property at the sale in execution and, on 22 May 2001, obtained registration of transfer into their names."*

The majority of the Appeal Court, per Harms JA, at paras [18] and [19] of the judgment, with reference to the PIE Act, found as follows:

> *"[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (section 4(8), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 800, Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 360G-362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (Ex Parte Neethling and Others 1951 (4) SA 331 (A) at 335E, Administrators' Estate Richards and Nichol and Another 1999 (1) SA 551 (SCA) at 561C-F).*
>
> *[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant considerations are nearly without fail within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide."*

7.1 There is undoubtedly much sympathy for the first respondent in the situation she currently finds herself and those related to her in the present matter. During the hearing of the matter, when the Court indicated to her counsel that she had no genuine defence to the application, she reportedly was unhappy and left the courtroom. Regrettably, all the circumstances set out by her do not constitute a valid defence against the eviction relief sought by the applicants. Her circumstances also do not make

out grounds entitling this Court to exercise a discretion not to evict her and the other unlawful occupiers of the property. In addition, the first respondent and her family cannot truly be said to be poor and destitute. See, *inter alia*, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC). On her own version, the first respondent, although she claims to be unemployed, employs at least three domestic servants in her employ. It begs the question where does she derive the income from. She says she is still making payments to the bank in the hope that she can still keep the property. The first respondent, in what appeared to be a desperate attempt to delay the matter further also sought a postponement of the matter. The reason advanced by her counsel was that the first respondent wished to file certain documents which were currently in the bank's archives. In this regard, it was alleged that such documents would shed some light on the history of her repayments to the bank in respect of the mortgage bonds over the property. The application for a postponement, which was strongly opposed, was declined as it had no merit at all. The notice of motion was served on the respondents as far back as 8 June 2011. She filed her opposing papers on 26 July 2011. The *ex parte* notice of application in terms of section 4(1) of the PIE Act was served on her in June 2011. She therefore had ample time to secure the said documents and prepare her defence.

7.2 The undisputed fact of the matter is that both applicants, especially the second applicant, legitimately bought the property. As an owner, in law, as his counsel argued, he is entitled to possession of his property, and to an eviction order against a person, such as the first respondent, who unlawfully occupies the property. See *Brisley v Drotsky* 2002 (4) SA 1 (SCA). The personal circumstances and unmeritorious defence advanced by the first respondent, cannot exclude the second applicant from access to and full use and enjoyment of his property. He continues to suffer prejudice for as long as the first respondent and the others continue to occupy the property. In *Wormald NO and Others v Kambule* 2006 (3) SA 562 (SCA), at para [15], Maya AJA (as she then was) said:

> *"[15] It must be borne in mind that the effect of PIE is not to expropriate the landowner and that it cannot be used to expropriate someone indirectly. The landowner retains the protection against arbitrary deprivation of property under s 25 of the Bill of Rights. PIE serves merely to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) ([2002] 4 All SA 384)."*

7.3 In the present matter, the applicants complied with all the formalities required by the PIE Act. On the other hand, the first respondent plainly did nothing at all to alleviate her own circumstances. She and her ex-husband, Ngoma, defaulted in making repayments to the bank in respect of what appears to be

a vast and luxurious property. There is no evidence that the first respondent made any efforts to secure alternative accommodation through the third respondent.

7.4 In the heads of argument, and in respect of the application for a postponement, counsel for the first respondent argued that she must be allowed a reasonable opportunity to file an affidavit in order to explain her proper defence and explain the history of the matter fully. In this regard, reliance was placed on *Kabelo Betlane and Shelly Court* CC, Constitutional Court 14/10 [2010] ZACC 23. The short answer to this submission is that the facts in that case are clearly distinguishable from the facts in the present matter. For example, in *Kabelo Betlane*, the appellant there successfully challenged the validity of the writ of execution, which is not the case in the present matter. Furthermore, the premises concerned in that case were no longer available for occupation.

CONCLUSION

[8] I conclude therefore that in the present matter, the applicants have undoubtedly and, on a balance of probabilities, made out a case for the relief claimed in the notice of motion. It is just and equitable for the first respondent and those who occupy the property under her to be evicted therefrom, after considering all the circumstances as envisaged in *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C). The first respondent has remained in

occupation of the property all along. During argument of the matter on 5 October 2011, it was made clear to her that she will have to be evicted ultimately. In these circumstances, it will, in my view, be unjust to allow her an extended period within which to vacate the property. The second applicant continues to be irreparably prejudiced, more so that there are allegations in the supporting affidavit attached to the founding papers that the property is being vandalised and used as an illegal shebeen. On the other hand, the applicants' prayer that the first respondent be ordered to vacate the property within 7 days from the date of this Court's order, borders on the unreasonable. On proper consideration, I am of the view that a further period of 30 days within which the first respondent ought to vacate the property, will be fair and reasonable in the circumstances. The costs of the application fall to follow the result.

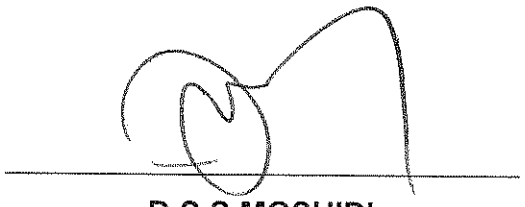
ORDER

[9] In the result the following order is made:

1. The first respondent and the second respondent are hereby ordered to vacate the property situate on Portion 3 of Holding 177, President Park Agricultural Holdings, Registration Division I.R. Province of Gauteng, at Plot No. 3, 177 Kruger Road, President Park, Midrand, Johannesburg, within thirty (30) days from the date of this order.

2. That should the first respondent and second respondent fail or refuse to vacate the property as ordered above, the sheriff of the court, with the assistance of the South African Police Service, if necessary, is hereby authorised to evict the respondents from the property described in order 1 above, forthwith.

3. The first respondent and second respondent are ordered to pay the costs of this application, and any costs previously reserved, if any, jointly and severally, the one paying the other to be absolved.



D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANTS	J J BOTHA
INSTRUCTED BY	BURDEN AND SWART ATTORNEYS
COUNSEL FOR THE FIRST RESPONDENT	S V DUBAZANE
INSTRUCTED BY	MAHLANGU MASHOKO INC
DATE OF HEARING	5 OCTOBER 2011
DATE OF JUDGMENT	10 FEBRUARY 2012

SUMMARY

Civil procedure – eviction of respondents from blatantly luxurious and vast residential property in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 ("*the PIE Act*") – first respondent and her former husband defaulting in respect of repayments of two mortgage bonds registered over the immovable property in favour of bank – the bank foreclosing – first applicant buying immovable property at public auction and reselling property to second applicant – as owner at law, second applicant entitled to occupation – considerations of equity and fairness justifying eviction of first respondent and other unlawful occupiers from immovable property – in terms of section 4(8) of the PIE Act since first respondent having no justifiable defence, and neither poor or destitute.