REPUBLIC OF SOUTH AFRICA

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

CASE NO: 03791/2016

12.12.2016

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

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DATE SIGNATURE

In the matter between:-

JULY MARTINS TSHABALALA Applicant

and

FUNEKA BIDI First Respondent

CITY OF JOHANNESBURG MUNICIPALITY Second Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] This opposed application came before me on the opposed motion roll of the week commencing 12 September 2016.

[2] The applicant sought the eviction of the first respondent from certain property described as Erf […] Township Malvern, Gauteng ('the property'), together with any person occupying the property by virtue of the first respondent's occupation thereof, with effect from a date to be determined by this court, together with orders empowering the Sheriff or his lawful deputy to evict the first respondent and any others occupying the property by virtue thereof, and costs including the costs of the Section 4(2) notice in terms of the Prevention of Illegal Eviction from and Unlawful Occupation Of Land Act, 19 of 1998 ('PIE').

[3] The application was opposed by the first respondent who alleged that the parties, (being the applicant and first respondent), had entered into a customary marriage, alternatively a tacit universal partnership, which precluded the granting of the eviction order sought by the applicant.

[4] The City of Johannesburg Municipality, the second respondent, did not participate in the proceedings.

[5] The common cause facts material to the application were the following:

5.1 The parties were involved in an intimate relationship from at least May 2012 until approximately 2015 or thereabouts.

5.2 The property was occupied by the parties from May 2012 or thereabouts, having been secured by the applicant through a home loan from Absa Bank.

5.3 Upon taking up occupation of the property, the parties were already involved in an intimate relationship. The applicant was the sole provider and the first respondent, unemployed.

5.4 One child, born of the relationship between the applicant and the first respondent, was living with the first respondent in the property.

5.5 The first respondent was the head of her household.

[6] The applicant alleged that he was the sole owner of the property, which was registered in his name and secured by way of a mortgage bond from Absa Bank, pursuant to which he paid R5 141.31 monthly.

[7] The applicant averred that the parties intended, at some stage, to marry in terms of customary law. Notwithstanding, the relationship broke down prematurely and the plans to marry came to nought. Hence, the applicant demanded that the first respondent vacate the property, which she refused to do.

[8] Accordingly, the applicant alleged that the first respondent was in unlawful occupation of the property.

[9] The applicant alleged that he was suffering undue hardship pursuant to the first respondent's refusal to vacate the property. The first respondent was allegedly not paying the municipal charges arising from the property, effectively consuming electricity and water at the applicant's expense, although the first respondent denied as much.

[10] In addition, the first respondent was appropriating the rentals received from the tenants occupying various informal structures erected on the property.

[11] Hence, two issues required determination:

11.1 Whether a valid customary marriage existed between the applicant and the first respondent or not; and

11.2 Whether or not the parties had entered into a tacit universal partnership.

[12] The applicant denied the existence of the customary marriage. The applicant argued that the first respondent had failed to demonstrate compliance with the three requirements for the recognition of a customary marriage in terms of the Recognition of Customary Marriages Act, 120 of 1998 ('the Customary Marriages Act'). This because the first respondent did not allege that the marriage was negotiated, or entered into, or celebrated in accordance with customary law, as required in terms of section 3 of the Customary Marriages Act.

[13] Furthermore, the first respondent had failed according to the applicant, in her duty to ensure that (the) marriage was registered as required in terms of section 4(1) of the Customary Marriages Act.

[14] The applicant argued that the first respondent, if she was *bona fide* in her assertion of a customary marriage between the applicant and herself, ought to be in possession of a customary marriage certificate recording the marriage and bearing the prescribed particulars'.[1]

[15] The first respondent's allegations in respect of the existence of the customary marriage, however, were confined to an averment that as at May 2012 or thereabouts, 'the applicant and I had been staying together for some time and had already commenced with arrangements for a customary marriage and were, for all intents and purposes, husband and wife'.

[16] In the circumstances, the applicant was correct in his contention that the first respondent failed to aver facts sufficient to establish the customary marriage on a balance of probabilities

[17] A tacit universal partnership comprises four essential elements, all of which are required for the existence of such a partnership,[2] namely:

17.1 A partnership agreement;

17.2 The purpose of the partnership must be to make a profit;

17.3 Both parties must contribute to the partnership; and

17.4 Both parties must benefit from the partnership.

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1 Section 4(4)(b) of the Customary Marriages Act.
2 *Butters v Mncora* 2012 (4) SA 1 (SCA) [11].

[18] The applicant denied the alleged universal partnership. The first respondent sought to substantiate the alleged existence thereof by reference to payment by her of the deposit and the erection and payment of certain structures on the property.

[19] A loan of R10 000.00 (ten thousand rand) was allegedly taken by the first respondent from Capitec Bank in order to pay the deposit on the property, the amount of which was not disclosed by the first respondent. The difficult with the first respondent's averment is that the bank statement proffered in support thereof reflected the deposit of R10 000.00 into the account during April 2012, and three separate cash withdrawals totalling R9 000.00, in May 2012.

[20] No allegation was made by the first respondent as to whom she paid or transferred the funds to or when she allegedly did so. Nor was any documentary proof of the alleged payment of the R10 000.00 towards the deposit furnished by the first respondent. In effect, the first respondent's allegations in this regard were notably vague.

[21] The applicant, however, furnished documentation in support of his reply that he paid the deposit, the transfer costs and the costs of registering the mortgage bond over the property. The deposit of R58 000.00 was paid on 20 July 2012, the transfer costs of R11 398.56 on 25 August 2012 and the bond registration fees of R7 392.60 on 29 August 2012. The applicant attached copies of the pro forma statements of account in respect of the transfer costs and bond registration fees, together with proof of payment thereof to the respective required recipients, the names of whom correlated with the respective invoices. Additionally, proof of the applicant's payment of the deposit was furnished by him.

[22] The first respondent alleged further, that she was responsible for the erection of the informal structures on the property as well as payment of the cost of materials required to build them.

[23] In this regard, the first respondent alleged that she started the process of building the structures to let out to tenants and made payments towards the finishing and renovations of some of the rooms. The first respondent provided two invoices showing the purchase of building supplies, during January 2013.

[24] The first respondent's averments were effectively countered by the applicant in reply.

[25] Insofar as the first respondent alleged that the proceeds of the rentals received from the occupiers of the informal structures on the property, were paid towards the mortgage bond instalments of the property, (which the applicant denied), insufficient allegations were made by the first respondent in this regard. The first respondent failed to furnish details of the rental amounts received and proof thereof, as well as the amounts contributed to the mortgage bond instalments and dates thereof. No documentary proof of the transfer or payment of those rentals towards the mortgage bond instalments was furnished to the court. The first respondent's averments in this regard were somewhat vague.

[26] Whilst the first respondent attempted to deal with the requirement of her contribution to the alleged universal partnership, there was an absence of averments as regards the balance of the requirements.

[27] Hence, the first respondent's averments in respect of the universal partnership were insufficient to establish the essential requirements of such a partnership.

[28] It is a well established principle of our law[3] that:

'[12] … an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the Court, not such as to raise a real or genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers …

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. …'

[29] In the light of the paucity of the first respondent's averments in respect of both grounds of opposition alleged by her, the first respondent has not 'seriously and unambiguously' addressed the facts raised by her in opposition to the applicant's claims.

[30] Given the failure of the first respondent to deal sufficiently with the requirements of both the alleged customary marriage and the tacit universal partnership, I am of the view that the allegations and the grounds of opposition to the application, stand to be rejected on the papers.

[31] Hence, I am compelled to conclude that the first respondent is in unlawful occupation of the property.

[32] The first respondent did not dispute that there was compliance with the procedural requirements of PIE.

[33] In the light of the fact that the first respondent is in unlawful occupation, the question becomes whether it is just and equitable that she be ejected from the property, and, if so, on what terms.[4]

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3 *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA).
4 *Botha NO v Deetlefs* 2008 (3) SA 419 (N) [12].

[34] The first respondent has been in occupation of the property for more than six (6) months. Accordingly, sections 4(7), (8) and (9) of PIE find application in the following terms:

'(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, ... whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question. …'

[35] I am obliged, 'In determining a just and equitable date, … (to) have regard to the interests and circumstances of the first respondent as occupier (together with those of her child) and pay due regard to the broader considerations of fairness and constitutional values. I am required to infuse elements of grace and compassion into the formal structures of the law …'[5]

[36] Taking into account that:

36.1 The applicant is the owner of the property and is paying the mortgage bond together with the municipal consumption incurred by the first respondent and her household.

36.2 The applicant, notwithstanding, has been deprived of the use and enjoyment of the property, as well as the rental income derived from the informal structures attached to the property.

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5 *Botha NO v Deetlefs & Another* 2008 (3) SA 419 (N) [23].

36.3 The first respondent is the head of her household and lives with her six (6) year old child who attends school in the area of the property.

36.4 The applicant tendered maintenance in the sum of R2 000.00 per month in respect of the child.

36.5 The first respondent has been in occupation of the property for more than six (6) months.

the first respondent should be ordered to vacate the property on or before 30 January 2017 and if she has not done so by that date, an eviction order may then be carried out.

[37] It appears from the papers that the first respondent is unemployed. Whilst I was not advised of her prospects of obtaining gainful employment, I have found that she should vacate the property on or before 30 January 2017.

[38] Given that the minor child born of the parties' relationship attends school in the area, it will assist the first respondent to have until 30 January 2017 in order to locate alternate accommodation in that area. Accordingly, in the light of the fact that that the first respondent, on the probabilities, will lose access to the rentals from the informal structures located on the property, and simultaneously have to commence paying for accommodation for herself and her child, it is just and equitable that the applicant be ordered to contribute towards the child's maintenance with effect from the first day of the month following on the first respondent vacating the property, in the amount of R2 000.00 per month, as tendered by him.

[39] It speaks for itself that the first respondent is entitled to approach the maintenance court for the appropriate relief, as indeed is the applicant. I intend the maintenance order herein to operate pending any order of the maintenance court.

[40] I am of the view that it is appropriate to take up the applicant's tender of maintenance given that the first respondent is to vacate the premises, together with the difficulties involved in procuring effective relief through the maintenance courts.[6]

[41] Such an order will serve to assist the first respondent to relocate together with the parties' child, and to maintain the child in the area in which the child attends school. This will contribute, albeit to a limited extent, to preserving the dignity of the first respondent and the parties' child.

[42] The applicant has been successful in this application, the first respondent having denied any obligation to vacate the property. Accordingly, the applicant is entitled to his costs of the application.

[43] Based on the aforegoing I grant the following order:

1. The first respondent and any person occupying the property situated at Erf […] Township Malvern, Gauteng, by virtue of the first respondent's occupation thereof, is ordered to vacate the property on or before 30 January 2017.

2. In the event of the first respondent failing and/or refusing to vacate the property on or before 30 January 2017 in terms of paragraph 1 above, the Sheriff or his lawful deputy is authorised to enter upon the property in order

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6 *Bannatyne v Bannatyne & Another* 2003 (2) SA 363 (CC) [26] – [30].

to evict the first respondent together with all persons who occupy the property under or virtue of the first respondent's occupation thereof.

3. With effect from the first day of the month following on the first respondent vacating the property, the applicant is ordered to pay maintenance in respect of the child born of his relationship with the first respondent, in the sum of R2 000.00 (two thousand rand) per month.

4. The first respondent is ordered to pay the costs of this application together with the costs incurred in respect of the Section 4(2) notice in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT:	Mr S B Dlamini.
INSTRUCTED BY:	Mehlo and Ndedwa Incorporated.
COUNSEL FOR FIRST RESPONDENT:	Mapheto Attorneys.
INSTRUCTED BY:	Mapheto Attorneys.
DATE OF HEARING	14 September 2016.
DATE OF JUDGMENT	12 December 2016.