

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

Case Number: 33916/2020

In the matter between:

EPHRAIM KGADI LETLALO First Applicant

OSLINA RAMATLOTLOO LETLALO Second Applicant

AMMONGOLWANE MINICA LETLALO Third Applicant

STEPHEN TSHWLE LETLALO Fourth Applicant

MMANAPE MARIA LETLALO Fifth Applicant

and
MOKGAETJI SARAH MALAPILE First Respondent

EKURHULENI METROPOLITAN COUNCIL Second Respondent

Neutral Citation: *EPHRAIM KGADI LETLALO & OTHERS v MOKGAETJI SARAH*

JUDGMENT

MALUNGANA AJ

Introduction

[1] The five applicants are the registered joint owners of the immovable property known as Erf [...] Maokeng Section, Tembisa ('the property'). It is

alleged by the applicants that the first respondent is in unlawful occupation of the said property, in that she occupies the property without their consent.

- [2] As a result the applicants now seek the eviction of the first respondent and all the persons holding occupation through her from the property in terms of section 4(2) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 ("the PIE"). Orders are also sought directing the Sheriff or his deputy to evict the first respondent and any occupiers of the property.
- [3] The founding affidavit filed in support of the application is extremely terse. The applicants rely on the title deed annexed to the founding affidavit marked "A". The founding affidavit also annexes a copy of the deed search marked "B".
- [4] To the present application, the first respondent delivered her opposing affidavit. At the outset therein, the first respondent seeks condonation of her three days late filing of the application. Amongst the reasons stated in her condonation application is the lack of funds and COVID 19 complications. I have considered the issues raised and am satisfied that a good cause has been shown for granting of condonation. It is so granted.
- [5] In the answering affidavit filed on her behalf, the first respondent denies that she is unlawfully occupying the property. She avers that she was the second wife to the late Thaluki Jeremia Meso ("the deceased"), to whom she was married in terms of customary law. She further contends that the deceased had executed a will during his life time in terms of which she was nominated as beneficiary of the property, whilst his first wife, Mamonoke Meso ('the widow') would retain the dwelling in Matlakereng Village.

[6] It is noteworthy to state that the deceased was the registered owner of the property in question before it was sold by the widow to the applicants. The background to this application will be helpful.

History and nature of proceedings

[7] On 11 March 2016 and pursuant to an interdictory application launched by the first respondent against the widow and other respondents, Spilg J granted an order in favour of the first respondent as follows:

- (a) Interdicting and restraining the widow and the deeds office from selling, and/or transferring the property registered in the name of the deceased, being Erf [...], situated in Maokeng Section, Tembisa, pending the finalisation of the deceased estate, which would include the consideration by the Master of the High Court, the last will and testament of the deceased.
- (b) A copy of the will had to be lodged with the Master of the High Court within 14 days of the Order.
- (c) The Master of the High Court was directed not to give effect to an instruction to have the property transferred into the name of any third party or purchaser (s), and to endorse the title deed to that effect.

[8] During July 2018, the first respondent instituted another interdictory proceedings against the Master of the High Court and Mrs Mamonoke Meso, in which she sought the following relief:

- (a) That the Master of the High Court, Johannesburg, be directed to accept a copy of the will and testament of the deceased who died on 25 February 2007.
- (b) That the Master be directed to cancel Letters of Executorship issued to Mrs Mamonoko Meso on 28 April 2015.

- (c) Directing that the estate of the deceased be administered and devolve in terms of the said will and testament.

Applicant's contention

- [9] The first applicant contends that the first respondent's occupation of the property is unlawful, more particularly that he is the registered owner of the immovable property. He has nothing to do with the litigation which had ensued between the widow and the first respondent. He goes on to state that the first respondent must sort it out her legal issues with the previous owner. Consequently, it is just and equitable to evict the first respondent from the property.

Respondent's contention

- [10] According to the first respondent there is a non-disclosure of the material facts by the applicants, which will have a material impact on the relief sought in this application.¹The first respondent avers that pursuant to the court order issued by Spilg J, the Master of the High Court considered the deceased's will and rejected it. Her contention in this regard is that the consideration of the will does not end with the rejection, as it includes all rights of recourse bestowed upon the person aggrieved by the Master's decision. The Master had allowed the transfer of the immovable in circumstances where it was not free of objection.
- [11] In paragraph 8.5 of the answering affidavit the first respondent contends as follows:

"8.5 Ad paragraph 8,9 and 10

Save to admit that the Applicants, is on the face of the Deed of Transfer, I deny that the Applicants are innocent and genuine bona fide purchasers of the property.

¹ Case lines 009 -10. Answering Affidavit, para. 5.3

I say this because the property was sold to the Applicants under the circumstances that violates the court order under case number:2016/07388. In the light of the contentions I have advanced in the preceding paragraphs of this affidavit, I respectfully submit that the agreement of sale between the First to Fifth Applicants and the executrix was a nullity.

The averments I have made and facts stated in the various affidavits deposed to by me in matters relating to this property were known by the First Applicant.

I find it important at this stage to highlight to this Honourable Court that, the first applicant is my late husband's nephew. During my late husband's lifetime, the first Applicant stayed with us in the same property. In 2016, the first occasion I established that the First applicant had offered to purchase this property I applied for an order interdicting the proposed sale."

Applicant's replying affidavit

[12] The relevant portions of the applicant's replying affidavit in response to the above allegations read:²

"8.5 I still submit that this arguments are irrelevant in the court dealing with eviction and should be properly raised with the previous owner in an appropriate court as the time of first registration into the seller's names there was no existing interdict on the property as the Will was rejected already by the Master of the High Court. I hereby enclose the previous owner's affidavit that deals with this aspect of the matter together with attachments.

8.6 I am adamant that the first respondent is an illegal occupant and that the will presented by her to the Master was rejected.

² Case lines 062-4. The Applicant's Replying Affidavit

8.7 I am still adamant that the first respondent is an illegal occupant and it is just and equitable that she must vacate the property in dispute.

8.8 I am advised that court order and rejected Will were presented to the Deeds Office for the purpose of registration and therefore it was proper that the registration into the previous owner was made.”

The widow’s answering affidavit to the first respondent’s application in case number 24678/2018

[13] The relevant portions of the widow’s answering affidavit referred to in paragraph 8.5 of the applicant’s replying affidavit, *supra* read:³

“3.3 After seven months, my attorney approached the Master of the High Court to find out about the decision and it was then established that the will was rejected by the Master of the High Court as it clearly appears on the attached copy of a will. Then six months after the rejection of the will by the Master of the high Court, I instructed my attorneys to apply for endorsement of the title deed in terms of sec 45(1) of Act 47 of 1937, I hereby enclose confirmation that was made by the Registrar of Deeds office on 30 June 2017 as annexure marked “F”. I am therefore the lawful new owner of the property situated at Erf [...] Maokeng Extension 1 Tembisa.

3.4 I must submit that the applicant had more than reasonable opportunity to challenge the Master’s decision but neglected to do so. Her application now when I have already taken full ownership is simply to prejudice me as the owner of the property. I am almost 80 years old of age and wish that the applicant must leave me in peace to dispose of the property and enjoy the benefits of my

³ Case lines 062-18. Answering Affidavit by Mamonoke Johanna Meso, case number: 24678/2018

marriage with my late husband to the fullest before I die. On that basis I request the Honourable court to dismiss this application.”

The legal framework

[14] At this stage it is convenient to consider the applicable legal principles. Section 1 of the PIE Act defines an Unlawful occupier as:

“unlawful occupier means a person who occupies land without the express or tacit consent of the owner or a person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).”

[15] Section 4(7) provides that the court may grant an order for eviction if an unlawful occupier has occupied the land in question for more than six months when the proceedings are initiated, if it is of the opinion that it is ‘just and equitable to do so,’ and after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

[16] Section 4(8) empowers to evict an unlawful occupier if it is satisfied that all the requirements of this section had been complied with and no valid defence has been raised by the unlawful occupier, and to 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).”

- [17] In determining whether an eviction is just and equitable the court is required to consider amongst others, whether land has been made available or can be made available by a municipality or an organ of state for the relocation of the occupier. See *Occupiers of Erf 101,102,104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and others* [2009] 4 All SA 410 (SCA).

Submissions

- [18] It was submitted on behalf of the applicants that the property was bought free of interdict as it was already in the names of the widow. Furthermore the applicants have complied with the procedural requirements set out in the PIE Act.
- [19] On behalf of the first respondent it was argued that the widow sold the property to the applicants in total disregard of the court order debarring the Registrar of Court from giving effect to the purchaser and from endorsing the title to that effect. He further submitted that the issue relating to the rejection of the will should first be ventilated before the issues of administration of the estate can be finalized. Reference was made to the definition of the spouse as contemplated in the Reform of Customary Law of Succession and Regulations of Related Matters Act 11 of 2010, in respect of which it was submitted that the first respondent falls within the category of spouse described therein.

Analysis of the issues

- [20] It emerges from the facts on record that the first respondent has been in occupation of the property concerned for a period in excess of 10 years. At all material times she occupied the property through the deceased, presumably with his consent. The applicant averred that the first applicant is the deceased's nephew, and at some stage he lived with them in the

property. I observe that this averment is neither denied nor challenged by the applicants.

[21] Importantly, the first respondent instituted proceedings against the Master of the High Court challenging his decision to reject the will purportedly executed by the deceased. Similarly, it is not denied that the application is still pending. In this connection, the first respondent contends in her answering papers that the consideration of the will does not end with the rejection of the will by the Master, as his decision can still be challenged. It is unclear if the first respondent was aware that the property which formed the subject matter of the application was being registered or sold to the applicants. I am respectfully in agreement with the first respondent's proposition that she is an interested party and ought to have been informed of the further step relating to the property after the rejection of the will by the Master.

[22] It has also been argued on behalf of the first respondent that the property was transferred to the applicants in total disregard of the order by Spig J. In my view, this is not a matter where the application for eviction can be decided on affidavit. The issues raised pertaining to the merits of the order and the rejection of the will do not belong to this application. The method for resolving dispute of fact in motion proceedings has been laid down in *Plascon -Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCAA 51; [1984] 2 SA 366.⁴ The first respondent's version that she was married to the deceased is met with a denial from the widow. The validity or otherwise of her marriage cannot be entertained here.

[23] In light of the above, it remains to consider whether it would be just and equitable to grant an eviction order. Sachs J, dealing with the concept

⁴ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 ...It is well established under the *Plascon -Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them on the papers.

“just and equitable” in the context of PIE in *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA217 (CC), referred to the comments of Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and others* and stated in paragraph 33 as follows:

“... [1] In matters brought under PIE, one is dealing with two diametrically opposed fundamental interests. On the one hand, there is the traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner. On the other hand, there is a genuine despair of people in dire need of adequate accommodation ...It is the duty of this court, in applying the requirements of the Act, to balance these opposing interests and brings out a decision that is just and equitable... The use of the term “just and equitable” relates to both interests, that is, what is just and equitable not only to persons who occupied the land illegally but to landowner.

... [36] The Court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and the PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay regard to the broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu* ,

part of a deep cultural heritage of the majority of population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.”

[24] It follows from the above decision that the court should not blindly focus on the lawfulness of the occupation but should infuse other elements of grace and compassion into the formal structures of the law in order to achieve just and equitable result. It is therefore not sufficient to consider only the issue of ownership of the property and conclude that the occupier is in unlawful occupation of the property. Other factors such as how the occupier occupied the property deserve consideration, so is the manner in which the landowner acquired ownership of the property from which he seeks to evict the occupant.

[25] In the instant case the first respondent does not only rely on the alleged customary union with the deceased, but also on the purported will of the deceased. Further she avers that the first applicant is the nephew of the deceased, and that at some stage he came to stay with her and the deceased in the disputed property. As regards the relevant factors. I have observed that the first respondent is out age, and presumably unemployed. It is not clear from the papers as what her source of income. There is simple no sufficient evidence placed before to consider whether that the first respondent can be able to afford or find an alternative accommodation if evicted from the property. If the first applicant had stayed with the first respondent, which evidently is not denied, he ought to have brought to light issues which the court appertain the personal circumstances of the first respondent. For all of these reasons I am unable to conclude in the context of s 4(8) that the eviction of the first respondent would be just and equitable in the circumstances.

Conclusion

[26] In regard to the contention raised by the applicants that the first respondent had had ample time to challenge the Master's decision but neglected to do so, I am of the view that there is merits in that assertion. It is apparent *ex facie* the record that the first respondent did absolutely nothing to pursue the application since the filing of the widow's answering affidavit in 2018. No reasonable explanation has been proffered for the stagnation of the case. No doubt the applicants have suffered some prejudice as a result of this inordinate delay. It is therefore necessary for this court to express its deprecation of the first respondent's conduct. In addition, the court should also issue an appropriate order to prevent the recurrence of this conduct.

[27] Having reached a conclusion that it will not be just and equitable to grant an eviction order against the first respondent at this stage, I also find it unnecessary to make any findings on the contentious issues raised in this application.

[28] Accordingly, the order is:

- (1) The matter is postponed sine die pending the determination of the application launched by the first respondent under case number:24678/2018
- (2) The first respondent is directed to take the necessary steps to secure the enrolment the said application within 60 (sixty) days of the date of this order;
- (3) Should the respondent fail to comply with clause 2 of this order, the applicants are authorised to approach this court on the same papers duly supplemented for an eviction order.
- (4) The first respondent is directed to pay the wasted costs of this application.

MALUNGANA PH

Acting Judge of the High Court

APPEARANCES

For the Applicant: : Mrs. Molope-Madondo
: Molopo-Madondo Attorneys

For the Respondent : Mr. T Mashishi
: Tsoku F. Mashishi Attorneys