

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

27/5/2016
CASE NO: 69567/2012



DATE OF JUDGMENT:

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

Hoize

In the matter between:-

ELIAS NTHAKI MALEKA

First Applicant

LILLY TEBOGO MALEKA

Second Applicant

and

ROSEMARY IKA

First Respondent

**THE UNLAWFUL OCCUPIERS OF
ERF 22369 MAMELODI EXT 4**

Second Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

KOOVERJIE AJ:

A. APPLICATION:-

1. This is an application in terms of the Prevention of Illegal Eviction From and Unlawful Occupation Land Act. No. 19 of 1998 (PIE Act).

B. COUNTER APPLICATION:-

2. The Respondent sought the following relief in respect of the counter application namely that:
 - 2.1 the “offer to purchase” marked “A” in the main application be declared invalid and unenforceable;
 - 2.2 the Deeds of Transfers issued in respect of all the transfers be declared null and void and be set aside;
 - 2.3 The Registrar of Deeds be ordered to expunge registrations of the transfers of ownership in respect of various transfers;
 - 2.4 The City of Tshwane Metropolitan Municipality and the Head of Department of Housing, Gauteng Provincial Government, be ordered to

facilitate that erf number 22369 Mamelodi Extension 4, is transferred in the name of the First Respondent.

3. Counsel for the Respondents submitted that Mrs. Ika has not only a direct and substantial interest but a legal interest as well. Furthermore by virtue of her constitutional right to adequate and secure housing she is entitled to thereto.
4. Counsel for the Applicants argued that Mrs. Ika does not have any right in law to occupy the property and neither does she hold a title as lessee or even as owner.
5. The requirements for *locus standi in judicio* are essentially that the party must have an interest in the litigation, which is not far removed and such interest exists currently.¹
6. Even though she had not been a party to the relevant agreements between the purchasers and sellers, she does however have an interest in the said property. She is currently occupying the premises and the outcome of the application would have an effect on her. It was noted that various legal points were raised in her affidavit and to which she possibly has inadequate knowledge thereof. However the court acknowledges that litigants rely on the advice of their legal advisors, who assist them in the preparation of their papers.

¹ Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1998 (3) SA 369 (A)

C. BACKGROUND:-

7. This matter goes as far back as 1998, when the First Respondent's husband (Mr. Ika) obtained a home loan from Khaya Lethu Home Loans (Khaya Home Loans) in respect of their former property situated at 21362, Ikageng Section, Mamelodi East, Pretoria. The Ika's occupied the house on the basis of a loan which was to be repaid in monthly instalments. (First house.)
8. During May 1992, Mr. Ika fell in arrears and the family were evicted from the premises. Upon negotiating a settlement with Khaya Home Loans, Mr. Ika's loan account was reinstated. The Ika's were relocated to another premises apparently a "showhouse" situated on Erf 22369, Mamelodi, Extension 4, Gauteng and which property is the subject matter of the dispute. (Second house.)
9. The reason for their relocation was that their previous home was occupied by other tenants.
10. A negotiation was recorded in correspondence dated 22 June 1993, from Khaya Home Loans on the basis that Khaya Home Loans would be prepared to reactivate the account and give them occupation of the second house on the following conditions:

- 10.1 the owner occupying their home would agree to vacate and take possession of another property;
 - 10.2 that Mr Ika pays the arrears; and
 - 10.3 a stop order would be arranged against his salary in respect of the instalments.
11. This was accepted by Mr. Ika on the basis that a written confirmation be given that the new owner indeed would vacate the property and take possession of another property. This was the last correspondence in respect of the Ika's arrangement with Khaya Home Loans. The Ika's enjoyed occupation of the premises until they were informed in 2012 that they were occupying the premises unlawfully.
12. In the 19 years that they had occupied the property, the property was purchased by various owners, the last being the Malekas (Applicants). The property changed hands as follows:
 - 12.1 The property was lawfully owned by the City Council of Mamelodi during 1991, the City Council granted a right of leasehold, for a period of 99 years to the South African Housing Trust (Housing Trust) in terms of Section 2(1)(a)(i) of the Black Communities Development Act 4 of 1984 (BCDA). This leasehold was registered by means of a "Certificate of Registered Grant of Leasehold".

- 12.2 In September 2002, the “Housing Trust” was replaced with the National Housing Finance Corporation (Finance Corporation). The effect thereof was that all the rights and assets were transferred to the Finance Corporation, which right included the Leasehold right over the said property.
- 12.3 On or about 18 August 2011 the Finance Corporation sold and transferred the property to Khaya-Lethu Trading SA CC (Khaya Trading).
- 12.4 On 30 November 2011 Khaya Trading sold the property to Mr. Masemola.
- 12.5 On 25 May 2012, Mr. Masemola sold the property to the Malekas (the Applicants).
13. Mrs. Ika challenged the validity of the ownership on the basis that no written consent was furnished by the City Council to the Finance Corporation which recorded that the Leasehold was transferred to the Finance Corporation.
14. Consequently all the transactions thereafter are unlawful, hence the last “owner”, the Applicants, have no right in law to the property. As unlawful owners they cannot evict the Applicant.

D.) POINTS IN LIMINE

15. The application was laced with numerous points in *limine*. However at the hearing the parties raised only two legal points. As alluded to above, Counsel for the Respondent persisted with the point that since no written consent was given in respect of the Leasehold of the premises from the City Council, the transfer deeds in respect of all the owners are null and void.
16. The Applicants challenged Ms. Ika's *locus standi* in the counter application. At no point was Ms. Ika involved in any of the respective transfers of the property with the various buyers and sellers. She could therefore not have *locus standi* in support of the counter application.
17. The first legal point will be dealt with in detail below as it remains the main issue of dispute.
18. Insofar as the second point raised by the Applicant, this court has already alluded above that even if Mrs. Ika had not been involved in the relevant transfers, she remains an interested party.

E. RESPONDENT'S CASE

19. It is necessary to highlight the Respondents' case in light of the legal point raised by them. The salient parts of the Respondents' arguments are as follows:

19.1 Ms. Ika had occupied the premises lawfully on the basis of the agreement with Khaya Home Loans;

19.2 the transfer of the property was effected in without her knowledge;

19.3 the crux of the dispute centres on Section 16A of the Deeds Registries Act, No. 47 of 1931, which stipulates:

“When a right of leasehold which has under any provision of the Black Communities Development Act 1984, been granted to any person, is registered in the name of a person, that right shall, subject to the provisions of the said Act and if the Regulations made thereunder, be transferred in the prescribed manner by means of a deed of transfer executed or attested by the Registrar and subject to the conditions of the grant to another person: Provided where the State is the transferor, such transfer may be effected by means of a deed of grant.” (The Respondents' underlining).

19.4 Section 16A requires that transfer of any right of leasehold shall be subject to the provisions of the Black Communities Act, No. 4 of 1984.

- 19.5 Section 54(2)(b) of the Black Communities Act (BCA), provides that no grant or transfer of any leasehold shall be effected until proof is furnished to the Registrar of Deeds that the Local Municipality (in this case the City of Tshwane Metropolitan Municipality), has granted written consent to the said grant or transfer.
- 19.6 The irregularity began with the transfer of the property from the City Council to the Finance Corporation where the Registrar had not been furnished with the written consent of the City Council.
- 19.7 In a nutshell, the transfer of the right of leasehold by the Finance Corporation to Khaya Lethu Trading as well as the subsequent transfers are unlawful and are *void ab initio* and of no force and effect.
- 19.8 Furthermore, the Finance Corporation had not produced a written contract for the sale of the house to Khaya Lethu Trading SA CC in terms of Section 2(1) of the Alienation of Land Act, No. 68 of 1981, such sale is therefore invalid. The same principle applies to all the subsequent transfers.
- 19.9 Masemola when he, purportedly sold the property to the Malekas, had no title in the property and could therefore not pass transfer.

(i) **Eviction**

20. The Ika's had occupied the property by way of agreement with Khaya Home Loans, and such agreement had not been terminated by Khaya Home Loans, the Housing Trust nor the Finance Corporation either expressly or in writing.
21. In the event that this court would find that the PIE Act is applicable, then its requirements must be met before anyone can be evicted from their home. PIE Act was specifically enacted so as to give effect to the rights in Section 26 (non-deprivation of a home without an order of court after consideration of all the relevant circumstances). Counsel referred to various authorities in substantiating these submissions, which will be referred to below.
22. The Applicant's argument, that the Ika's knew as far back as 2015 that the house was sold and that she had ample time to look for alternative accommodation, cannot be sustained. This court has to exercise its discretion having regard to all the requirements in the PIE Act. Hence it would not be just and equitable to grant an order evicting Ms. Ika and her family.
23. Counsel for the Respondents specifically requested this court to order the City Council to file a report in respect of the issues raised in the application and the counter application. The City Council owes a constitutional obligation to the Ika's who may face homelessness.

24. The Registrar of Deeds should further be directed to submit a report to this court.

25. Hence the Respondents seek that the application be dismissed with costs in their favour and the counter application be upheld with costs.

(ii) **Putative holder in terms of the Upgrading of Land Tenure Rights Act, No. 112 of 1991** (Land Tenure Rights Act)

26. It was further submitted that the Ika had a land tenure right by virtue of the Land Tenure Rights Act.

27. “Land Tenure Right” is defined as *“any leasehold, deed of grant, quitrent or any other right to the occupation of land created by or under any law”*.

28. It was conceded that Ms. Ika could not have occupied the property by virtue of any leasehold or deed of grant but her right persists on the basis of her being a “putative holder” – she is defined as *“a person who occupies an erf as if he/she is the holder of the land tenure right in respect of that erf but who is not recorded in the register of land rights as the holder of the right in question”*.

29. The aforesaid Act finds further application as Ms. Ika enjoys the legislative protection in terms of Section 26(1) of the Constitution as well as Section 2(1) of Housing Act No. 107 of 1997. Section 2(1)(c)(ii) requires all three spheres

of government to ensure that the housing development provides a wide choice of housing and tenure options as is reasonably possible.

F.) APPLICANTS' CASE

30. Counsel for the applicants made the following submissions:

30.1 they do not contest the legislative provision that written consent should be given in terms of Section 16A of the Deeds Registries Act read with Section 54(2)(b) of the Black Communities Act. However their contention is based on the fact that if the Respondent relies on this defence then surely she had the responsibility to present evidence to the effect that no consent had been obtained from the City Council in writing in respect of the transfer of the leasehold.

30.2 the Respondents' argument was based on the relevant "powers of attorney" in respect of the deed of transfer which does not record that consent was given. Since no such express consent was recorded therein, the only reasonable inference to be drawn is that no consent was obtained.

30.3 Moreover the Respondents should have ascertained whether such recordal existed in the deeds of transfer and whether the written consent was indeed in place from the City Council and the Registrar of Deeds.

- 30.4 The Clearance Certificates themselves are evidence of the fact that the City of Tshwane was aware of the transfers of the aforesaid property and would have expressed its consent to the transfers.
- 30.5 Reference was made to **Pillay v Krishna & Another 1946 AD at 946**, the *locus standi* on the principle that “*He who asserts, proves and not he who denies, since a denial of fact cannot naturally be proved provided there is a fact that is denied and that the denial is absolute*”.
- 30.6 The Applicants remain the registered and lawful owners of the property. They are entitled to deal with the property as they please, which includes the right to terminate any consent previously granted by the former owner of the property.
- 30.7 the Respondent cannot by virtue of her personal right have more rights over the property than the Applicants, who are the registered owners of the property.

In support of this argument reference was made **Ndlovu v Ngcobo: Bekker and Another v Jika 2003 (1) (A) 113 SCA at 122 D**, where the court held that the ordinary definition of the term “unlawful occupier” meant that the Act applied to all unlawful occupiers, irrespective whether their possession at an earlier stage had been lawful.

Putative Holder

30.8 The upgrading of the Land Tenure Rights Act does not find application herein as it specifically relates to tribal land.

The full definition of “land tenure right” is defined as *“any leasehold, deed of grant, quitrent or any other right of the occupation of land created by or under any law and, in relation to tribal land, includes any right to the occupation of such land under the indigenous law or customs of the tribe in question”*.

30.9 insofar as application in terms of “any other law” is concerned it is clear that the Respondent’s occupation does not fall within this category either.

30.10 Khaya Lethu Housing Trust had granted the Respondent consent by way of an agreement to temporarily occupying the property. This does not give the Respondent any right in law to be considered a “putative holder”.

30.11 in further argument, it was submitted that the basis of the occupation is a *precarium* i.e. an arrangement in terms of which the owner gratuitously persists with the possession of property. Such consent was given temporarily and such possession would have expired on Khaya Lethu’s Trading SA CC’s taking ownership of the property.

30.12 furthermore Ms. Ika has resided on the property for over 19 years. She has particularly failed to tender information regarding any attempts made to obtain the first house and the terms of occupation in relation to the second house.

30.13 the Applicants have complied with requirements of the PIE Act. All that was required on the part of the applicants was to show a legitimate title as owners of the property and that such property has been occupied unlawfully. As an unlawful occupier she is obliged to adduce sufficient facts to enable the court to exercise its discretion whether an order for eviction would be just and equitable.

Analysis and Findings

31. The court has heard counsel for both parties, considered their additional heads as well as the contents of both the application and counter application, and is indebted for the heads of argument from both counsel.

32. The first issue pertains to whether the Applicants are the lawful owners. There has been no evidence presented that the property in question was registered irregularly. It is a known fact that the Registrar of Deeds is obliged

to comply with the prescribed process of registration in terms of the Deeds Registries Act.

33. Every registration is subjected through a process beginning at stage of sale, the preparation of the papers by the transfer attorneys to the proper examination of all deeds and documents submitted at the Deeds Office.
34. Surely if there had been any irregularity, in this instance, that the written consent of the City Council was outstanding, or was not obtained, the Registrar would have executed and transfer of the said property.
35. The Respondents raised various discrepancies regarding of the registration documents as well as the transfer documents. However this court cannot declare the deeds invalid on the basis of these discrepancies. There have been no concrete facts put before this court that the registration was irregular.

At least a response from the Registrar of Deeds in respect of the particular transfers in issue should have been obtained.

36. It is settled law that the effect of registration in land is that the person is deemed to be the legal owner of the land.
37. Moreover the transfer from the Masemolas to the Malekas is considered to be a lawful and legal sale. The fact that Masemola was not the registered owner

at the time, does not preclude him from being an “owner” who can sell property to another.

In **Frye's (Pty) Ltd v Rees 1957 (3) SA (A) at p 581 A** Hoexter JA held:

“There can be no doubt that neither a sale nor a lease is void merely because the seller or lessee is not the owner of the property sold or leased.”

38. On the other hand this court must take into consideration, the predicament that Ms. Ika and her family finds themselves in.
39. The agreement between Mr. Ika and Khaya Home Loans appears to be a temporary arrangement, where they would reside in the second house, until Khaya Home Loans relocate the tenants living in their house (first house). The said occupation of Mr Ika's was against a loan agreement where Mr. Ika was required to settle in monthly instalments.
40. This court does not agree with the submissions made by the Applicants' counsel that Mrs. Ika had not taken the initiative to enquire about this temporary arrangement and their relocation back to their first house.
41. Ms. Ika in response to this application alludes this court to the difficulties that she has had in respect of this aspect. The court was made aware of the following factors namely:

- Mr. Ika had left the family a few years ago,-
- Mrs. Ika attempted to enquire from him as to the progress of moving back to their own house as well as the arrangement he had with Khaya Home Loans. It was a hopeless exercise as Mr. Ika refused to assist and ensure that his family has a roof over their heads
- Further attempts had been made on her part to resolve this issue. She had procured the assistance of an attorney to assist her. In doing so, she learnt fact that Khaya Home Loans was deregistered and is no longer in existence.
- She further sought the assistance of South African National Civic Organisation (SANCO).
- She claims to have also approached the City Council of Mamelodi where they advised her that they could not assist her.

42. On the facts before us, the National Housing Finance Corporation had sold the said property to Khaya Trading SA CC. The temporary arrangement was between Khaya Home Loans and Mr. Ika. The question then is – Was the National Housing Finance Corporation aware of this arrangement between Mr Ika and Khaya Home Loans when they sold the house?

43. On the evidence before me I find that the Applicants are the registered owners and deemed to be the lawful owners. Mrs Ika does not have a greater right.

(ii) **Putative Holder**

44. Counsel for the Respondent submitted that the Respondent is a “putative holder” of the land tenure right in respect of the said property. As already alluded above a “putative holder” is defined as:

“the person who occupies an erf as if he / she is the holder of the land tenure right in respect of that erf but who is not formally recorded in the register of land rights as the holder of the right in question.”

45. In this instance the land in issue belonged to the City Council of Mamelodi and the leasehold right was granted to the South African Housing Trust by virtue of “Registered Grant of Leasehold”. In terms of the Disestablishment Act, the South African Housing Trust Limited’s rights and assets were transferred to the National Housing Trust Limited. The State was the sole shareholder of the entity. The National Housing Finance Corporation thus gained title to the property in issue by virtue of the aforesaid Act. The objective of the upgrading of Land Tenure Right Act was to secure tenure by making provision for the upgrading of certain rights. Depending on the nature of the right, it was either upgraded automatically or after a prescribed procedure. The rights would include those that arise from a leasehold, quitrent and deed of grant. It has been conceded that Mrs Ika’s rights do not emanate from the aforesaid.

The other rights derive from legislation, tribal occupational rights in accordance with the indigenous customs and traditions. Neither does Mrs Ika's rights derive from the aforesaid. It is common cause that her occupation was in terms of an arrangement with Khaya Home Loans, which does not fall in any of the aforesaid categories. In light thereof this defence cannot be sustained.

(ii) **Eviction**

46. It is settled law that no one may be evicted from their home without an order of court and upon considering all the relevant circumstances as envisaged in Section 4 of PIE.²
47. Section 26 (3) of the Constitution imposes a duty on the courts to investigate and address considerations of justice and equity in the determination of eviction applications. Although this court in exercising its discretion as to what is just and equitable, has a wide discretion, it does not have a free hand to do whatever it wishes. It must specifically have regard to the provisions of Section 6(3) of PIE, which are peremptory as well as Sections 4(6) and 4(7) of PIE.

² Residents of Joe Slovo, Western Cape v Thebelisha Homes 2010 (3) SA 454 (CC) at 527E-528E.

48. When exercising a judicial discretion this court is obliged to strike a balance between the proprietary rights of the owner and the basic human right of the occupier.³

49. In **Ndlovu v Ngcobo; Bekker & Another v Jikka**, the court held:

“The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retain the protection of S52 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner’s full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions simply put, that is what the procedural safeguards provided for in S4 envisage.”

50. Counsel for the Applicants specifically argued that the Ikas have been occupying the second house for many years without making the necessary enquiries regarding occupation of their first house nor have they attempted to seek alternate accommodation.

51. The blame cannot be solely laid at the Ika family's door. Khaya Home Loans had certainly not undertaken to relocate them to their first home. Even if the Ika's have been living for free, this is also due to the oversight or lack of administration on the part of Khaya Home Loans. No explanation has been

³ Absa Bank v Murray 2004 (2) SA 15 C at 21 C - G

proffered whether the National Housing Finance Corporation was aware of this arrangement.

52. Ms. Ika informed this court that she currently lives with her children and grandchildren, the youngest at the time was 1 month and the eldest being 6 years. She is currently the head of the household.
53. Section 4(7) of PIE Act stipulates that all relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and household headed by women must be taken into consideration.
54. In exercising its judicial discretion, this court must aim to achieve a balance between the Maleka's ownership against the basic human rights of Ms. Ika and her family.
55. I find that even though the Ika family face eviction, such eviction can only occur within a reasonable period of time where they are able to find alternative accommodation and subject to certain conditions.
56. The eviction may only be effected after 6 months of the granting of this order. Until such time, the respondents would do all that is necessary to relocate to their first house, alternatively be placed in suitable accommodation.

57. The third respondent, the City Council, would be directed to assist the first and second respondents to relocate to their first house, alternative to find suitable accommodation preferably in Mamelodi, Extension 4 or in the “Ikageng Section Mamelodi East.

Costs:

58. Both parties have succeeded partially in the application and counter application respectively. The appropriate order should be that each party should pay its own costs.⁴

Order:

59. In the premises I make the following order:

- (1) It is declared that the applicants are the lawful owners of the property;
- (2) An eviction order is made against both the first and second respondents, which will only have effect after 6 months of the date of judgment;
- (3) The third respondent is directed to assist the first and second respondents to relocate to their home situated at 21362, Ikageng section, Mamelodi East, Pretoria, alternatively to place the first and second respondents in suitable accommodation.

⁴ Fripp v Gibbon & Co 1913 AD 354

(4) The third respondent is directed to comply with this order with immediate effect.

(5) Each party to pay its own costs.

A handwritten signature in black ink, appearing to read 'Koooverjie', is written over a horizontal line.

KOOVERJIE AJ

Acting Judge of the High Court

Date of hearing:

Counsel for the Applicants: Adv K. Potgieter

Attorneys for the Applicants: Couzyn Hertzog and Horak Inc, Pretoria

Counsel for the first and second Respondents: Adv MD Mohlamonyane

Attorneys for the Respondents: Mahlangu Attorneys, Pretoria