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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2019/08402

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

In the matter between:

JFS PROPERTIES NO. 12 (PTY) LIMITED

(REG NO. 2006/021257/07)

Applicant

and

THE UNLAWFUL OCCUPIERS OF HOLDING 24

INADAN AH AGRICULTURAL HOLDINGS GAUTENG

First Respondent

CITY OF JOHANNESBURG

Second Respondent



JUDGMENT



Goedhart AJ

- [1] The Applicant, JHF Properties No 12 (Pty) Ltd, seeks the eviction of the unlawful occupiers from Holding 24 Inadan Agricultural Holdings Gauteng which is situated at corner Orleans Road and Clairvaux Road, Johannesburg, 2162 (“the property”). The application for eviction is brought in terms of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“the PIE Act”). In terms of section 4(1) of the PIE Act, the Applicant has to be the owner or person in charge of the property in order to succeed with the application for eviction.

[2] The Applicant purchased the property on 14 May 2018 from Randabel CC for a purchase consideration of R1,200 000,00. The property was registered in the name of the applicant in the office of the Registrar of Deeds, Pretoria on 8 November 2018 under Title Deed Number T78485/2018. A judicially certified copy of the Title Deed was attached to the replying affidavit after ownership was placed in dispute in the answering affidavit.¹ The Applicant has therefore proven ownership of the property.

[3] The Applicant followed the procedures prescribed under the PIE Act. On 13 March 2019 Siwendu J authorised the section 4(2) notice and service thereof.² A similar order was granted by Wright J on 17 May 2019.³

[4] The Applicant's case is that it must succeed with its eviction application based on its compliance with the PIE Act. Further, that in so far as the property is occupied for both residential and commercial purposes, the application must be determined based on the principles of *rei vindicatio* as far as the commercial occupants are concerned. In this regard, the applicant relies on *Chetty v Naidoo 1974(3) SA 13 (A) at para 20*:

“ It is inherent in the nature of ownership that possession of the res should normally be with the owner , and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a rei vindication need therefore do no more than allege and prove that he is

¹ Record, p175-180, RA9. Section 18(1) of the Civil Proceedings Evidence Act 25 of 1965 provides: “ *Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be an examined copy or extract purporting to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence*”; Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 82A-C.

² Record, p28-31.

³ Record, p54-58.

the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner.”

[5] On 11 July 2019, having been served with the notice of motion and the section 4(2) notice, Mr Dumisani Nkomazana (“Nkomazana”) served an answering affidavit. His affidavit sets out that:

[5.1] He is employed by Ms Maria Lubelia Barcelos (“Barcelos”).⁴ Barcelos emigrated to Australia and left him in charge of the property “and the business in question”.⁵

[5.2] A certain Mr Mokwejane (“Mokwejane”) attempted to hijack the property. Mr Nkomazana was arrested for trespassing. He avers that a case of fraud was opened against Mokwejane which is under investigation by the Commercial Crimes Unit Johannesburg under reference number Douglasdale CAS328/11/2010.⁶ He did not see Mokwejane again, but reported the incident to his employer, Barcelos, who deposed to an affidavit on 4 April 2011.⁷

[5.3] Nkomazana was surprised when he was served with this application, as he had not been advised that the property had been put up for sale.⁸ Upon receipt of the application for eviction, he contacted Barcelos to make inquiries and was then

⁴ Record, p87, para 1; p88, para 5.

⁵ Record, p88, para 8.

⁶ Record, p88, para 9.

⁷ Record, p88, para 9, Affidavit by Barcelos, p94-97.

⁸ Record, p89, para 10.

advised by Barcelos that she has not sold the property.⁹ Based on his inquiry, Barcelos sent an email on 30 May 2019 in which she states that she had not given any authority to sell the property, and that she will not “once again have this hijacked”.¹⁰ Barcelos’ version as evidenced by the attachments to the answering affidavit, corresponds with that of Nkomazama and is to the effect that she has a 50% interest in Randabel CC, with the remaining 50% held by her sister.

[5.4] Nkomazama also sets out that he has been employed and residing at the property since 1998 with his wife and his five minor children.¹¹ He provides no further information regarding his personal circumstances, that of this wife or his five minor children. He sets out that he has no other means of income “except from the business” that is conducted on the property, and that if the eviction is permitted, it will be severely prejudicial to him and his family.¹²

[5.5] Nkomazama avers that there has been non-compliance with the law because there is no report from the municipality regarding alternative accommodation.¹³ He refers to the relevant considerations that a court must take into account, such as female or child headed families and whether they may be rendered homeless.¹⁴ This notwithstanding, he volunteers no information regarding his and his family’s personal circumstances.

⁹ Record, p89, para 11.

¹⁰ Record, p89, para 11 as read with p105.

¹¹ Record, p88, para 7; p90, para 15.

¹² Record, p90, para 15.

¹³ Record, p90, para 16.

¹⁴ Record, p90, para 17.

- [6] The crux of the answering affidavit is that Mr Nkomazana occupies the property through Barcelos who, it is alleged, is the rightful owner. To the extent that the property was sold to the Applicant, it is alleged that it was fraudulently sold. Nkomazana also avers that there has not been compliance with the Applicant's statutory duties under the PIE Act.
- [7] In its replying affidavit, the Applicant sets out the steps it took to verify the allegations that the property had been "hi-jacked" by Mokwajana. The Applicant attaches the documents which it obtained during the course of the process of investigating the allegations in the answering affidavit to the replying affidavit.
- [8] The documents obtained by the Applicant through its attorneys of record reflect that:
- [8.1] On 21 February 1989, Barcelos and her sister resigned as members of Randabel CC. This appears from the CK2 form attached to the replying affidavit as "RA-2".¹⁵
- [8.2] On the same day, one Humbertu Rufinu Ferreira and Lidia Marta Ferreira were appointed as members of Randabel CC.¹⁶
- [8.3] On 29 October 2010, Humbertu Rufinu Ferreira and Lidia Marta Ferreira were removed as members by order of court dated 15 October 2010. The CK2 form which reflects this is attached as "RA-5".¹⁷

¹⁵ Record, p116, para 11.2 as read with p158.

¹⁶ Record, p117, para 11.3 as read with p163.

¹⁷ Record, p117, para 11.4 as read with p164.

- [8.4] On 29 October 2010, Mkwajana was appointed as sole member of Randabel CC.¹⁸ There have been no subsequent changes to the membership of Randabel CC.
- [8.5] On 14 May 2018, Randabel CC, represented by Mkwajana, concluded the offer to purchase the property with the applicant.¹⁹
- [9] The consequence, the contentions by Nkomazana (and Barcelos) are not borne out by the replying affidavit and the documents attached to the reply. From these documents it would appear that Barcelos had voluntarily resigned as a member of Randabel CC in 1989. The manuscript annotation on “RA-5” is to the effect that Humbertu Rufinu Ferreira and Lidia Marta Ferreira were “removed by court order dated 15 October 2010”, and that Mkwajana became the sole member of Randabel CC on 29 October 2010. If indeed the records of the Companies office do not reflect the correct position, Barcelos has known since 4 April 2011, when she deposed to the affidavit, of this state of affairs. However, nothing has been done for a period exceeding eight years to correct the records in the Companies Office. In contrast, the applicant has demonstrated that it is a bona fide third party purchaser and now registered owner of the property. It was entitled to rely on the representation that Mkwajana is the sole member of the Randabel CC, the previous owner of the property. The applicant purchased the property from Randabel CC for value.
- [10] The section 4(2) notice which was served on the property on one Dumi Makosana pursuant to the orders granted by Siwendu J on 13 March 2019 and Wright J on 17 May 2019, requires of the occupiers to disclose their personal circumstances. In respect of the personal circumstances of Nkomazana, the answering affidavit only sets out that he has lived at the

¹⁸ Record, p117, para 11.5 as read with p165.

¹⁹ Record, p117, para 11.6 as read with p166.

property since 1998 with his wife and five minor children. The answering affidavit reflects that a business is being operated from the property. Nkomazana does not state that he will be rendered homeless if evicted. He does not provide the ages of his children or any details regarding his wife. Thus, despite being aware of the factors that the court would take into account in considering an eviction application, Nkomazana does not volunteer the information.

[11] On 9 April 2019, Sutherland J granted an order in terms of which the Second Respondent was to conduct an inspection of the property within 30 days of the order and to deliver a report within 30 days thereafter setting out which of the First Respondent/s qualify for the provision of temporary emergency accommodation. The order was served on the Second Respondent on 25 April 2019. The Second Respondent has not complied with the order. The Applicant did not compel compliance. Although there is no report by the Second Respondent, there is no indication in the answering affidavit that Nkomazana and his family would be rendered homeless and would require emergency temporary housing.²⁰

[12] Counsel for the First Respondent submitted that the Applicant ought to have joined other interested parties. In light of the averments set out in the replying affidavit and the supporting documents attached thereto, more particularly the documents reflecting Ms Barcelos' resignation as a member of the CC in 1989, which demonstrate that Nkomazana could not hold the property through Barcelos, the argument was not persisted with.

²⁰ In City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another 2012 (2) SA 104 (CC), the Constitutional Court determined that the City is enjoined to provide temporary emergency accommodation for persons evicted by private landowners.

[13] It appears that Barcelos and Nkomazana caused a summons to be issued against the Applicant as first defendant and against Randabel CC as second defendant during or about 31 October 2019. The summons was served on 19 November 2019. The relief sought is that the sale between the First Defendant and Randabel CC be set aside. The summons and particulars of claim were handed up by agreement during the course of the hearing. The action does not affect the current proceedings. On the facts before me, the Applicant has demonstrated that Barcelos does not have any interest in the property having resigned as a member of Randabel CC in 1989. Further, the applicant has proven that it is the registered owner of the property which it acquired from Randabel CC for value.

[14] In respect of costs, there is no justification for seeking a costs order against Nkomazana under circumstances where he placed before the court what was within his knowledge concerning the ownership of the property as conveyed to him by Barcelos. Mr Hollander was requested to obtain an instruction from the Applicant in respect of the issue of costs. He advised that the Applicant does not persist with an order for costs against Nkomazana/the First Respondents.

[15] In the result, I make the following order:

[15.1] The First Respondents, being Dumisani Nkomazana (Identity number [...]), Lungile Mtetha, Dumi Makosana, and all other persons who occupy the property are evicted from the property situated at cnr Orleans Road and Clairvaux. Road, Johannesburg, 2162, more fully described as Holding 24 Inadan Agricultural Holdings Gauteng (“the property”).

[15.2] The First Respondents are ordered to vacate the property on or before 3 February 2020, failing which the eviction order may be carried out.

[15.3] Each party is to bear its own costs.

**G-M Goedhart
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| COUNSEL FOR THE APPLICANT: | Adv L. Hollander |
| APPLICANT'S ATTORNEYS: | Vermaak & Partners Inc. |
| COUNSEL FOR THE FIRST RESPONDENT: | Adv M. O. Mudimeli |
| FIRST RESPONDENT'S ATTORNEYS: | Matojane. Malungana Inc. |
| DATE OF HEARING: | 26 November 2019 |
| DATE OF JUDGMENT: | 28 November. 2019 |

