

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

Case No: 11030/2012

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

1 March 2013

EJ FRANCIS

In the matter between:

DANIEL VAN DEN BERG N.O.

First Applicant

PIETER JACOBUS JOOSTE STROBOS N.O.

Second Applicant

And

PETRO STROBOS

First Respondent

ALL OTHER OCCUPIERS

Second Respondent

THE DIRECTOR OF PUBLIC HOUSING,
CITY OF JOHANNESBURG – ROODEPOORT

Third Respondent

JUDGMENT

FRANCIS J

1... The Calendula Trust (the trust) is the registered owner of property situated at 1014 Calendula Crescent, Weltevreden Park X45, Roodepoort (the property). The Trust has two trustees namely Daniel van den Berg (the first applicant) and Pieter Jacobus Jooste Strobos (the second applicant) hereinafter referred to

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as the applicants. The second applicant is married to the first respondent, Petro Strobos and they have two minor daughters who are living with their mother on the property. The applicants brought an application for an order that the first respondent and the persons who occupy with her, to forthwith vacate the property.

2. The first respondent is a major female housewife and is living on the property with their daughters who are aged 14 and 11 years old respectively since 2000. She and the second applicant are currently embroiled in an acrimonious divorce action. The second applicant left the property during early August 2010. The first respondent obtained a domestic violence protection order against the second applicant which prevents him from having any contact with her. She also obtained a rule 43 order that *inter alia* permits her to live on the property pending the outcome of the divorce proceedings. The second applicant is also responsible for the upkeep of the property and the maintenance of the first respondent and their children.

3. The applicants brought the application on the following basis:

- 3.1 The trust is the registered owner of the property and needs to take urgent occupation of the property which is in need of urgent repairs and due to an imminent threat that trees situated on it may fall on the house. There is also a serious threat that the retaining walls on the property may give in and cause serious damage to the property as well as the adjoining property. They rely on a report by one CF Joubert, a

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consulting civil who is of the view that the property should be vacated for all the repairs to be done on it.

3.2 The first respondent had indicated in the Rule 43 application that there are several items on the property that needs urgent repair and maintenance which confirms the report of C F Joubert.

3.3 The first respondent has refused and denied the trust access to the property purportedly based on a domestic violence order that she obtained against one of the trustees of the trust. She is not entitled to deny the trust access to its property as the trust is not subject to the domestic violence order and has a legal right to reasonable access to its property to maintain and repair it where necessary; especially in the light of the threat of damage to the property.

3.4 The first respondent has obstructed the applicants from gaining access to the property and demands to have the repairs affected through only contractors that meet her approval.

3.5 The security situated in the property also covers the security of the adjoining property at 1012 Calendula Street, belonging to the trust and the first respondent has on occasion failed to alert the applicants or its employees about an intruder that triggered the alarm system and attempted to steal a vehicle on the premises at 1012 Calendula. It is an extensive security system that cannot easily be relocated.

3.6 The first respondent was living on the property with the second applicant, her husband and a trustee of the trust, and their two daughters. He has instituted divorce proceedings against the first

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respondent in the North Gauteng High Court.

- 3.7 The second applicant left the house during early August 2010 and shortly thereafter the first respondent obtained a domestic violence order against him and he was in terms of the order prohibited to set foot on the property.
- 3.8 The first respondent then applied for interim maintenance in terms of rule 43 and is occupying the property in terms of a rule 43 court order. However as was pointed out by the presiding judge in a recent rule 43(6) application by the first respondent, the trust was never a party to the rule 43 proceedings and is therefore not subject to the provisions of that order.
- 3.9 The applicants in this matter is a trust which is represented by its trustees who are holding the property separate from their private estates.
- 3.10 The trust has never consented to the first respondent remaining in occupation of the property and there is no agreement between the trust and the first respondent for the continued occupation of the property. It is not bound by the court order of rule 43 since it was not a party of the second applicant's divorce and there is no obligation on it in law or otherwise to continue to allow the first respondent to occupy its property.
- 3.11 The trust is aware that the second applicant has offered to make other suitable accommodation available for the first respondent and her children.

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4. It was contended by the applicants that the first respondent's continued occupation of the property is infringing its rights of enjoyment of the property and particularly its right to rent, sell, repair or occupy the property. They are suffering prejudice as a result of the first respondent's continued unlawful occupation of the property. It was further contended that it is therefore just and equitable that the applicants be given vacant possession of its property.
5. It was contended by the first respondent that the application constitutes an abuse of the process and that it is brought *mala fide* at the behest of the second applicant in a transparent attempt to frustrate and to avoid compliance with an order of the Northern Gauteng High Court, issued in terms of rule 43 on 25 June 2010. In terms of the order she and her children are entitled *pendent lite* to occupy the erstwhile matrimonial home which forms the subject matter of this application. The effect of the order which the applicants are seeking would be in direct contradiction with the rule 43 order. The first respondent has occupied the property since 2000 when she and the second applicant moved into the property and they have occupied it as their matrimonial home with their two children. The minor children have lived in the property for most of their lives. The relief sought would certainly not benefit the children and it would be against their best interests. The property constitutes the home of the children and herself and much of the aforementioned Rule 43 order relates to their continued occupancy of the property.
6. It was further contended by the first respondent that the trust was formed

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during October 1999 and the second applicant was duly appointed with Letters of Authority by the Master on 18 October 1999. The beneficiaries of the trust were identified as being Pieter Jacobus Strobos, Petro Strobos and the descendants of Pieter Jacobus Strobos. The descendants are described as any legitimate own children. The donor had intended to create a trust for the beneficiaries. The object of the trust was to invest the assets of the trust for the benefit of the beneficiaries. The trust was intended to be a trust which would hold assets for the benefit of the beneficiaries on a long term basis, and the trust would utilise such assets and acquired knowledge and skills for the benefit of the beneficiaries. The trustees would have absolute power to deal with the assets of the trust in their sole and absolute discretion and as they may deem to be in the interest of the beneficiaries. The second applicant, herself and the children of the second applicant are the beneficiaries of the trust are still so the beneficiaries.

7. The first respondent contended that the second applicant is disgruntled by the following orders that the first respondent obtained and wish to evict her from the property in a transparent attempt to obtain the upper hand in the divorce action:

7.1 The rule 43 application which resulted in an order on 25 June 2010.

7.2 The interim interdict obtained against the second applicant by the first respondent, in which in terms of the Family Violence Act 116 of 1998 (FAVA) on 7 May 2010 on the return date in the Roodepoort Magistrate's Court, and on 27 October 2010 the interim interdict was

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confirmed and made final. The second applicant was prohibited from entering the property where the first respondent and the minor children was resident and is currently still resident.

7.3 The second applicant launched an application to have the final interdict set aside and on 27 June 2012 the additional magistrate JD Herman dismissed the second applicant's application in terms of section 10(2) of the FAVA.

8. It is clear from the foregoing that the application is being opposed on various basis. It is not necessary for purposes of this judgment to deal with all of those basis since it is common cause that there is a court order that permits the first respondent and her minor children to remain on the property pending the outcome of the divorce proceedings that are pending between the second applicant and the first respondent.

9. As stated above the first respondent, the second applicant and their two minor children have been occupying the matrimonial home which belongs to trust since 2000. The second applicant left the property in August 2010 and is residing with his girlfriend at a different property. It is common cause that the property adjacent to Calendula 1014, and therefore Calendula 1012 also belongs to the same trust and is being controlled by the second applicant. Her husband has filed for a divorce which divorce is being opposed by the first respondent. The first respondent had obtained a rule 43 order that allows her to remain in the property with her children pending the outcome of the divorce

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proceedings. In terms of the order the second respondent must continue to pay maintenance and maintain the property. Since the minor children have lived on the property for most of their lives, I do not believe that the relief sought by the applicants would certainly benefit the minor children.

10. The second applicant is a trustee and was so at the time when the rule 43 application was granted. The trust is seeking an order to evict the first respondent and all persons occupying with her from the said premises on the grounds that they are the owners of the property and that she is in unlawful possession of it.
11. There is simply no evidence before this court that the respondent is in unlawful occupation of the premises. She had been living on the property with her husband and is still living on it. A court order was granted which allows her to remain on the property pending the outcome of the divorce proceedings. She is living on the premises in terms of her marriage relationship with the second applicant and in terms of a court order. The applicants appear to have brought the application based on some remarks that were apparently made by the judge who had heard the rule 43 application namely that the trust was not a party to the proceedings. The remarks made by the judge in my view is not a basis to bring the application in this format. There is a valid order that remains valid until it has been set aside by an order of this court. The applicants have in any event pleaded in paragraph 9.11 of the founding affidavit that the first respondent is occupying the property in terms of rule

43 order. They have stated the following in the said paragraph:

“The Respondent then applied for interim maintenance in terms of rule 43 of the High Court Rules and is occupying the property in terms of a Rule 43 Court Order; however as was pointed out to the presiding judge in a recent Rule 43(6) application by the respondent, the Calendula Trust was never a party to the Rule 43 proceedings and is therefore not subject to the provisions of that Order.”

12. The application before this court is not for an order to rescind the rule 43 order but for an order to evict the first respondent and her two daughters from the property. The applicants have pleaded that the first respondent is in unlawful possession of its property. In a *reivindicatio* application it is not necessary for an applicant to plead that the occupier is in unlawful possession of its property. An occupier must prove the basis for his or her occupancy. However since the applicants have pleaded that the first respondent is in unlawful occupation of the property and has failed to prove that the first respondent is in unlawful possession of the property and this was the basis for the application, the application must fail. The first respondent has in any event proven that she is living on the property in terms of an agreement between her and the second applicant and in terms of a court order which is admitted by the applicants. The rule 43 order remains valid and is binding until it is set aside by an order of court. Until the rule 43 order has been set aside or the divorce action is finalised the applicants cannot seek an order for the eviction of the first respondent from the property. The rule 43 order is binding on the applicants.

14. The application should fail for another reason. The applicants have failed to

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set out grounds why the order that they are seeking should be regarded as just and equitable and reasonable under the circumstances, considering the right and interest of the minor children involved and the fact that the household is being headed by a female person. I do not believe that it will be just and equitable for this Court at this stage to order that the first respondent and her minor children should be evicted from the property with immediate effect.

The household is headed by a female. If the property is in need of urgent repairs the first respondent should allow the applicants to have access to repair the property. It will be in the interest of the first respondent and her children that the repairs should be done.

15. The application stands to be dismissed. There is no reason why costs should not follow the result.

16. In the circumstances I make the following order:

16.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR THE APPLICANTS	:	AJ MURPHY INSTRUCTED BY OBERLECHER ATTORNEYS
FOR FIRST RESPONDENT	:	R FERREIRA INSTRUCTED BY COUZYN HERTZOG ATTORNEYS
DATE OF HEARING	:	27 AUGUST 2012
DATE OF JUDGMENT	:	1 MARCH 2013

