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/SG

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE:

CASE NO: 40882/2012

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....

DATE

SIGNATURE

In the matter between:

RICHARD LEBALLO

APPLICANT

And

THABO LEBALLO MASUNGANY

1ST RESPONDENT

KOKI LEBALLO MASUNGANY

2ND RESPONDENT

LYDIA LEBALLO MASUNGANY

3RD RESPONDENT

ABE LEBALLO MASUNGANY

4TH RESPONDENT

THE FAMILY MEMBERS OF THE 1ST, 2ND, 3RD and
4TH Respondents and or any unlawful
occupiers of 1.... M.... Street, S....., Pretoria
CITY OF TSHWANE MUNICIPALITY

6TH RESPONDENT

JUDGMENT

MOGOTSI, AJ

[1] Introduction

This is an application for the eviction of the first, second, third, fourth and fifth respondents from the house known as 1.... M... Street, S....., Pretoria (hereinafter referred to as “the property”) in terms of the Prevention of the Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (as amended).

The first, second, third and fourth respondents gave notice of intention to oppose the application on 23 July 2012 and filed heads of argument on 15 July 2013. The matter was set down for hearing on 25 November 2013. The respondents failed to appear on the trial date and no reason was given for such failure. The court proceeded to hear the application based on affidavits filed.

2. The Parties

- 2.1 The applicant is Richard Leballo an adult male employee at Putco Bus Company, residing at 1... M..... Street, S....., Pretoria.
- 2.2 The first respondent is Thabo Leballo Masunganyi an adult female residing at 1..... M..... Street, S....., Pretoria.
- 2.3 The second respondent is Koki Leballo Masunganyi an adult unemployed male residing at 1... M..... Street, S....., Pretoria.
- 2.4 The third respondent is Lydia Leballo Masunganyi an adult unemployed female residing at 1... M... Street, S....., Pretoria.
- 2.5 The fourth respondent is Abbey Leballo, an adult unemployed male residing at 1..... M.... Street, S....., Pretoria.
- 2.6 The fifth respondents are all other unlawful occupants at the property known as 1.... M.... Street, S....., Pretoria.
- 2.7 The sixth respondent is the City of Tshwane, a municipality as contemplated in section 2 of the local Government, Municipal

Systems Act 32 of 2000, c/o the Municipal Manager, 20th floor
Saambou Building, 227 Andries Street, Pretoria.

2.8 The applicant, first and fourth respondents are siblings. The second and third respondents are the children of the first respondent.

3. Background

The applicant, first and fourth respondents are the children of Moshidi Florah Leballo (the deceased) who was awarded “the property” situated at 1.... M..... Street, S....., Pretoria (“the property”) under the 99 year leasehold.

On or about January 1989 the deceased was given notice in terms of the Convention of Certain Rights into Leasehold Act 81 of 1988 (“the Act”) by the sixth respondent. The Act made provision for the conversion of rights in land into ownership. As at the time of the deceased death (on 27 December 1995) transfer of “the property” into her name had not taken place and “the property” remained the property of the sixth respondent.

An inquiry was held by the sixth respondent in the year 2000 and subsequent to that the property was registered into the names of the applicant and his deceased wife.

The grounds for the eviction appear from the affidavits filed in the proceedings and they are *inter alia* as follows:

“The applicant is the owner of the property.

You are in unlawful occupation of the property.

You occupy the property without any remuneration to the applicant.

You have no right to remain in the property.

No relevant circumstances prevail which justify your occupation of the property and it is just and equitable in terms of the Act that the court grants an order for your eviction from the property.

You are entitled to appear before the court and defend the matter and where necessary you have the right to apply for legal aid.”

An order was made by the Honourable RAULINGA J in terms of section 4(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 that the applicant's main application for the eviction of the respondents and related relief be served on the first to sixth respondents by the sheriff of the court at "the property" by serving the application on each occupier he/she find there and by affixing a copy of the application at the main entrance of the property. Notices of intention to oppose were filed.

First respondent's answering affidavit avers among others that she indeed resides at "the property". That although she was ... in terms of customary law the marriage was discontinued and the applicant recalled her to the property due to circumstances she was living in. The second and third respondents are her children. The third respondent has a small baby and she is unemployed and single the first respondent is also single.

The first respondent is still awaiting the results of her application for a low income house (RDP). She prays that the matter be referred for

mediation in terms of section 7 of Act 19 of 1998 and she avers that he mother's house was not acquired by the applicant in good faith.

The third respondent avers that it is the applicant who starts arguments when he is intoxicated.

The fourth respondent avers in his affidavit that he has been staying in that "property" since 1683 and that he has not been aware that the applicant is the owner of the property until the eviction proceedings were started. He just like other respondents questions the procedure followed when the applicant acquired ownership of the property.

All the siblings except the fourth respondent vacated "the property" and lived elsewhere. The first, second and third respondents returned to the property on or about 2010 and they once more left the property. The further respondent appears to be the only respondent still staying with the applicant. The respondents are alleged to be causing mayhem in that they tune up the radio to full blast, inconsiderate of the applicant's six children who have to study. The third respondent is alleged to be

very provocative, vulgar and has had several confrontations with the applicant and his children.

The respondents deny the allegations and they say the applicant is difficult and provocative when drunk.

It is the applicant's further contention that the balance of convenience favours him and that the respondents be evicted.

4. The Merits of the Application

The respondents' main defence is that they should not be evicted from their "mother's house". They say there is a factual dispute regarding the property and who is/are the legal owners thereof.

Applicant had "the property" registered in his name and the respondents were under the impression that they were only choosing him as the principal member. The respondents only became aware of the situation once they received the eviction application. The

respondents say that they have a legal right to stay there and should not be evicted.

The sixth respondent should have converted the ownership to all respondents as well and was actually bound to do so. The respondent never lawfully gave consent to ownership of the property to be transferred to the applicant and the applicant never acquired the property in good faith.

It will not be just and equitable for the court to grant and order for eviction as in terms of section 21(1)9a) and 2(1)(b) schedule 1 of Land Tenure Rights Act 112 of 1991. Ownership was to be converted to the name of the person in whose name the land tenure right was registered immediately before conversion.

5. The Law

5.1 Section 26 of the Constitution Act 108 of 1996 as amended states that everyone has the right to have access to adequate housing

and requires the state to take reasonable measures to realise that right.

Section 26(3) of the Constitution provides that:

“No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

Eviction proceedings by the owner of land are governed by sections 4(6), section 4(7) and 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). Clearly the legislature contemplated two categories of applicants or evictors – “an owner” and “an organ of state” an owner would then include registered owner of land.

The PIE Act was also introduced to regulate the eviction process and to afford property judicial oversight. It was enacted to balance the owner’s

property rights and the occupant's right to access to housing, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

A court may refuse an eviction application if the respondent would be rendered homeless and the granting of the eviction order would not be just and equitable in the circumstances.

Occupiers, ... Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] 4 All SA 54 (SCA)

In terms of section 6(3) of the PIE Act in deciding whether it is just and equitable to grant an order for eviction the court must have regard to –

- (a) the circumstances under which the unlawful occupier occupied the land and evicted the building or structure;
- (b) the period the unlawful occupier and is or her family have resided on the land in question; and

- (c) the availability to the unlawful occupier of suitable accommodation or land.

Factors mentioned in section 6(3) of PIE Act are not numerous clauses in determining what is “just and equitable”.

Section 4 of PIE Act is of more relevance in this matter than section 6.

Courts have stressed the need for fairness regard to the constitution, the need to treat people with dignity and respect and the responsibilities of government in providing housing. *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2001 1 SA 46 (CC); 2000 (1) SACR 1169 (CC) 82-88.

Amongst the relevant circumstances to which this court must have regard in determining justice and equity are the rights and needs of the children the parties before court and a household headed by a woman (1st and/or 3rd respondents).

5.2 The difficulty that the respondents face is that:

- (a) The applicant has a deed of transfer (T123967/2003) (VA3290/2012).
- (b) They never had the process leading to the appointment of the applicant reviewed or appealed against even when they became aware of the notice of eviction.
- (c) The applicant's contention is further that when he took over "the property" its approximate value was R20 000.00 (twenty thousand rand). He renovated the house by adding more rooms and it is now valued at R700 000.00 (seven hundred thousand rand).

The applicant is of the view that the respondents want to be unduly benefitted because they do not want to pay rent or contribute towards renovation costs. He also renovated the house believing that it is his property. He argues that he

acquired ownership thereof in a transparent and *bona fide* manner.

(d) Although the respondents contend that the dispute of ownership is factual and that it should be referred for mediation in terms of section 7 of Act 19 of 1998, they have not taken any steps towards mediation despite the fact that these proceedings were started on 13 July 2012.

(e) The matter is further complicated by the respondents' non-appearance on a trial date and failing to give any reason for that.

5.3 Dispute of Fact

In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 3 SA 1155 (T) it was decided that: –

If, during an application, dispute of facts arise, the court must exercise a discretion as determined in terms of rule 6(g) of the

Uniform Rules, to dismiss the application or refer the dispute to oral evidence or to trial. This discretion must be exercised judiciously.

The approach to be adopted when confronted with disputes of facts in motion proceedings has been set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

“It seems to me, however, that his formulation of the general rule and particularly the second sentence thereof, requires some clarification and perhaps qualification. It is correct that where in proceedings on notice of motion disputes of fact have arisen on the affidavits of final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicants affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by

respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of facts.

In Thebe Ya Bophelo Healthcare Administrators (Pty) and Others v National Bargaining Council for the Road Freight Industry and Another 2009 3 SA 187 (W) 19.

“The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned the time-honoured rules ... are to be followed. These are that where an application in motion proceedings seeks final relief and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants’ founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent’s version are bold or uncreditworthy, or the respondent’s version raises such obviously fictitious disputes of fact or is palpably implausible or farfetched or so clearly untenable that the

court is justified in rejecting that version on the basis that it obviously stands to be rejected.”

The respondents were present when the issue of registration and or transfer of “the property” in the name of the applicant was discussed. If it was not their intention to have “the property” registered in the name of the applicant it is surprising that ever since they became aware of the registration and the fact that notices of eviction were served on them, they showed no interest in rectifying the situation if indeed registration was to be dealt with. The question now is whether such a dispute genuine or *bona fide*.

At times a denial by respondent of fact which has been alleged by applicant may be insufficient to raise a real genuine or *bona fide* dispute regarding the alleged fact. If in such a case, respondent has not availed itself of the right to apply for the deponent concerned to be called and cross-examined in terms of rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the factual averment of the applicant, it

may proceed on the basis of the correctness of that averment and include it within the factual matrix upon which it determines whether applicant is entitled to the final relief sought, *Peterson v Cuthbert Co Ltd* 1945 AD 420 at 428-429.

5.4 Just and Equitable to Order Eviction

Courts have stressed on the one hand the need for fairness, regard to the constitution, the need to treat people with dignity and respect and on the other hand, the responsibilities of government in providing housing and the purposes of the proposed evictions. *Residents of Joe Slovo Community, Western Cape v Thebalisha Homes and Others* 2010 3 SA 459 at para 199; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC); 2000 (1) BCLR 1169 at paras 82-88.

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 2 SA 104 (CC) – “In

determining whether the eviction of the occupiers will be just and equitable it is necessary to address –

- (a) the rights of the owner in a constitutional and PIE era;
- (b) the obligations of the city to provide accommodation;
- (c) the sufficiency of the city's resources;
- (d) the constitutionality of the city's emergency housing policy;
and
- (e) an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues.

6. Conclusion

From the above reasons I make a finding that the prejudice the applicant continues to suffer from if the relief is not granted outweighs any prejudice the respondents will endure. The applicant has standing as

the owner of “the property” to seek the eviction of the respondents. The first, second, third, fourth and fifth respondents are unlawful occupiers, having no right to remain on the applicant’s property and having been given notice by him to vacate his property.

I therefore came to the conclusion “that it is just and equitable to grant an eviction order after considering all the relevant circumstances, including the rights and needs of children and the plight of first and second respondents as women heading their respective households.

The applicant pays rates, taxes and renovation of the house while respondents stay for free. The balance of convenience favours the applicant whose children study under difficult circumstances occasioned by unlawful occupiers.

Having reached such a conclusion, I make the following order:

Order

1. An eviction order is issued in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 against the first, second, third, fourth and fifth respondents, being the unlawful occupiers of “the property” known as house number 13 Madisha Street, Saulsville, Pretoria and any person occupying the property through them.
2. The eviction order may be enforced if the respondents and any person(s) occupying the property through the respondents do not vacate the property within two (2) months of the service on the respondents of this order.
3. The sheriff of this court is authorised to enlist the assistance of members of the South African Police Service to carry out the order set out in paragraph 2 above, if needs be, subject to the condition that the sheriff shall at all times be present during the eviction.
4. Each party to pay his/her costs.

D D MOGOTSI
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

For the : Adv

Instructed by:

For the : Adv

Instructed by:

Date of Judgment: