REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 07007/2013

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

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DATE SIGNATURE

In the matter between:

VENPINE PROPERTIES (PTY) LTD
(REGISTRATION NO. 1986/000578/07) Applicant

And

ANNA MARGRETHA NIKITARIDIS First Respondent

GERASSIIMOS NIKITARIDIS Second Respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

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J U D G M E N T

MASHILE, J:

[1] This eviction application follows upon the acquisition of ownership of the property described as, The Remaining Extent of Holding 151 Kyalami

Agricultural Holdings Extension 1, situated at 170 Jakaranda Street, Kyalami Agricultural Holdings Extension 1 (“the property”) by the Applicant.

[2] Although there are three respondents in this matter, reference to respondents in this matter shall mean the First and the Second Respondents as no order is sought against the Third Respondent. The factual background is that:

2.1 The Respondents are husband and wife, married out of community of property;

2.2 The First Respondent was the owner of the property until she lost it in October 2012 as a result of foreclosure proceedings instituted by ABSA Bank Ltd;

2.3 The proceedings culminated in the property being sold at a sale in execution where it was purchased by Vernon Kenneth Matthews who in turn sold it to the Applicant during October 2012 for an amount of R3 200 000.00;

2.4 Following the acquisition of the property by the Applicant in October 2012, the First Respondent indicated that she wished to repurchase the property from the Applicant but has until the hearing of this application not approached the Applicant with a view to satisfying her wish;

2.5 The Respondents have since October 2012, the date on which the property was purchased by the Applicant, been in unlawful occupation as they do not have the permission of the Applicant to remain on the property;

2.6 Furthermore, neither Respondent has instituted proceedings to set aside the sale in execution;

2.7 None of the unlawful occupiers in particular, the First and the Second Respondents pay any rates and taxes and/or any occupational rental to the Applicant;

2.8 In consequence of this, the Applicant expends substantial amounts each month on assessment rates, taxes, water and electricity while the Respondents enjoy free occupation. The Applicant has until now not recovered any of the amounts that it had expended monthly on the property.

[3] The Applicant contends that as the registered owner of the property, it should be given possession and occupation of the property. Since there is no agreement between it and the Respondents for the continued occupation of the property, the sale in execution has not been nullified and the First Respondent has not repurchased the property from it, the Respondents have no right to live on the property and should vacate.

[4] Both Respondents have defended the application but only the Second Respondent has delivered his answering affidavit. When the parties appeared before this court on 25 November 2015, the Second Respondent moved that the matter be postponed *sine die* to enable him to obtain legal representation. He indicated that he would be financially ready to approach his attorneys with instructions after the end of January 2016.

[5] Needless to state that the application to postpone was understandably vehemently opposed by the Applicant. The grounds of such opposition were that:

5.1 When Wanless AJ postponed the matter *sine die* on 2 September 2015, he did so to enable the Second Respondent to instruct attorneys to represent him. At the hearing of this matter the reason had not changed;

5.2 Like he did on the previous appearance before Wanless AJ, the Second Applicant did not warn the Applicant that he was planning to apply for a postponement until he was before court.

5.3 A further postponement of the matter would highly prejudice the Applicant financially because as an owner it remains liable for all the property rates, taxes, electricity and water, which amount it is likely not to recover from anyone.

5.4 The Respondents' defences for remaining in occupation of the property were unsustainable.

[6] It was against that backdrop that the court considered the Second Respondent's application for postponement and dismissed it. The matter had to proceed without legal representation for the Second Respondent.

[7] Although the Second Respondent had on a previous occasion delivered an answering affidavit, no heads were filed on his behalf. He claimed that his entitlement to remain in occupation of the property derives from an oral lease agreement which he concluded with his estranged wife, the First Respondent, with whom he lives on the property. In the second place, he maintained that he has an oral option agreement to acquire the property from the Applicant at fair market value.

[8] The court must decide, having properly weighed all the circumstances surrounding all the parties, whether or not the Respondents should be evicted from the property. It will follow as a matter of course that if the defences that the Second Respondent has raised are upheld, the court will decline to entertain his eviction from the property. Since the First Respondent did not file any papers other than her Notice of Intention to Oppose, the court surmises that she has no defence to the Applicant's claim

[9] The Applicant has already demonstrated that it is the owner of the property by virtue of the registration of transfer of the property into its name. For that reason, I do not need to traverse the subject of ownership. It is settled in our law that the possession of an owner's property by another is prima facie wrongful. Accordingly, it is not expected of a Plaintiff to allege or prove that the other party to the proceedings' possession is wrongful or against his wishes. If they are nonetheless made, they cannot attract additional onus upon the party making them. See *Chetty v Naidoo* 1974 (3) SA 13 (A).

[10] A party depending on a right to possession, like the Second Respondent does in this application, bears the burden of alleging and proving it. In this regard it could be instructive to refer to the following paragraph uplifted from Chetty v Naidoo *supra*:

> "Once it has been established that the plaintiff is owner of the property and the defendant is in possession, then the *onus* is on the defendant to prove that she has the right to occupy the property."

See also, *Woemann N.O. v Masondo* 2002 (1) SA 811 (SCA).

[11] In *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), Cameron JA, as he then was, stated:

> "[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet

> motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order."

[12] Although the above passage pertains to matters concerning disputes of fact, it is pertinent in this case to the extent that the Second Respondent is raising what one can describe as fictitious defences and/or implausible versions.

[13] I turn now to consider the defences of the Second Respondent, the first being that he has concluded an oral agreement with the First Applicant to remain in occupation. The significance of such an agreement is that if the court finds that he did conclude such an agreement, the Applicant will be obliged to recognise and honour its terms. Perhaps the first remark should be that it is uncharacteristic of a married couple, let alone a couple whose relationship is estranged, to enter into a lease agreement of this nature.

[14] It is noteworthy to observe that the idea of the lease agreement was not canvassed during earlier communication whether by telephone or correspondence between either the First or Second Respondent's attorneys and those of the Applicant. Moreover, the Second Respondent was afforded an opportunity to prove payment of rental to the First Applicant by way of production of bank statements, which he failed to do.

[15] I have also noted that when the sheriff sold the property at the sale in execution in October 2014, he specifically recorded that it was free of any encumbrances. Why would the sheriff state that there were no encumbrances if there were? In the circumstances, I am persuaded that the concept of an oral lease agreement was recently hatched to justify the Respondents' continued occupation of the property.

[16] The Second Respondent alleges that he did not receive notification of the eviction proceedings against him and the First Respondent. However, the sheriff specifically notes on his return that he served it upon the First Respondent who is purportedly his estranged wife. The Second Respondent received the application for his eviction because the notice of intention to oppose cites both of them as respondents. A rhetorical question is, could the attorney have done this without instructions? For those reasons, I believe it is safe to reject his evidence as false.

[17] The Second Respondent also alleged that he has an option, probably also verbal as it is not attached to his answering affidavit, to purchase the property from the Applicant. This is extraordinary because there are no details such as the date of such option, where, how, who represented the Applicant when it was concluded. Like in the case of the lease, in all prior conversations with the Second Respondent's attorneys there is no intimation of the existence of such an option.

[18] The above being the case, it is best to discard it as the idea has all the hallmarks of a fabrication specifically designed to ensure that the Respondents remain in occupation of the property.

[19] This court cannot countenance the Second Respondent to present the most untenable defences whose objective is to delay and/or deny the Applicant an order entitling it to the enjoyment of its property. See the *Fakie* case *supra*.

[20] The Second Respondent has impudently contended that the Applicant was not suffering any prejudice as a result of the Respondents' continued occupation of the property. This assertion is devoid of any merit in view of the fact that the Applicant has been paying assessment rates, taxes, electricity and water. On the other hand, the Respondents have since October 2012 been living on the property for free.

[21] The amount that the Applicant disbursed monthly is unlikely to be recovered bearing in mind that the Respondents can hardly afford legal representation at present. If this is not prejudice then it is difficult to imagine what circumstances are likely to constitute such.

[22] The Respondents have been in occupation of the property for more than three years at no cost whatsoever. The Applicant has been the

registered owner of the property for approximately three years and has been paying all the costs associated with its ownership yet it has neither possession nor access to the property.

[23] The Respondents have failed to demonstrate to this court that they are entitled to remain in occupation. The Application must succeed especially in view of the Applicant's compliance with the Prevention of Illegal Eviction Act No. 19 of 1998 ("PIE") and that the Respondents have been in unlawful occupation since 2012.

[24] In the result, I order that:

1. The First and the Second Respondents are to vacate the property within 30 days of the date of this order;

2. The First and Second Respondents are to pay the costs of the Applicant jointly and severally, the one paying the other to be absolved.

3. The Applicant is to serve this order upon the First and the Second Respondents within three days of the date of delivery hereof;

4. No order is made against the Third Respondent.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for Applicant: Adv. R Raubenheimer
Instructed by: Prinsloo Attorneys

Counsel for the Respondents: No appearance
Instructed by:

Date of Hearing: 24 November 2015
Date of Judgment: 8 December 2015