REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 28227/2011

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

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DATE SIGNATURE

In the matter between

SENNE NARE COMFORD **Applicant**

and

MASHUDU MATTWES MUNZHEDZI **First Respondent**
UNLAWFUL OCCUPIERS OF ERF 2860 KAALFONTEIN **Second Respondent**
CITY OF JOHANNESBURG **Third Respondent**

JUDGMENT

MADIMA, AJ

Introduction

[1]. This application has been before this court on several occasions. For one reason or the other, it could not be brought to finality. The Applicant is the registered owner of the property described as Erf 2860 Kaalfontein ("the property"). He purchased this property from one Patricia Tshabalala ("Tshabalala") sometime in 2010. Applicant registered a mortgage bond with First National Bank ("the bank") to the value of R250 000.00. He currently pays the amount of R3 225.22 per month to the bank in order to service the loan. Applicant states that he is also paying rates and taxes to the Municipality. The Applicant is the holder of a valid title deed in respect of the property. Applicant has attached to his papers all the relevant documents in support of his claim. He however is not in occupation and peaceful possession of the property because of the unlawful occupation thereof by First and Second Respondent.

[2]. The First Respondent retorts in his answering affidavit that he had also purchased the property from the same Tshabalala in 2004. He attached as proof of such purchase, a document he named "deed of sale". The document is dated 06-11-2004 and reads in part thus "*This is to confirm that Matthews Mas (sic) Munzhedzi, I.D.No … had pa (sic) R25 000.00 for the house to Tshabalala Patricia I.D.No …. On the above mentioned date*. There are also signatures apparently of the parties, including those of First Respondent and also apparently that of Tshabalala, who confirm the purchase.

[3]. The First Respondent states further in his answering affidavit that the house in question is an RDP house, and that he paid R35 000.00 for it. He also alleges that he paid an additional R70 000.00 for the renovations thereto. He has not been able to have the property transferred to his name. He claims that after full payment of the purchase price, he contacted Tshabalala to assist him in transferring the house to his name but Tshabalala told him that the house will not be transferred to his name as she, Tshabalala was not in possession of her own title deed yet. Tshabalala undertook to effect the transfer once she had the title deed.

[4]. The Applicant states that upon registration of the property in his names, he requested the First and Second Respondent to vacate the property. They refused to move out, hence the instant application.

[5]. On or about 11 October 2011 the Honourable Judge Carelse authorized a section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the Act") notice. The grounds for eviction in the notice were that (a). the applicant is the owner of the property and that respondent was occupying the property without applicant's consent, (b). the applicant purchased the property and a copy of the deeds search was attached, (c). the respondent's occupation of the property was unlawful and prejudices the applicant, and (d). that respondent refused to vacate the property notwithstanding demand. It is important that I reproduce the provisions of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the Act") which provides that

'4. Eviction of unlawful occupiers

(1). Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2). At least 14 days before the hearing of the proceedings contemplated in ss(1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3). Subject to the provisions of ss(2), the procedure for the serving of notices and filing of papers is as prescribed by the Rules of the court in question.

(4). Subject to the provisions of ss(2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the Rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5). The notice of proceedings contemplated in ss(2) must –

(a). state that the proceedings are being instituted in terms of ss(1) for an order for the eviction of the unlawful occupier;

(b). indicate on what date and at what time the court will hear the proceedings;

(c). set out the grounds for the proposed eviction; and

(d). state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid

[6]. In his answering affidavit, and at the hearing of the application, the First Respondent raised several points *in limine* claiming, *inter alia*, non compliance with the provisions of s4 of the Act. The Respondent stated in this regard that the applicant for eviction should first approach the court on an ex parte basis, and thereafter serve the entire application, together with the ex parte application on respondent. The respondent claimed that the applicant did not obtain authorization from the court to serve the application on respondent. Further that applicant had failed to show that all the requirements of the Act had been complied with.

[7]. The second point raised in limine was that applicant had failed to join the municipality in the eviction proceedings. Respondent stated that the applicant only cited the municipality but did not serve the application on it.

[8]. The third point raised in limine was that the applicant had miscalculated the dies.

[9]. The fourth point was that the respondent had purchased the property from the same person who had allegedly sold the same property to the applicant. The seller should, because of her unquestionable interest, be joined in the proceedings.

[10]. The final point raised by the respondent was that the applicant served a notice of set down on respondent's correspondent attorneys for 13 September 2011 without mentioning the s(4) notice. The applicant was ordered to pay the costs occasioned by the postponement thereof.

[11]. On 27 October 2011, Honourable Rossouw AJ ordered that the applicant "*to ensure that there has been compliance with the provisions of s4(2) and (5) of the Act 19 of 1998 before the matter is set down for hearing*".

[12]. On 6 December 2011, Honourable Boruchowitz J granted an order evicting the respondent. The judge ordered that

1. The First Respondent and others are to be evicted from Portion 148 of Erf 2860 Kaalfontein Extension 5.

2. The Respondents are to vacate the property on or before 20th January 2012.

3. In the event that the Respondents do not vacate the property on the 20th January 2012 the Sheriff of the Court or his lawfully appointed Deputy be authorized to evict the Respondents from the property.

4. The First Respondent is to pay Applicants' costs of suit.

[12]. The First Respondent successfully applied for the rescission of the order against him which was granted on 6 December 2012 by Boruchowitz J. It would appear that the Applicant was not represented on the day in question. Honourable Francis J made the following order:

1. The judgment granted by this court on 6 December 2011 under case number 2011/28227 is hereby rescinded and set aside.

2. The First Respondent is to pay the costs of this application.

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[13]. It would appear that for a period of over eight months nothing happened with regard to this matter. On 21 August 2012 Honourable Vally J removed the matter from the roll with no costs ordered. No reasons were provided. I shall assume that it was by agreement between the parties. Be that as it may, this has no bearing in the current circumstances.

[14]. Another eight months were to pass until the matter came before Honourable Modiba AJ on 22 April 2013. The First Respondent again raised the point that the applicant had failed to comply with the provisions of s4(2) of the Act. The Honourable Judge upheld the point and held that

"*having upheld the first point in limine raised by the first respondent, it is not appropriate for me to consider the merits of this case until applicant has addressed the relevant point in limine*".

[15]. The relevant portion of the Honourable Judge's order reads thus:

1. *The first point in limine raised by the first respondent is upheld;*

2. *The applicant is to serve an amended s4(2) notice of the first, second and third respondent; and to a lesser extent;*

3. *The applicant is to pay the first respondent's wasted costs occasioned by the hearing of this matter de bonis proprii*.

[16]. On 27 April 2013 the applicant re-served his s4 notice. On 29 May 2013 the parties appeared before me. Ms T Seboko for the First Respondent submitted that the First Respondent purchased the property from Tshabalala. He could not obtain transfer because Tshabalala kept on making excuses. Ms Seboko concedes that Applicant purchased the same property from Tshabalala for the amount of R250 000.00. Counsel also conceded that the property has since been transferred into the name of Applicant.

[17]. Counsel for First Respondent referred me to the provisions of s4 of the Act and also to *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others [2001 (4) SA 1222 (SCA)*] where the court held that "*Since no indication is given in s4 about how the court's directions regarding the s4(2) notice are to be obtained, common sense dictates that the applicant approach the court by way of an ex parte application for such direction*".

[18]. I do not comprehend how *Chetty v Naidoo 1974 (3) SA 12 (A)* assists the First Respondent. The court, dealing with the underlying principles of ownership held that "*it may be difficult to define dominium comprehensively but there can be little doubt that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found from whomever holding it*." I doubt that the First Respondent can claim ownership of the property by merely *occupatio* alone. He is not the holder of the title deed. The property is thus not registered in his name.

[18]. Mr N Mahlangu, who represented the Applicant submitted that applicant had complied with the peremptory procedural requisites of s4(5) and (6) of the Act. He further reminded the court that the relief his client seeks has been previously granted to the applicant by the court. More importantly, so submitted Mr Mahlangu was the fact that the First Respondent had not provided new facts for the court not to grant the eviction application.

[19]. Counsel for the applicant submitted further that the First Respondent's case was, apart from the points in limine that were raised, one of which was upheld, that the first respondent had purchased the property from Tshabalala, and also his reliance on sections 7, 10A and B of the Housing Act of 107 of 1997. These relevant sections provide that

10A Restriction on voluntary sale of state-subsidised housing

(1). Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that person unless the dwelling or site has first been offered to the relevant provincial housing department.

(2). The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his

or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidized housing.

(3). When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the Provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.

(4). No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor.

10B Restriction on involuntary sale of state-subsidised housing

(1). Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person's successor's in title or creditors in law, other than creditors in respect of credit-linked subsidies, shall not sell or otherwise alienate his or her dwelling or site unless the dwelling or site has first been offered to the relevant provincial housing department at a price not greater than the subsidy which the person received for the property.

[20]. It is indeed surprising that the First Respondent raised the above provisions of the Housing Act as a defence against his eviction when he himself is a party to a sale and purchase that is prohibited by the Housing Act. First Respondent has no clean hands. Our courts are very clear in this regard. If First Respondent and indeed the Provincial Housing Department are of the view that the sale and purchase of the property was unlawful, and therefore the transfer should not have been effected, then they should have both the sale to and the transfer into Applicant's name be reviewed and set aside. Unless and until this has been done, the sale and transfer remain valid.

[21]. The courts held in (Oudekraal Estates (Pty) Ltd v City of Cape Town & Others (2004) 6 SA 222 at 242A-C) that "*until the administrator's approval, and thus also consequences of the approval, is set aside by a Court in proceedings for*

judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question".

[22]. The Court went further and held that "*No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside*."

[23]. I do not believe that the sections of the Housing Act that first Respondent seeks to rely on are useful to his case. This is an eviction matter. First Respondent cannot refuse to vacate a property on the basis that the Housing Act provides otherwise. First Respondent must state why an eviction order should not be granted against him. So far he has failed lamentably.

[24]. I now return to the Act. Section 4(6) of the Act provides that the court can grant an eviction order if it is just and equitable and after taking into consideration relevant facts such as the rights and needs of the elderly, the rights of children, the rights of disabled person and the rights of households headed by children.

[25]. First Respondent claims that he bought the property from Tshabalala. That may well be so. He has however failed to proof that he is the owner thereof. On the other hand, the Applicant has a title deed in his name . That is enough to establish ownership of the property. Our courts have held in *Ndlovu v Ngcobo, Bekker and Another v Jika 2003 (1) SA 113 at 124J-125A* that "….*provided the procedural requirements had been met, the owner was entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposed or disclosed circumstances relevant to the eviction order, the owner, in principle would be entitled to an order for eviction"*.

[26]. I find that the Applicant's s4 notice is in order. He has been able to establish his ownership of the property. The First Respondent's continued insistence on Applicant's

non compliance of s4 is ill founded, ill advised and unavailing to First Respondent. The First Respondent has no credible defence against the application for his eviction.

[27]. The First Respondent's submission that he is the owner of the property is flabbergasting. What is more astounding is his further reliance on such "ownership" to oppose the eviction application. The fact that he could have paid Tshabalala for the property has nothing to do with the Applicant...

[28]. I must also mention that Tshabalala has not been called upon by the First Respondent to depose to a supporting affidavit in order to confirm the First Respondent's claim. I am also unsure how the confirmatory affidavit would have assisted the First Respondent even in the event she had done so.

[29]. I am accordingly satisfied that the Applicant has successfully made out a case for the eviction of the First and Second Respondent. His application should therefore succeed.

[30]. I therefore make the following order that:

1. The Respondents and all persons occupying through them or under their control to vacate the respective premises as described as Erf 2860 Kaalfontein;

2. Failing compliance with the order, the Sheriff or his deputy is authorized and directed to evict the First and Second Respondent and all persons occupying through them in the aforesaid premises;

3. The Sheriff is authorized to approach the South African Police Services for such assistance.

4. The Respondents and all persons occupying through them are to vacate the premises by 30 August 2013.

5. The First Respondent to pay the costs of the application on an attorney and own client scale.

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TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicants:	Mr N Mahlangu
Instructed by:	Matela Sibanyoni & Associates
	011 331 1473
On behalf of the Respondent:	V.T Seboko
Instructed by:	Mopeli Attorneys
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	011 869 0024/0521
Dates of Hearing:	30 May 2013
Date of Judgment:	31 July 2013