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

Case number: 20794/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
30/09/21

In the matter between:

**JACOB JABU MABASO
BASIMANE EDWIN MABASO
NTSWAKI JOHANNA AP HANA**

**First Applicant
Second Applicant
Third Applicant**

and

**KEDIBONE ESTHER MANYATHELA
(Identity Number: [...])
THE CITY OF JOHANNESBURG
METROPOLITAN
MUNICIPALITY**

**First Respondent

Second Respondent**

Delivery: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 30 September 2021.

Summary: Eviction application. The respondent's defence is marriage in terms of customary marriage. The principles governing customary marriage restated. The requirements of eviction under PIE Act restated.

JUDGEMENT

MOLAHLEHI J

Introduction

[1] This is an application to evict the first respondent and those occupying the property through and under her from the property situated at ERF [...], portion number 0, Chiawela Extension 3, which is commonly known as [...] Makgalo Street, Chiawela extension 3, Soweto, (the property) as contemplated in section 4 of the Illegal Eviction from Unlawful Occupation of Land (the PIE Act).

[2] The applicants contend that the first respondent and all those who reside on the property through her are in an illegal occupation.

[3] The applicants' case is that they are owners of the property in question. The applicants say that they became the owners of the property by virtue of section 1 (1) (b) of the Intestate Succession Act, 81 of 1987. According to them, they inherited the property following the death of their father, who died intestate on 10 May 2019.

[4] The property was transferred to the applicants' names as joint property owners on 18 October 2019. It should be noted that initially, the properties situated in the Township of Soweto were previously owned by the local municipality. Thus, the deceased and his family occupied it under the lease agreement with the city. This legal regime of ownership of property in townships has since changed. The Department of Housing, now the Department of Human Settlements, is responsible for facilitating transferring the properties to those who occupy them.

[5] The applicants contend further that the first respondent and the others do not have the right to the continued occupation of the property as she was not married to the deceased.

[6] On 28 June 2019, the applicant issued the first respondent with notice to vacate the property through their attorney of record. She was in terms of the notice required to vacate the property by 31 July 2019. The respondent refused to vacate the property. For this reason, the applicants contend that the occupation of the property by the first respondent and the others is unlawful.

The respondent's case,

[7] The respondent opposed the application because she claims to have concluded a customary marriage with the deceased and is therefore entitled to retain possession of the property by virtue of the deceased's half share in the property.

[8] According to the first respondent, she started staying with the deceased from 14 February 1997 after the third applicant and the deceased divorced on 16 January 1997. She claims that she stayed with the deceased as husband and wife and "the ceremony (presumably referring to the customary marriage) was concluded on 20 September 2003." They operated a liquor business at the property and maintained it without any contribution from the third applicant.

The issues

[9] The issues for determination in this matter are the following:

- i. whether the continued occupation by the first respondent and all those occupying the property through and under her is not lawful or no
- ii. Whether it is just and equitable for the eviction order to be granted, and if so,
- iii. what time frames should be given to the respondents to vacate the property.

[10] The issue of whether the respondent has a right of continued occupation of the property turns mainly around the question of whether she was married in terms of customary law with the deceased.

Principles of customary law.

[11] The requirements for a valid customary marriage is governed by section 3 (1) of the Recognition of Customary Marriages Act 120 of 1998 (the Act), which provides as follows:

"Requirements for validity of the customary marriage.

- (1) For a customary marriage entered into after the commencement of this Act to be valid-
 - a. The prospective spouse-
 - i. .
 - ii. Must both consent to be married to each other under,
 - b. The marriage must be negotiated and entered into or celebrated in accordance with customary law."

In interpreting section 3 (1) (b) of the Act, the Constitutional Court in *MM v MN*¹ said:

"Section 3 (1) (b) goes on to stipulate that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'. Customary law may thus impose validity requirements in addition to the process set out in sections (1) (a). In order to determine such requirements a court would have to have regard to customary practices of the relevant community."

[12] The courts have generally accepted that the requirements for a valid customary marriage entail a process of family participation, lobola agreement, and the final arrangement as to when the woman would join the man's family.²

¹ 2013 (4) SA 415 (CC) paragraph 29

² See *Matsoatsoa v Roro* [2011] 2 ALLSA324 at paragraph 29.

[13] In dealing with the formalities of a customary marriage, the court in *Matsoatsoa*,³ said:

"A customary marriage in terms of African tradition is not an event but a process comprising a chain of events. Furthermore, it is not about the bride and the groom. It involves the two families. The basic formalities, which lead to a customary marriage: emissaries sent by the man's family to the woman's family to indicate interest in the possible marriage. (This of course presupposes that the two parties man and woman have agreed to marry each other); a meeting of the party's relatives will be convened where lobolo will be negotiated or part thereof is handed over to the woman's family and the two families will then agree on formalities and date on which the woman will then be handed over to the man's family which handing over may include, but not necessarily be accompanied by a celebration."

[14] In general, the essential part in the conclusion of a customary marriage is the handing over of the bride (known as *makoti*) to the groom's family. She is then welcomed to her husband's family and regarded as part of that family.⁴

[15] In the present matter, there is no evidence of compliance with any of the above requirements. The respondent presented no evidence of the deceased's family engaging in discussions about the lobolo or being introduced to the deceased's family. There is also no evidence that she has ever met the family of the deceased. In addition and more importantly there is no record of the registration of the marriage.

[16] The respondent's counsel attached to the heads of argument a copy of the Department of Home Affairs' letter purporting to confirm that the respondent was married to the deceased. The letter reads as follows:

"TO WHOM IT MAY CONCERN.

³ *Matsoatsoa v Roro* - supra

⁴ *Moropane v Southon* 2014 JOL 32177 (SCA) para [40].

RE: MANYATHELA KEDIBONE ESTHER ID NUMBER: [...]

This serves to confirm that the above-mentioned paragraph was married customarily to the deceased **MABASO MATHEWS ID NUMBER [...]** on our National Population Register.

I trust the above is in order."

[17] The letter was signed on behalf of the Office Manager Soweto L/O by someone else who is not identified in the letter.

[18] In the first place, there is no explanation as to why the letter was not attached to the answering affidavit neither is there any affidavit from the officer of the Department who signed the letter. The letter does not indicate whether the customary marriage between the respondent and the deceased was ever registered with the Department of Home Affairs in terms of section 4 of the Act.

[19] In light of the above, the respondent has failed to provide sufficient and persuasive evidence that a customary marriage was concluded between her and the deceased. It, therefore, means that the respondent cannot assert the right to occupy the property based on a half share of the deceased arising from a customary marriage.

[20] The next issue to consider is whether the respondent should be evicted from the property.

In terms of section 4 of the PIE Act. to succeed in an application for eviction, the applicant has to show the following:

- (a) that he or she is the registered owner of the property concerned, and
- (b) the occupation of the property is unlawful, and thus the occupiers have no legal right to occupy the property.

[21] In general, upon satisfying the above requirements, the court would then consider the following before granting the eviction order:

- (a) whether the factors as set out in section 4(6) and section 4(7) of the PIE Act have been satisfied and
- (b) The compliance with the formal requirements of the PIE act.

[22] The next issue to consider is whether the respondent should be evicted from the property in terms of section 4 of the PIE Act. To succeed in an application for an eviction, the applicant has to show the following:

- (a) that he or she is a registered owner of the property concerned, and
- (b) the occupation of the property is unlawful, and thus the occupiers have no legal right to occupy the property.

[23] On the facts before this court, it is clear, mainly having found that there was no customary marriage between the respondent and the deceased, that the respondent and the others do not have any defence to the eviction application. It is also clear that the respondent and those occupying the property with him are doing so unlawfully.

[24] The next issue to consider is whether the first respondent and those occupying the property with her have disclosed relevant facts and circumstances that would show why the applicants are not entitled to evict her and the others. In this respect, the first respondent indicated that her eviction would result in homelessness.

[25] The applicants have attached a Windeed property report which indicates that the first respondent is a joint owner of a property situated at ERF number [...] in Kagiso Ext 12. This means that the first respondent will not be rendered homeless if she was to be evicted as she has alternative accommodation in Kagiso.

[26] For the above reasons, I find it equitable to have the first respondent and those occupying the property with and under her evicted from the property.

Order

1. The First Respondent currently residing at the property situated at ERF [...], PORTION NUMBER: 0, CHIAWELO EXT 3, which is more commonly known as [...] MOKGALO STREET, CHIAWELO EXT 3, SOWETO, and all other occupants residing on the property through and under her, vacate the property as contemplated by Section 4(1) of Act 19 of 1998I.
2. The First Respondent and all persons occupying through and under her shall vacate the above premises within 14 days of date of this order;
3. The eviction order may be carried out by the Sheriff or his deputy with the assistance of the South African Police Services or a Private Security Company, should the First Respondent and all persons occupying through and under her, failing to vacated the property by the date set in paragraph 2 hereof;
4. The First Respondent and all persons occupying through and under her are interdicted and restrained from entering the property at any time after they have vacated the property, or been evicted therefrom by the Sheriff and or his Deputy;
5. The Sheriff or his deputy are authorised to utilize the same order evicting First Respondent and all persons occupying through and under her, should they re-enter the property after the Sheriff gave effect to the order as per paragraph 2 supra;
6. The First Respondent is ordered to pay the costs of this application on a party and party scale.

E MOLAHLEHI J
Judge of the High Court of
South Africa, Johannesburg

Representation:

For the Applicant: Ms Thobeka Mkhize (Attorney)

Instructed by: SSLR Incorporated

For the Respondent: Adv. T.C Matambuye

Instructed by: Kedibone Esther Manyathela

Date of the hearing: 27 July 2021

Date delivered: 30 September 2021