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

CASE NUMBER: 2021/49224

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

6 December 2022

In the matter between: -

RED OAK PROPERTIES (PTY) LTD
(REGISTRATION NUMBER: 2020/768206/07)

Applicant

and

ISABELLE BOKABA

First respondent

**THE UNLAWFUL OCCUPIERS OF UNIT [....],
P [....] (DOOR [....]), [....] B [....] STREET,
HILLBROW, JOHANNESBURG**

Second respondent

CITY OF JOHANNESBURG LOCAL MUNICIPALITY

Third respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and

time for hand-down is deemed to be 10h00 on 6 December 2022.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The applicant seeks an order evicting the first and second respondents and/or any other persons occupying through them the immovable property known as Unit [...], P [...] (Door [...]), [...] B [...] Street, Hillbrow, Johannesburg (**“the property”**).

[2] The respondents oppose the application and take issue with the *locus standi* of the applicant. They also allege collusion between the administrator of the body corporate, Mr Jan van den Bos, the applicant and a separate juristic entity known as Stratafin (Pty) Ltd (**“Stratafin”**).

[3] The first respondent alleges that she has applied for letters of executorship in the estate of her great uncle, the former owner of the property, which authority will permit her to institute rescission proceedings to set aside the order declaring the property executable. As a consequence, the first respondent seeks a stay of the eviction proceedings pending the issue of letters of executorship and the rescission proceedings.

[4] The applicant’s compliance with the statutory requirements of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (**“PIE”**) is not disputed.

THE APPLICANT’S CASE

[5] The applicant is the lawful and registered owner of the property. In support of this allegation, a Deeds Office property search reflecting the applicant as owner of the property is attached to the founding papers.

[6] As a matter of background, the applicant purchased the property at an auction

on the 7th of December 2020 and on or about the 9th of June 2021 ownership of the property was transferred to the applicant when the property was registered in its name at the Johannesburg Deeds Office.

[7] The applicant informs the court that the occupants occupied the property prior to the acquisition of the property by the applicant. It is not known to the applicant when these occupants took occupation of the property and whether it was through any lease agreements with previous owners of the property.

[8] The applicant does however state that no verbal or written lease agreement exists between the applicant, the respondents or any of the occupiers.

[9] The applicant instructed its attorneys of record to give notice to the respondents to vacate the property by the 1st of September 2021. The notice to vacate was served personally on the first respondent. Despite the notice, the respondents have failed to vacate the property.

[10] The applicant asserts that it is prejudiced by the continued unlawful occupation of the respondents in that it is unable to let the property to paying tenants and to generate a rental income. To exacerbate matters further, the respondents are not paying for the electricity and consumption use at the property and as a consequence, the applicant is burdened with these expenses.

[11] In the premises, the applicant seeks the eviction of the respondents from the property.

THE RESPONDENTS' CASE

[12] The first respondent informs this Court that on the 27th of September 1991 the property was transferred and registered into the name of her deceased great uncle, Mr Kokonono Paulus Gololo. During approximately 2015 the first respondent took occupation of the property through the consent and authority of her great uncle.

[13] On the 30th of November 2016, Mr Gololo deposed to an affidavit at the Silverton police station in terms whereof he consented to the first respondent looking

after the property as he was old and unable to continue occupation.

[14] On the 1st of August 2018 a group of unit owners at P [...] obtained a court order in terms whereof Mr Jan van den Bos was appointed as administrator to the P [...] Body Corporate. It is alleged by the respondents that Mr Van den Bos' appointment was not immediate according to their interpretation of the order, and it is from this interpretation that the respondents' allegation of lack of *locus standi* flows.

[15] The respondents suggest that there is a link between the applicant and Mr Van den Bos. They state that the applicant and a separate juristic entity, namely Stratafin, have the same directors. The respondents allege that Mr Van den Bos and the applicant work hand-in-hand to declare properties at P [...] specially executable, only to on-sell these properties at a paltry sum.

[16] On the 13th of February 2021 the first respondent's uncle, Mr Gololo, passed away at Mmametlhake in the Limpopo Province. The first respondent informs this court that her great uncle was never married and that the process of the appointment as executrix has taken a very long time. The first respondent also states that her great uncle did not have any children of his own.

[17] It is important at this juncture to point that Mr Gololo passed away after the order declaring the property specially executable was granted and the property was sold at a sale in execution.

[18] The first respondent asserts that she was precluded from acting on behalf of her late great uncle due to the fact that she was not issued letters of executorship and could therefore not litigate on behalf of the deceased estate.

[19] The first respondent therefore asks that the eviction proceedings be stayed pending the issuing of letters of executorship and rescission proceedings to be instituted by her on behalf of the deceased estate.

[20] The first respondent claims that she is an unemployed single mother with two minor children aged 10 and 4 years, respectively. She also states that these children

rely on her for support and upkeep. The first respondent derives a rental income from the occupiers who occupy this unit with her. However, she states that the rental income is barely enough to cover her and the children's needs. Should she be evicted, the first respondent states that she will be rendered homeless and destitute and that she will require alternative accommodation from the third respondent, namely the City of Johannesburg Metropolitan Municipality.

[21] The first respondent disclosed the personal circumstances of the other two occupiers. Mr Scott Sithole is employed and sells fruits and vegetables in the inner city whereby he generates a small income. Mr Given Msimango is employed as a waiter and earns a monthly salary of R3 000.00.

THE APPLICANT'S REPLICATION

[22] The applicant denies that he does not have the requisite *locus standi* to institute the eviction proceedings. Mr Van den Bos was appointed as administrator by this Court in terms of section 16 of the Sectional Title Schemes Management Act, 8 of 2011. The applicant interprets the court order as an interim order for the immediate appointment of Mr Van den Bos as administrator pending the determination of part B of the application.

[23] Upon Mr Van den Bos' appointment as administrator and in an attempt to normalise the situation in P [...] body corporate, he obtained financing due to insufficient levy payments made by owners. Stratafin, a financial services provider in a community schemes industry who assists body corporates who are in financial distress by providing financing to them and thereafter acquire the rights in respect of the debtors' book of the body corporate as security for the financing provided.

[24] The applicant is a wholly-owned subsidiary of Stratafin and is the property-owning company of the financial services business.

[25] In terms of the agreement entered into between the administrator and Stratafin, Stratafin would obtain clearance figures in conjunction with the administrator and/or managing agent to ensure that the security provided by the

body corporate in respect of the funding received is paid once the unit is sold and transferred.

[26] Stratafin, through the applicant, would purchase the units and would then make the necessary write-offs of the outstanding levies once the property has been transferred to the applicant.

[27] The applicant states that the action by Stratafin and the applicant are neither nefarious, nor a scheme between them and the administrator, Mr Van den Bos.

[28] It is an application of the law and a legal means of recovering outstanding levies on behalf of the body corporate to ensure that Stratafin recovers the monies provided to the scheme in good faith.

[29] The applicant points out that the owner of the property passed away after the property was sold. It was not a primary residence of the owner and personal service was therefore not required in terms of rule 46A of the Uniform Rules of Court. The papers were served at the *domicilium citandi et executandi* being occupied by the first respondent.

[30] The applicant states that it is misleading to indicate that the purchase price of the property was only R34 000.00 as Stratafin had already advanced the outstanding levies to the body corporate and as such, unless the unit could be on-sold from the applicant, the financing advanced would never be recoverable. If recovered, then the purchase price would equate to R200 000.00, which is the amount paid to the Sheriff as well as the outstanding levies. This would be the approximate market value of the unit in any event.

[31] The applicant contends that the personal circumstances of the respondents do not disclose a defence to the claim for eviction.

DETERMINATION OF APPLICANT'S *LOCUS STANDI*

[32] Three different courts, in addition to the court that determined the rescission application, considered an objection to administrator's *locus standi*.¹ In each instance the court came to the same conclusion that on a purposive interpretation of the court order appointing Mr Van den Bos as administrator, his appointment was immediate. I am bound to follow these judgments, unless I can find that they are plainly wrong.

[33] In the process of interpreting the court order, Makume J² motivated the Court's reasoning as follows: -

"[13] It is unfortunate that paragraph 1 of the Court order is not a model of good drafting and may if read in its own cause confusion as to when Mr Van den Bos assumes powers. What is important is that the Court order should be read holistically to get the true intention of the order. What is it that the applicant in that matter sought to achieve by approaching court it can surely not have been to wait for a date in the future to give Mr Van den Bos powers in terms of the Scheme. A reading of paragraph 3.12 puts this beyond doubt. It reads as follows:

[3] The Administrator vested with the powers and obligations as provided in terms of Section 16 of the Act which includes inter alia the right to:

3.12 approach the honourable court to institute legal proceedings:

3.12.1 for the recovery of arrears from Sectional Title owners and other debt owed to the respondents and to institute further legal proceedings where necessary for the aforementioned purposes in terms fully set out in Section 15 of the Act...'

¹ *Jan van den Bos v Shivambo and the City of Johannesburg*, case number 3176/2021 (judgment dated 8 September 2022) by Matojane J; *Jan van den Bos N.O. v Manyakane and two others*, case number 8956/2021 (judgment dated 20 July 2022) by Makume J; *Okafor v Jan van den Bos and the City of Johannesburg*, case number 2020/28938 (judgment dated 4 July 2022) by Crutchfield J; *Jan van den Bos N.O. v Mogoane and three others*, case number 2021/5838 (judgment dated 18 August 2022) by Swanepoel AJ.

² *Jan van den Bos N.O. v Manyakane and two others*, case number 8956/2021 (judgment dated 20 July 2022).

[14] *I find no ambiguity in the order granted appointing Jan van dan (sic) Bos as administrator of P [...]. The Court order must be read purposively aimed at arrived at the true intention of the writer. The only basis that the applicant went to Court in case number 0899/2018 was because P [...] Body Corporate had become dysfunctional and had to be placed under administration in order to remain in business. I can therefore find no reason why the powers of Jan van dan (sic) Bos would have had to wait for a future uncertain date. The respondent's point in limine regarding the locus standi of Mr Van dan (sic) Bos is just but one of the tactics to delay the inevitable and falls to be dismissed."*

[34] I cannot fault the reasoning in these judgments incorrect and accordingly find that the respondents' point *in limine* has no merit and must fail.

COLLUSION

[35] The most often quoted definition of collusion in our law is that given by Curlewis J in *Bevan v Bevan and Ward*³ where the learned judge said: -

"In our law, ordinarily speaking, collusion is akin to connivance, and means an agreement or mutual understanding between the parties that the one shall commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury."

[36] From the definition set out above it would seem that the Court held the view that for there to be collusion, there had to be some arrangement – express or implied – between the parties to mislead the Court by withholding or concealing material facts or suppressing a possible defence. In my view, the relationship between Mr Van den Bos, the applicant and Stratafin was more than adequately explained. A Deeds Search of the applicant attached to the founding papers confirms that Mr Van den Bos is not a director. Moreover, Mr Van den Bos was appointed lawfully in terms of an order of this Court. It is certainly not the respondents' case that they have challenged the powers, functions or conduct of Mr van den Bos at any stage in any

³ (1908) TH 193 at 197.

of the court proceedings instituted by them. This defence must accordingly follow the same fate as the *locus standi in limine* point, and must fail.

TO STAY OR NOT TO STAY

[37] As far back as the 4th of February 2021, the respondents' attorneys of record requested copies of the court papers filed in support of the application to declare the property executable and court orders. Copies of the papers were declined by the applicant's attorneys by virtue of the provisions of POPI and the fact that the occupants who requested the documents were not the registered owners. According to the correspondence, no further steps were taken by the occupiers of the first respondent until the 26th of August 2021 when she respondents' attorneys of record submitted a list of documents and requested letters of executorship to be issued.

[38] Amongst the documents that were submitted, was an affidavit by the applicant applying for letters of executorship and the particular of next of kin as well as an inventory of the deceased estate. The supporting documents were not attached to the founding papers. The Court is therefore not apprised of the nature and extent of the deceased estate or the heirs. Moreover, the applicant who applied for letters of executorship cannot be gauged from the annexures attached to the answering papers either. Significantly, the covering letter does not bear any stamp from the Master's office as acknowledgement of receipt of the application. Apart from the date on the covering letter, there is no evidence if and when exactly the Master received the application.

[39] From a reading of the answering papers, the first respondent took no further steps to follow up with the Master's offices regarding the issue of letters of executorship. Despite being represented by attorneys who were able to advise her, the first respondent sat on her laurels and made no attempt to take the Master's office to task or to approach this Court for appropriate relief in order to have the letters of executorship issued expeditiously.

[40] I am unable to find any facts on the papers before me to warrant a stay of the proceedings under the circumstances. In any event, on the facts as they currently

stand, the prospects of succeeding with a rescission even if letters of executorship were to be issued, appear to be slim.

[41] As far as the personal circumstances of the first respondent and the occupiers are concerned, the respondents have done very little to assist the Court in furnishing full details of their circumstances. By way of example, the first respondent failed to inform the Court why there is no maintenance order in place for the payment of maintenance for the support of her minor children - this notwithstanding the fact that the details of the biological father appear on the birth certificates. The first respondent also does not tell the Court what attempts she has made to find employment, and what her highest level of qualifications and work experience is. As far as the two other occupiers are concerned, they both earn a monthly income and no reason is advanced by it would not be possible for them to find suitable alternative accommodation.

[42] In the result, I find that the respondents have failed to make out a *bona fide* case against the eviction proceedings and for a stay of such proceedings.

EVICITION JUST AND EQUITABLE

[43] Where a private landowner applies for eviction, a court has to make two enquiries. First it has to consider all relevant factors and decide if it is just and equitable to order eviction. If it decided it is just and equitable to evict, it has to make a second enquiry into what justice and equity require in respect of the date of eviction and conditions attaching to the order. Once the first and second enquiries are concluded, a single order is to be made.⁴

[44] PIE imposed a new role on the courts in that they are required to hold a balance between legal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned.⁵ However, the extent to which the court must go beyond normal functions was also placed in perspective by the Supreme Court of Appeal in *Changing Tides*. It stated that this injunction must be seen in the

⁴ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at paragraph [25].

⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paragraph [13].

context that courts are neither vested with powers of investigation, nor equipped with the staff and resources to engage in broad-ranging enquiries into socio-economic issues.⁶

[45] Having considered the facts, I find that the respondents have failed to disclose a *bona fide* defence and they are in unlawful occupation.

[46] The personal circumstances furnished by the respondents are scant. At her own peril the first respondent has not taken the Court into her confidence about her capacity to generate an income. The other two occupiers generate income and are therefore able to find suitable and affordable accommodation elsewhere.

[47] In the premises, the respondents failed to make out a case for homelessness. It has also not been suggested by the respondents that there is a shortage of immediately available accommodation for the occupiers.

[48] As a consequence of my finding that the respondents will not be rendered homeless in the event of their eviction, there is no reason for the third respondent to report. In the circumstances I consider it just and equitable to evict the respondents.

[49] Ms Lombard, appearing for the applicant, proposed a period of 2½ months within which the respondents are required to vacate the property. Mr Mhlanga for the respondents indicated that they would abide by the decision of the Court.

[50] The Court takes cognisance of the fact that it is the festive season and that businesses, including rental agencies, close down. January is usually also a trying month for families who have to enrol children into school and pay school fees. The Ngwenya family is no exception. Upon consideration of the evidence, a period of three months afforded to the respondents to vacate the property would be just and equitable in the circumstances.

⁶ *Changing Tides (supra)* paragraph [27] at 313.

ORDER

[51] In the circumstances I make the following order: -

*“1. The first respondent, second respondent and/or any other persons occupying the immovable property through and under them, being the property known as Unit [...], P [...] (Door [...]), [...] B [...] Street, Hillbrow, Johannesburg (**‘the property’**) are hereby evicted.*

2. The first respondent, second respondent and/or any other persons occupying the immovable property through and under them are hereby ordered to vacate the property on or before the 31st of March 2023.

3. The sheriff or his deputy is authorised to do all things necessary to give effect to the order in paragraphs 1 and 2 above in the event that the first respondent, second respondent and/or any other persons occupying the property through and under them fail or refuse to vacate the property on the 31st of March 2023.

4. The first respondent and second respondents shall pay the costs of the application, jointly and severally, the one paying the other to be absolved.”

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 16 November 2022

DATE OF JUDGMENT: 6 December 2022

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