

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2018/10660

[1] REPORTABLE: ~~YES~~ / NO
 [2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
 [3] REVISED

28/6/2019
 Date:

[Signature]
 L T MODIBA

In the matter between:

Madulammoho Housing Association

Applicant

and

Mildred Nkosi

First Respondent

The City of Johannesburg

Second Respondent

J U D G M E N T

Modiba, J:

INTRODUCTION

- [1] This is an opposed application for the eviction of the first respondent and all those claiming occupation under her from UNIT H202 JABULANI VIEWS, MATJHABENG, SOWETO (*"the property"*).

- [2] The first respondent filed opposing papers. However, her attorney of record filed a notice of withdrawal as an attorney of record on 13 March 2019. On 15 April 2019, when postponing the application to the opposed motion court roll, the court per Windell warned the first respondent to be in court on 27 May 2019. On that day, the matter was heard in her absence after the court usher called out her name in court. Only the court officials and the applicant's representatives were in court. He also called out her name several times outside the court room and in the ground floor entrance foyer.

- [3] For all intents and purposes, the application remains opposed by the first respondent as she never withdrew her opposition. Therefore, this court considered it as such.

APPLICABLE LEGAL PRINCIPLES

- [4] In terms of section 4 (1) read with section 4 (8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,¹ a property owner may apply to court to evict an occupier from property the latter occupies unlawfully. Once it is established that the applicant is an owner and that the occupier

¹ 19 of 1998

occupies the property illegally, the court hearing the application must undertake two separate enquiries.

[3.1] Firstly, it must determine whether it is just and equitable to grant an eviction order having regard to all relevant factors set out in section 4 (7). The factors include the availability of alternative land or accommodation. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*,² the court said:

"The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order."

[3.2] Secondly, it must determine the date of implementation of the eviction order and applicable conditions, taking into account considerations of justice and equity in relation to:

[3.2.1] the date of implementation of the eviction order;

[3.2.2] conditions if any, to be attached to the eviction order;

[3.2.3] the impact the eviction order will have on the occupiers; and

[3.2.4] whether the occupiers may be rendered homeless thereby or need emergency assistance to relocate elsewhere.

[5] In, the court considered the meaning of 'just and equitable in the context of section 4 (7) of the Act and said:

² 2012 (6) SA 294 (SCA) at paragraph 25. See also *Johannesburg Housing Corporation (Pty) Limited v The Unlawful Occupiers of the Newtown Urban Village* 2013 (1) SA 583 (GSJ)

"this case has to be decided according to whether it would be just and equitable to grant an eviction order against the respondent, after considering all the relevant circumstances, including the availability of land for the relocation of the occupiers, the rights and needs of the elderly, children, disabled persons and households headed by women.

- [6] In *Ndlovu v Ngcobo, Bekker & Another v Jik*³, the court at paragraph [19] stated:

"Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not an issue between the parties."

- [7] A property owner should never be expected to provide free occupation to an illegal occupier. The trauma of relocation is insufficient to resist an eviction order where an occupier has no right, recognised at common law, to remain in illegal occupation of a property. In this context, the court interpreted homelessness to mean:

*... 'without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property to the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property) of the occupier being able to find alternative accommodation that is (a) comparable or better standard to and (b) at a similar rental to and (c) within reasonable proximity to that of the property from which the eviction is sought'."*⁴

- [8] The present application is determined with reference to the legal requirements and authorities set out above.

³ 2003 (1) SA 113 (SCA) at para 19.

⁴ Newtown Urban Village at paragraph [122].

OWNERSHIP AND ILLEGAL OCCUPATION

- [9] The first respondent occupied the property from 1 May 2013 until the end of October 2013 in terms of a lease agreement entered into with the applicant. Thereafter and in terms of clause 1.3 of the lease agreement, the lease became a monthly lease terminable on one month's written notice by either party. On 25 October 2017, the applicant through its attorney, addressed a notice of cancellation and notice to vacate ("*the notice*") to the first respondent, giving her one month's calendar notice of termination of her tenancy effective from 1 November 2017 to 30 November 2017. The applicant contends that from 1 December 2017, the first respondent has been in unlawful occupation of the property.
- [10] The first respondent disputes the applicant's ownership of the property. She does so relying on an application which is pending before this court in a separate matter, where the applicant's ownership of the property is in dispute. To prove its ownership of the property, the applicant relies on a printout from the Deeds office. The deed of transfer of the property confirming ownership is the best evidence of ownership.⁵ The Deeds office print out confirms current ownership held in terms of a deed of transfer registered in the deed office. The first respondent alleges that the Deeds Office documents relied on by the applicant to prove ownership are not genuine and authentic as Deeds Office records are capable of being manipulated. She provides no basis for suspecting

⁵ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82. See also *R v Nhlanhla* 1960 (3) SA 568 (T) at 570D-H.

that the document is not authentic. She also fails to take this court into her confidence as to why she has not verified the applicant's ownership of the property with the Deeds Office. Its records are public.

[11] To this application, the first respondent only attached the Notice of Motion for the application she relies on to dispute ownership of the property. It is unclear whether the first respondent is one of the fifty seven applicants in that application as only the first applicant is fully cited. Without the founding affidavit, it is not possible to ascertain from this document, the basis on which the applicant's ownership of the property is disputed.

[12] The Notice of Motion was issued on 10 April 2017. It was served on the respondents on 11 April 2017. Since then two years has lapsed. The first respondent does not take the court in her confidence regarding progress made and when the application is likely to be heard. Under these circumstances, it is probable that the applicants do not intend to prosecute it further.

[13] The first respondent reprobates and approbates the lease agreement. On the one hand she disputes the applicant's capacity to conclude the lease agreement with her. She contends that an entity referred to in a subsidy agreement between the applicant and the Gauteng Department of Housing as Social Housing Institution ("SHI"), and not the applicant, ought to have entered into a lease agreement with her. However, the said agreement clearly identifies the applicant as the SHI for the purpose of the agreement.

[14] On the other hand, the first respondent contends that she signed the lease agreement under duress and was not given a copy to familiarise herself with its contents to confirm whether the applicant was, in terms of the subsidy

agreement, legally allowed to enter into a lease agreement with her and/or any other occupant of Jabulani Views.

- [15] The first respondent's contention that she is entitled to transfer of the property is misplaced. The provision she relies on clearly does not give her such a right. It provides:

"10 THE BENEFICIARY

- 10.1 *The Institution records that the prospective tenants are made up as follows regarding their qualifying beneficiary status and any other income group(s) in line with the social housing subsidy policy:*

Beneficiaries earning monthly

Income between R1500 and R7500 per month, probably with one or more dependants, who are able to pay an affordable rent for well managed and good quality Social housing.

- 10.2 ...

11 PROHIBITION ON SALE/MISUSE OF PROPERTY

- 11.1 *The Institution may not:*

- 11.1.1 *Sell the property to any qualifying beneficiary before the expiry of four years as stipulated in the National Housing Code."*

- [16] This clause does not impose an obligation on the applicant to sell the property to any beneficiary including the first respondent. It merely prohibits the sale to a beneficiary who has been a beneficiary for less than four years.

- [17] All the issues dealt with above, stand to be determined on the applicant's version as the first respondent fails to seriously dispute it as envisaged in the seminal *Plascon Evans* judgment. She either barely denies the applicant's allegations or put up such a far-fetched version that this court may not rely on it.

WHETHER IT IS JUST AND EQUITABLE TO EVICT THE RESPONDENT

[18] On the papers filed, it is improbable that if evicted, the first respondent faces the risk of homelessness. If she did, only then would the second respondent's obligation to provide alternative accommodation arise.⁶ She is employed. She earned R6500.00 per month more than five years ago. She is forty three years old. It is not her case that she is unable to continue to work. It is also not her case that she cannot obtain alternative accommodation if the eviction order is granted.

[19] In the papers filed, the first respondent identifies herself with the other occupiers of Jabulani Views. By so doing, she opened the door for the applicant to refer to other matters in which the eviction of other occupiers was sought. In the judgment of my sister Justice Kathree-Setiloane in *Madulammoho Housing Association (Pty) Ltd v Mbambo, Ayanda and 56 others*⁷, she found that Madulammoho is the owner of a social housing complex known as Jabulani Views comprising 300 units. The respondents occupied the property in terms of lease agreements that were subsequently terminated. Regarding the respondents' allegation in respect of homelessness, Justice Kathree-Setiloane said:

"Because of the careful measurement of the Applicant has to do with respect to compliance of its obligations in terms of social housing, all the Respondents have been very closely assessed as being able to afford the rental. Accordingly, and despite the protestations of the Respondents they will not be homeless upon eviction as they have the measured ability to afford rental."

⁶ Occupiers, Berea v De Wet N.O. and Another 2017 (5) SA 346 (CC).

⁷ ZAGPJHC 276 (28 June 2016).

- [20] The first respondent confirms undergoing such a screening process. I therefore, find that she does afford rental.
- [21] The first respondent sets out her personal circumstances only baldly and vaguely. She attaches no proof of the existence of two school going children, which is in her personal knowledge.
- [22] The first respondent has not set out any basis on which this court should find that if the eviction order is granted, she will be unable to find alternative accommodation of a comparable or better standard to that she currently occupies, nor has she disclosed any facts that would indicate that such alternative accommodation is not available at a similar rental to and within reasonable proximity to the property she currently occupies. Under these circumstances, I find that it is improbable that the first respondent will be homeless if evicted from the property.
- [23] I am satisfied that the applicant has made out a case for the relief sought in the notice of motion and that a period of one month is just as equitable for the first respondent to vacate the property. She has been in unlawful occupation of the property for more than two years during which she was aware of the applicant's intention to evict her therefrom. During this period, she had more than sufficient time to find alternative accommodation.
- [24] In the premises, the following order is made:

ORDER

1. The first respondent and all those claiming occupation through and under her are evicted from Unit H202 Jabulani Views, Matjhabeng, Soweto ("*Unit H202*");
2. The first respondent and all those claiming occupation through and under her are ordered to vacate Unit H202 on 30 July 2019.
3. In the event of the first respondent and all those claiming occupation through and under her failing to vacate Unit H202 on 30 July 2019, the Sheriff of the above Honourable Court or his lawful deputy is authorised, directed and empowered to carry out the eviction order on 1 August 2019.
4. The first respondent is ordered to pay the costs of this application.



Madam Justice L.T. Modiba
Judge of the High Court

APPEARANCES

Counsel for the applicant:

Mrs V Fine

Instructed by:

Mervyn Joel Smith Attorneys

For the respondent:

In default of appearance

Date of hearing:

27 May 2019

Date of judgment:

28 June 2019