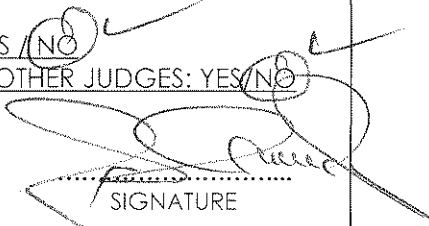


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 7742/2012

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>2012-10-09</u> DATE	
 SIGNATURE	

In the matter between:

MENZI KWAME NKURUMAH MCUNU

Applicant

and

ANNA MALATJI

Respondent

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] The applicant launched this application on 1 March 2012 for an order in the following terms:

- 1.1 That the respondent and/or any person/s unlawfully occupying the premises through them be evicted from the premises situated at Erf 254 Moletsane Township Soweto, also known as 254 Mokhatla Street, Moletsane, (*"the property"*);
- 1.2 That the respondent and any person/s occupying the premises through her be ordered and directed to vacate the property within 30 (thirty) calendar days from date of service of this order;
- 1.3 In the event of the respondent and/or any person/s unlawfully occupying the premises through her failing to vacate the abovementioned premises in accordance with prayer 1 above, that the sheriff or his lawful deputy, of this Court, be authorised to evict the respondent and/or any person/s occupying same through her. In such an event the applicant should be entitled to recover the costs of the eviction from the respondent when so evicted;
- 1.4 That the sheriff or his lawful deputy be authorised to elicit the assistance of the South African Police Services in order to give effect to this order, if such assistance is required by the sheriff or his lawful deputy;
- 1.5 Costs of this application on a scale as between attorney and client; and

- 1.6 Such further and/or alternative relief as this Court may deem necessary.

[2] The application was originally set down for 22 May 2012. On this date Makgoka J ordered that the section 4(2) notice be re-served on the respondent and then postponed the matter to 5 June 2012.

[3] On 5 June 2012 the matter served before my brother Moshidi J and he postponed it to 24 July 2012 subject to the following terms and conditions:

- 3.1 That the respondent serve her answering affidavit by no later than 19 June 2012;
- 3.2 That the applicant serve his replying affidavit, if any, by no later than 3 July 2012; and
- 3.3 That the respondent pays the wasted costs occasioned by the postponement of the matter on 5 June 2012.

[4] This matter then came before me on 24 July 2012, on which date it was agreed that argument will be heard on 27 July 2012.

[5] On 27 July 2012 argument was heard and at the end of it all I issued an order attached to this judgment as “AA”, with a promise that a full judgment will be handed down in due course.

[6] This is the full judgment I promised to hand down. It incorporates the order I gave on 27 July 2012.

[7] The respondent has filed her answering affidavit in opposition of the orders sought by the applicant.

[8] In its answering affidavit the respondent raised two points *in limine*, namely:

8.1 That “*this matter is still pending in this (South Gauteng High Court) under Case Number 12/22068 in which or wherein the Respondent has launched an application for the setting aside of the sale of the property (same Erf 254 Moletsane) to one Sipho Eldinfolo Mlotshwa by his (Respondent's) brother, one Ben Malatji*”; and

8.2 That this application does not comply with the Prevention of Illegal Evictions from and Unlawful Occupation of land Act, 1998 (Act 19 of 1998) as amended (“*PIE Act*”).

[9] An interesting aspect of the first point *in limine* is that the allegedly pending application the respondent is talking about is a new or fresh application launched when these proceedings were long under way on 14 June 2012 in which the applicants are two, they being:

9.1 First applicant, Joseph Mogale Malatji; and

9.2 Second applicant, Anna Malatji, who is the respondent (only one) in our present application.

[10] The respondents in that so-called pending application, unlike in this application where there is only one respondent, are five (5) namely:

10.1 Ben Malatji, being first respondent;

10.2 Sipho Eldinfonds Mlotshwa, being second respondent;

10.3 Nedbank Limited, being third respondent;

10.4 Mcunu Menzi Kwame Nkrumah being fourth respondent; and

10.5 Registrar of Deeds, Johannesburg, being the fifth respondent.

[11] That "*pending application*" have no date on which it was to serve in court in its notice of motion.

PENDING CASES

[12] A case is pending when a new one is instituted or launched when that first one is still under way or uncompleted. It is not the other way round.

[13] At the hearing of this application I decided that lest I misunderstood the respondent's point *in limine*, I asked counsel for the respondent whether I am correct that the matter the applicant contended was pending was only instituted long after this present application was before this Court. He answered in the affirmative. Upon my question how then the would or is this contention that this application should be suspended or stopped because there is an already pending case preceding it, he was very, very incoherent. In fact he sounded and looked very confused. I distinctly formed an impression that he did not have an idea what is meant by a pending case.

[14] When I wanted clarity over the different parties in the so-called pending matter and the fact that the notice of motion did not even have a court date, he had no response.

[15] Very surprisingly, in the face of the above anomalies, coupled with my explanation to him (counsel for the respondent) what *lis pendens* meant and how no such *lis* was pending in this instance, the respondent's counsel insisted that the respondent was still persisting with that point *in limine*. My

warning to him about the costs implications of such a move could not shake him from his standpoint.

[16] This and other *res novae* that emerged during submissions and argument by the respondent's counsel informed the decision I took to write a full judgment despite having issued my final order herein so that I could deal with these "*legal innovations*" as it may be very difficult for a normal qualified practitioner to comprehend what really happened. Granted, counsel stated that he was acting upon instructions from his client(s), however, it is my considered view and finding that he ought to have known better and/or advised his clients accordingly.

[17] I do not wish to waste any time on a non-issue. The first point *in limine* is not only misplaced but also an abuse of the process of the court which have had the effect of wasting time and also causing an unnecessary escalation of the costs of the hearing. It stands to be dismissed "*pronto*" and it must be accompanied by a punitive costs order.

THE SECOND POINT IN LIMINE : NON-COMPLIANCE

[18] The respondent merely made mention of an alleged non-compliance with the PIE Act by the applicant but did not come up with anything to substantiate this contention. As such, there is no point *in limine* to deal with on this point. It also must be dismissed with costs, which costs also qualify to

be on a punitive scale. This also was an ill-thought, capricious and wasteful exercise on the part of the respondent.

ISSUES IN DISPUTE IN THIS APPLICATION

[19] The respondent is refusing to vacate the property after due notice to her by the applicant to do so. The applicant has purchased the property at a legal or lawful sale in execution. It is already registered in his names.

[20] The respondent contend that her brother, one Ben Malatji had unbeknown to the family sold the property to Sipho Mlotshwa and that he had no right or mandate from the family to do so. It is Mlotshwa who lost the property in a sale in execution after foreclosure by the bank and due process.

BACKGROUND AND HISTORY

[21] During the year 1998 one Ben Malatji ("*Ben*") became the registered owner of the property under Deed of Transfer T19513/1998. During 2007 Ben sold and had the property transferred to Sipho Eldinfolo Mlotshwa under Deed of Transfer T14046/2007. The said Mlotshwa was a mortgagee in terms of a mortgage bond registered over the property. Nedbank was the mortgagor.

[22] Nedbank foreclosed against Mlotshwa and obtained a judgment against him in this Court under Case Number 2010/33686 and sold the property in execution on 7 July 2011. The applicant was the purchaser. He complied with all conditions of sale and the property was registered in his names at the Deeds Office on 30 September 2011.

[23] The respondent is in occupation of the property.

[24] During October 2011 the applicant approached the respondent and advised her of the current state of affairs and that he was now the owner of the property. The applicant afforded the respondent the opportunity of entering into a lease agreement with him over this property. The respondent refused. She also refused to make any payment(s) of any rental whatsoever. The applicant then gave her notice to vacate the property.

[25] After the expiry of the period granted her to vacate the property had expired, the respondent has failed, alternatively neglected, alternatively refused to vacate the property and thus is in unlawful occupation of same to date hereof.

[26] Attempts and efforts by the applicant's attorneys to persuade the respondent to vacate the property have been ignored. Even letters and notices were served on her through the Sheriff, Soweto but she has ignored them to date.

[27] The respondent is occupying and utilising the property but is, in addition to rentals, failing or refusing to pay any amounts towards water, electricity, rates and taxes, the costs of which are borne by the applicant.

[28] The applicant fears that the respondent may wilfully or negligently cause damage to the property, which damage would decrease the value of the property and that he is likely to suffer substantial expense to repair any damage which may be caused.

EVALUATION

[29] That the applicant is being severely prejudiced and suffering substantial financial burden occasioned by the respondent's unlawful occupation of the property cannot be gainsaid.

[30] What Ben Malatji did should not in my view affect the applicant's lawfully acquired rights of ownership over the property. The family is at liberty to take him to court for that and it is for that court to assess the situation and decide what order(s) to issue.

[31] The applicant contended and submitted that the respondent was gainfully employed and as such is capable of acquiring her own accommodation. Furthermore, the respondent was challenged to come up with any circumstance(s) like dependants and/or vulnerable persons living with her in the property which might influence the court to side with her in this

action for eviction. She did not make use of that opportunity. She said nothing about her personal circumstances and/or any aspect that may be of assistance to her in her answering affidavit. Apparently she was advised that the "*application*" she was part of that was launched well into the time this application was under way would put a stop to these proceedings. If she thought so, she was ill-advised.

[32] It is common cause that the respondent acted arrogantly towards the applicant who was very accommodative towards her. She bit the hand that wanted to feed her.

[33] In as far as this application is concerned, the respondent in my view has not furnished this Court or come up with facts or circumstances that could serve as a defence to the eviction order sought by the applicant. It is my finding that the applicant should succeed.

[34] I have considered the applicant's prayer that the cost order accompanying an order, if granted in his favour, should be on a scale as between attorney and client.

[35] This Court has a discretion on the type of costs order to grant in matters. After carefully assessing the circumstances and surrounding facts in this application, it is my finding that a such a cost order is the appropriate cost order to grant.

ORDER

[36] As stated above, I issued an order on 27 July 2012. That is the same order that I repeat hereunder:

36.1 IT IS ORDERED THAT:-

1. The respondent and all those persons in possession of and/or occupying and/or holding the immovable property situated at Erf 254 Moletsane Township, Registration Division I.Q., Province of Gauteng also known as 254 Mokthatla Street, Moletsane (*"the property"*) by, through or under the respondent are to vacate the property on 30 August 2012.
2. The sheriff for the area within which the property is situated is authorised and directed to forthwith evict the respondent and any person in possession of and/or occupying and/or holding the property by, through or under the respondent in the event of them failing to vacate the property on 31 August 2012. In such event the applicant is entitled to recover the costs of the eviction from the respondent when so evicted.

3. The sheriff for the area within which the property is situated is authorised to elicit the assistance of the South African Police Services in order to give effect to this order, if such assistance is required.
4. The respondent shall pay the costs of this application.



N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

ON BEHALF OF APPLICANT

INSTRUCTED BY

NAM-FORD INCORPORATED
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FOR THE RESPONDENT

INSTRUCTED BY

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 c/o MEDUPI LEHONG INC
 JOHANNESBURG
 TEL NO: 012 – 323 2023/
 011 – 331 8323

DATE OF ARGUMENT

27 AUGUST 2012

DATE OF ORDER

27 AUGUST 2012

DATE OF FULL JUDGMENT

10 OCTOBER 2012