

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 40111/2012

Date: 17 September 2014

In the matter between:

DEON MARIUS BOTHA N.O.

1st Applicant

SANDRA JOAN MCKENZIE N.O.

2nd Applicant

in their capacities as joint provisional trustees of the insolvent estate of

THEODORE FREDERIK KIES ID: 4[...]

MASTERS REF NO. T3911/11

and

THEODORE FREDERIK KIES

1st Respondent

BARBARA CHRISTINA KIES

2nd Respondent

ALL THE OTHER UNLAWFUL OCCUPIERS RESIDING

ON AND/OR OCCUPYING UNIT 2, SS 279 MILNER,

ALSO KNOWN AS 479B MILNER STREET,

WATERKLOOF, PRETORIA, GAUTENG

3rd Respondent

THE CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

4th Respondent

JUDGMENT

PRETORIUS J

[1] The applicants are the joint trustees in the insolvent estate of the 1st respondent. On 10 July 2012 the applicants launched an eviction application against the first to third respondents, which was opposed. The first respondent represented himself and the second respondent during the hearing of this application.

[2] Presently the first and second respondents occupy a sectional title unit number 2 in a sectional title scheme known as SS 279 Milner Street. The first respondent purchased said property on 28 September 2004 for the amount of R540 000.00. The property was registered on the first respondent's name on 17 March 2005.

[3] During 2005 and 2006 two sectional mortgage bonds were registered in favour of First National Bank (FNB) which provided security in the aggregated sum of R1 440 000.00.

[4] Corporate Money Managers (Pty) Ltd and the Allegro Group of Companies were placed under curatorship. This resulted in the court appointed curators to apply for the sequestration of the first respondent's estate as he was the only member of these two entities. The first respondent signed a surety for these two entities. A claim of R45 922 151.00 was submitted by the curators of Allegro and Corporate Managers to the applicants in respect of the first respondent's insolvent estate. On 24 March 2011 a provisional sequestration order was granted and on 28 February 2012 the first respondent's estate was placed under final sequestration by order of this court. On 27 October 2011 the applicants were appointed as provisional trustees of the respondent's insolvent estate and the current applicants were finally appointed on 5 October 2012 as trustees. On 23 April 2012 the applicants demanded that the first respondent vacate the property, which notice was served personally on the first respondent on 2 May 2012.

[5] Both the first and second respondents refused to comply with the demand which resulted in the launch of the current application on 10 July 2012.

[6] I have carefully read the first respondent's opposing affidavit. His defence is that a person cannot be a squatter in his own house. Secondly he alleged that there is enough equity in the estate to pay all the debts. He does not set out facts to support these bold and vague allegations.

[7] Mr Kies, the first respondent, alleges that the applicants have no *locus standi* and that the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, no 19 of 1998 [hereinafter "**the PIE Act**"] are not applicable at all.

[8] According to the provisions of the Insolvency Act the sequestration of the estate of the first respondent

leads to the fact that he is divested of his estate. His estate vests in the Master of the High Court and upon the appointment of the trustees it vests in them. The insolvency Act provides that all the property, which according to the definition in the Act, includes “*movable or immovable property wherever situated within the Republic*”.

[9] At present the applicants, in their official capacity, are the owners of the property. There is no question that they have the necessary *locus standi* to launch the present application.

[10] Section 2 of the PIE Act provides:

“This Act applies in respect of all land throughout the Republic. ”

[11] Section 4(1) of the PIE Act provides:

“Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.”

[12] In the present instance the first and second respondents are occupying the property without any form of consent from the trustees and are therefore the unlawful occupiers of the property. There is no doubt in my mind that the PIE Act applies.

[13] **In Bekker v Jika 2003 (1) SA 113 SCA** the court set out at paragraph 11 by Harms JA:

“Since the factors discussed are essentially neutral, one is left with the ordinary meaning of the definition which means that (textually) PIE applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful.”

(Court’s emphasis)

and at paragraph 19:

*“Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly **without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.**”* (Court’s emphasis)

[14] The first respondent does not challenge the procedure which had correctly been followed to launch the

ex parte application and thereafter to serve the court order and application on the first, second and third respondents. This was done correctly.

[15] A further complaint by the first respondent is that the trustees had not rendered security to the Master. Section 56(2) of the Act provides:

“Subject to the provisions of section 57, the Master shall, when a person so elected has given security to the satisfaction for the proper performance of his duties as trustee, confirm his election and appoint him as trustee by delivering to him a certificate of appointment, which shall be valid throughout the Republic.”

[16] The Master had appointed the applicants as trustees after they had provided the necessary security to the Master of the High Court.

[17] Although the first respondent argued that no claim was proved against his estate, the court finds that FNB had proved a secured claim in the amount of R1 094 459.83 at the first meeting of creditors held on 17 September 2012. The report prepared by the trustees after the second meeting of creditors reflects that the first respondent was not only the owner of the above mentioned property, but was the owner of a property which is referred to as the Hornbill Close property as well. ABSA Bank has a mortgage bond registered over this property in the amount of R2,4 million. The known creditors of the first respondent are reflected in the trustees report as:

- First National Bank (mortgage bond R1 094 458,83

- Absa Bank (mortgage bond) R2 400 000,00

- SARS Unknown

- Concurrent creditors ±R14 937 000,00”

[18] It is patently clear that the first respondent is factually insolvent. There is no equity in the estate.

[19] At the second meeting of creditors, held on 26 November 2012 one of the resolutions approved was:

“That the trustee be, and is hereby authorized, to sell or in any other way dispose of any immovable or movable assets of the Insolvent Estate, whether as a going concerns, or otherwise, or whether separately or jointly, with any other person or corporate entity, and on such terms and conditions as the Trustee, in his sole discretion, may decide on and particularly, in his sole discretion, should they decide to sell or otherwise dispose of any such asset, jointly with any other person or corporate

entity, on the method and quantum, of division, of the total consideration, by public auction, tender or private treaty, and on such terms and conditions as he, the Trustee, in his sole discretion may deem fit and any other costs thereof which he, in his sole discretion cannot pass over, to be costs of sequestration.”

[20] The applicants cannot sell the property whilst the respondents are still occupying the property. Hence this application for the eviction of the respondents.

[21] It is important to note that the application for the rescission of the sequestration order against the first respondent had been dismissed with costs. No appeal has been noted at any stage. The first respondent had applied for his rehabilitation and the application for rehabilitation was dismissed with costs.

[22] This is an application for the eviction of the first and second respondents. It is clear that the first respondent cannot accept that he has reached the end of the road and that he has no defence whatsoever.

[23] He and the second respondent have been occupying the property unlawfully, free of charge and to the detriment of the insolvent estate. Each day the value of the property is diminishing due to the lack of maintenance. It cannot be marketed and sold and the proceeds distributed to the first respondent's creditors. It has been two years and four months since notice to vacate had been given to the respondents, to no avail.

[24] The court has considered all the arguments by counsel for the applicants and Mr Kies, I have considered the provisions of the respective Acts as well. The respondents, are not relying thereon that they are poor and vulnerable. Mr Kies describes himself as a pensioner and legal advisor and therefore the only inference the court can draw is that he has an income. It will be just and equitable to grant the orders as requested in these circumstances.

[25] The continued occupation of the property is to the detriment of the *concursum creditorum* and cannot further be tolerated.

[26] I make the following order:

1. The first, second and third respondents (and all other persons and/or individuals who occupy and/or claim the property through them) is hereby ordered to vacate the property known as Unit 2, SS 279 Milner, also known as 479B Milner Street, Waterkloof, Pretoria, Gauteng [hereinafter “the property”] on or before Friday the 31st day of October 2014 at 17h00;
2. Should the first, second and third respondents (and all other persons and/or individuals who occupy and/or claim the property through them) fail to vacate the property on or before Friday, the 31st day

of October 2014 at 17h00, the Sheriff and/or his/her Deputy is hereby authorized, mandated and directed to take all such necessary steps forthwith to execute this order by evicting the first, second and third respondents (and all other persons and/or individuals who occupy and/or claim the property through them) from the property and, if necessary, to obtain the assistance of the South African Police Services to assist him/her in this regard;

3. The first respondent and second respondent shall pay the costs of this application, jointly and severally, the one to pay the other to be absolved.

Judge C Pretorius

Case number : 40111/2012

Heard on: 8 September 2014

For the Applicant: Adv Meintjes

Instructed by: Rorich Wolmarans & Luderitz Inc.

For the Respondent: Mr Kies

Instructed by: In Person

Date of Judgment: September 2014