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

CASE NO: 2021/45975

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

11/10/2022

In the matter between:

T [...], B [...] S [...]

Applicant

and

T [...], M [...] K [...]

First Respondent

**ALL UNKNOWN OCCUPIERS RESIDING AT ERF [...]
ELINDINGA EXT [...] TOWNSHIP**

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Eviction – residential premises – decree of divorce – forfeiture order in favour of applicant – applicant owner of property - entitled to evict first respondent – just and equitable that eviction order be granted

Order

[1] In this matter I make the following order:

1. *The first respondent and all persons who occupy with or through her are ordered to vacate the property situate at Erf [....] Elindinga Ext [....] Township situated at [....] A [....] Street, Elindinga Ext [....], within ninety days of the date of this order;*

2. *The Sheriff and Deputy Sheriff of the Court are authorised and instructed to carry out the eviction and to remove the first respondent and all persons who occupy with or through her from the property situate at Erf [....] Elindinga Ext [....] Township situated at [....] A [....] Street, Elindinga Ext [....], in the event of the first respondent or any other person failing to comply with the order;*

3. *The first respondent is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

INTRODUCTION

[3] This is an application for the eviction of the first respondent and all who occupy with her from residential premises situated at Erf [....] Elindinga Ext [....] Township situated at [....] A [....] Street, Elindinga Ext [....]. The applicant is the owner of the property¹ and the first respondent is his former wife.

[4] The applicant and the first respondent were married until their divorce by order of court on 7 September 2006.² In terms of the decree of divorce the first

¹ Paragraph 3.1 of founding affidavit (Caselines 002-9 & 002-15)

² Paragraph 3.4 of founding affidavit (Caselines 002-9 and 002-17)

respondent forfeited the benefits of the marriage in community of property, thus making the applicant the sole owner of the property. The applicant alleges that he was hesitant to enforce his rights as he was afraid of the first respondent's brothers who have since passed on.³

[5] Neither the first respondent nor anybody else pay any rent or compensation.

[6] The applicant now wants to sell the property.⁴ In August 2021 he gave notice that the first respondent vacate the property but she refused to do so.⁵

[7] In opposing⁶ to the application for eviction the first respondent relies on an agreement entered into before the decree of divorce was handed down, to the effect that she retain the property as her own. She is not in possession of a copy of the agreement and it was followed by the decree of forfeiture.

[8] She adds that the applicant was the owner of another property, and in terms of the agreement referred he would retain that property as his own while she would retain the property with which this application is concerned. However, the applicant denies that he at any stage was the owner of a second property.⁷ He did later inherit rights in a property from his mother.

[9] The first respondent states that she resides at the property with her daughter and grandchildren.⁸ In reply the applicants states that the deceased's only daughter passed away in 2004 or 2005,⁹ and this averment is confirmed by an affidavit by the daughter's male friend at the time, a Mr Vuma.¹⁰ There is no reason to resolve this fundamental dispute of fact in this application.

[10] I find that a proper case is made out that the applicant is the owner of the property, that the first respondent forfeited the benefits of the marriage by order of

³ Paragraphs 4.3 and 4.4 of founding affidavit (Caselines 002-10)

⁴ Paragraph 5.6 of founding affidavit (Caselines 002-12)

⁵ Paragraph 4.5 of founding affidavit (Caselines 002-10 and 002-18)

⁶ Paragraph 3 of answering affidavit (Caselines 006-4)

⁷ Paragraph 3.8 of replying affidavit (Caselines 007-6)

⁸ Paragraph 7 of answering affidavit (Caselines 006-8)

⁹ Paragraph 10.3 of replying affidavit (Caselines 007-9) ¹⁰ Caselines 007-13

court when the couple divorced, and that there is no enforceable agreement complying with the Alienation of Land Act 61 of 1981 that vests any rights in the first respondent.

[11] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 apply to the application. In considering an eviction application a Court must have regard to, *inter alia*, section 4 of the Act Section 4(7) to (9) read as follows:

(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, except where the land is sold in a sale of execution pursuant to a mortgage, 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.

[12] Mojapelo AJ¹⁰ said in the matter of *Occupiers, Berea v De Wet NO*:¹¹

“[47] It deserves to be emphasised that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and 'must state that the unlawful occupier . . . has the right to apply for legal aid'.” [emphasis added]

[13] I conclude that it would be just and equitable to grant an eviction order. Counsel for the parties were in agreement that if I were minded to grant an eviction order, a period of sixty days would be sufficient for the first respondent to find alternative accommodation. However, such period would expire during the festive season on 10 December 2022 and the order that I make provides for a period of ninety days and not sixty.

¹⁰ The learned Judge was acting in the Constitutional Court but was then the Deputy Judge President of what is now the Gauteng Division of the High Court in Johannesburg.

¹¹ *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) paragraph 47. See also paragraphs 39 to 57 of the Berea judgment and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paragraph 36; *Machele v Mailula* 2010 (2) SA 257 (CC) paragraph 15; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) paragraphs 11 to 25.

CONCLUSION

[14] I therefore make the order set out in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **11 OCTOBER 2022**

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DATE OF THE HEARING: 4 OCTOBER 2022

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