

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
15/11/2021

CASE NO.: 3774/2021

In the matter between:

F[....] A[....] N[....]

Applicant

And

N[....] C[....] N[....]

First respondent

M[....] E[....] R[....]

Second respondent

ANY UNLAWFUL OCCUPIERS OF PROPERTY [....]

Third respondent

EMFULENI LOCAL MUNICIPALITY

Fourth respondent

JUDGMENT

van der Westhuizen, J

- [1] The applicant launched proceedings for the eviction of the second respondent, M[....] E[....] R[....] from property registered jointly in the names of the applicant and the first respondent. The applicant and the first respondent are married in community of property.
- [2] In terms of the provisions of section 14 of the Matrimonial Property Act, 88 of 1984 (the Act), spouses, when married in community of property, hold the same rights in and to the communal property in respect of the disposal, alienation, encumbering and managing thereof.
- [3] This application arose in view of the alleged contravention, on the part of the first respondent, of the provisions of sections 14 and 15 of the Act. The applicant seeks an order, *inter alia*, declaring the actions on the part of the first respondent in respect of the said immovable property, invalid and void *ab initio*. Following on the said declaration, the applicant seeks the eviction of the second respondent, together with any person who occupies through her, from the said immovable property.
- [4] The first respondent supports this application and has filed a confirmatory affidavit. The second respondent opposes this application and has filed an answering affidavit.
- [5] A brief summary of the relevant facts that led to the launching of this application is as follows:
 - (a) The applicant and the first respondent were married in community of property during 1982;
 - (b) A property was purchased by the applicant and the first respondent and registered in their names jointly. They have been living there with their children born of the marriage;

- (c) During 2004, the first respondent suggested that they purchase a second immovable property for the use thereof by their children when they have grown up, and as an investment. The applicant agreed and asked the first respondent to identify such property;
- (d) A property known as [...], was identified by the first respondent and the family inspected the aforesaid property. The applicant and the first respondent agreed to purchase the aforesaid property. The first respondent handed an ABSA Bank Mortgage Loan Application to the applicant for signature. This was due to the legal requirement that both parties are required to give written consent in such instance, and in view thereof that the mortgage bond is to be registered in both their names. The same procedure was followed when they purchased their first property. The applicant duly signed the said document;
- (e) Following on the completion and signing of the said application for a mortgage loan, the applicant regularly enquired from the first respondent as to the progress of the registration of the disputed property into their names. This endured for months. The first respondent tried to pacify the applicant indicating that the registration was taking longer than expected and that she must be patient. At a later stage the first applicant indicated to the applicant, on her persistent enquiry about the progress, that unfortunately the bank had declined their request for a mortgage loan and that they had "lost" the property. The family was devastated by that news;

- (f) Sometime during 2016 the applicant approached the bank to enquire about the outstanding mortgage in respect of their first house. On being advised of the balance, the bank official asked the applicant whether she was interested in the balance of the mortgage on a second property where she was indicated as a joint owner and joint mortgagee. The applicant was surprised by the news that a second property was registered against her and her husband's identity numbers. The applicant requested a bank statement in respect of the second property. On her return home, both she and her children investigated the address of the property and it was confirmed that it was the property that they had intended to purchase in 2004;
- (g) Upon being confronted by the applicant, the first respondent eventually confessed to having in fact purchased the said property, but refused to advise who was occupying the said property. The applicant thereupon insisted to visit the property. She discovered that the property was occupied, but no one was present at the time. Subsequently a woman contacted the applicant and was very abusive towards her. The applicant later discovered that the first respondent had an extramarital affair and that the said mistress had occupied the disputed property. The said mistress is the second respondent. The applicant demanded from the first respondent that the second respondent evacuate the property, but to no avail;
- (h) The applicant's insistence that the second respondent evacuate the said property is premised upon the common cause fact that the applicant had never agreed that the said property could be occupied by the second respondent without value, or otherwise;

- (i) After threatening to take legal steps to have the second respondent evicted from the said property, the first applicant indicated that he had commenced eviction proceedings, but was unsuccessful in that regard. Allegedly the first respondent instituted two eviction applications in the Vereeniging Magistrates' Court, the second one is at present pending;
- (j) From the pending eviction application in the Vereeniging Magistrates' Court (a copy thereof is annexed to the founding papers), it is gleaned that the second respondent was permitted to occupy the said property as the "romantic partner" of the first respondent. She was permitted to occupy the said property until the first and second respondents' relationship ended, at which instance, the second respondent was to vacate the property. The occupation of the said property was in terms of the agreement between the first and second respondents to be without payment of rental until the relationship ended. It is common cause that the applicant was not a party to that agreement;
- (k) It is further gleaned from the pending eviction application that the romantic relationship between the first and second respondents had come to an end during 2010. In terms of the aforementioned agreement between the first and second respondents, the latter was obliged to vacate the said property which she refused and failed to do;
- (l) The second respondent opposes the eviction proceedings in the Vereeniging Magistrates' Court and filed opposing papers. In those papers the second respondent admits most of the allegations proffered by the first respondent in his founding affidavit. However, the second respondent

alleged, and continues to so allege, that she is the rightful owner of the said property and that she is entitled to remain in occupation of the said property;

- (m) The second respondent alleges that she and the first respondent had an agreement to purchase the said property as he was in the process of divorcing the applicant. She had apparently signed the offer of purchase of the property in her name, but was unable to secure a mortgage loan due to a bad credit rating. In this regard the second respondent alleged that she had provided an amount of R100 000.00 towards the payment of a deposit. She then agreed that the applicant sign the required mortgage loan application and that the property be registered in the names of the applicant and the first respondent for “administrative purposes”. What is meant by “administrative purposes” was not explained;
- (n) It is confirmed by the second respondent that the romantic liaison between the first and second respondents ended in 2010. However, since that date the second respondent has done nothing to secure the registration of the said property, of which she is allegedly the rightful owner, into her name. She merely relies on that alleged fact to remain in occupation of the said property.
- (o) It is to be recorded that the second respondent did not allege in her opposition to either of the applications for eviction in the Magistrates’ Court that she had occupied the said property for value. This issue was raised for the first time in opposition to this application. Furthermore, the second respondent failed to append any supporting documentation to support her claims of occupation for value. Further in this regard, the second respondent

appended a copy of her bank statement reflecting an amount of R100 000.00. No clear indication is to be gleaned from that document what that amount represents.

- (p) It is further to be noted and recorded that the second respondent now sought to allege that she had contributed to the monthly municipal service charges. However a tax invoice received from the relevant municipality indicates a large arrear amount in respect of services. A copy of that tax invoice was appended to the applicant's papers in this matter. The only response from the second respondent in that regard is to point out that the said document is made out only in the name of the first respondent. The relevance of that remark is not understood. The second respondent does not deny a large arrear amount indicated in respect of municipal service charges.

[6] On behalf of the second respondent points *in limine* were raised. In the first instance it is alleged that a huge dispute of fact has arisen and following on the principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹, the application cannot be decided on the papers as filed. There is no merit in this submission. The clear and undisputed facts are that the said property was correctly registered into the applicant and first respondents' names and that they had obtained the existing mortgage loan in both their names. The issue to be determined is whether the applicant consented to the second respondent occupying the disputed property. There is no dispute in that regard. This point *in limine* stands to be dismissed.

[7] It is further submitted on behalf of the second respondent that the joinder of the first respondent as a respondent is incorrect resulting in an alleged misjoinder. There is equally no merit in that submission. It is trite that misjoinder is the joining of several parties either as plaintiffs or

¹ 1984(3) SA 623 (C)

as defendants in circumstances which the law does not sanction. In the present instance, the law does not prohibit the joinder of the first respondent as respondent. The citation of the first respondent as a respondent is not unlawful where the primary relief is sought against his actions or conduct that do not conform to the provisions of sections 14 and 15 of the Matrimonial Act. Furthermore, the first respondent is a party to these proceedings and supports it. It is submitted that the second respondent intended to counterclaim against the first respondent. She was allegedly unable to do so due to the fact that the first respondent has not been cited as a co-applicant. What the content of that counterclaim would be was not made clear. The second respondent is at liberty to institute proceedings for whatever relief she intends to seek against the first respondent. The present citation of the first respondent does not constitute a misjoinder. This point *in limine* stands to be dismissed.

- [8] On behalf of the second respondent it is further submitted that the incorrect procedure was followed by the applicant and which did not conform to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE). The purpose of PIE is stated '*to provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto.*'
- [9] The term 'unlawful occupier' is defined to mean a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land. The said property is not commercial property and hence that exception does not apply in the present instance. The provisions of section 4 of PIE are clear, unambiguous and peremptory.² Two notices in respect of the seeking of eviction are required.³ In the present instance, only one such notice has been given, i.e. that in terms of the provisions of Rule

² *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001(4) SA 1222 (SCA)

³ *Op cit*, at [11]-[12]

6, i.e. the notice of motion in terms of that section. The relevant Local Municipality was cited as a party. But for the absence of the required court notice in respect of eviction, there has been compliance with the requirements of section 4 of PIE.

[10] Although the relief for eviction is secondary relief, the granting of the secondary relief is dependent upon compliance with the provisions of section 4 of PIE. There has been no compliance with all the requirements of section 4(2) of PIE. The court ordered notice in terms of section 4(2) of PIE has not been obtained, albeit that the second respondent has been acutely aware of the fact that her eviction from the disputed property is sought. It was conceded on behalf of the applicant that the provisions of PIE are applicable in the present instance.

[11] A further point *in limine* was raised by the second respondent. It is submitted that the applicant is not entitled to the primary relief, i.e. a declaratory order. In that regard reliance is placed upon a dictum in the unreported judgment of *Mahlangu KE et al v The Minister of Defence and Military Veterans et al*, case number 54573/18.⁴ The dictum relied upon reads as follows:

“[13] *When considering the grant of the declaratory relief, the court will not grant such order where the issue raised before it, is hypothetical, abstract and academic, or where the legal position is clearly defined by statute.*”

[12] The context of that dictum related to specific stipulated statutory provisions that applied to the particular circumstances of that matter. Whether that dictum will apply depends primarily upon the particular facts of a matter and the applicable statutory provisions to be considered. It does not apply *in vacuo*. In the present instance, the issue is whether the first respondent contravened the statutory

⁴ Judgment delivered on 5 September 2019

provisions of section 15(2)(a) and (b) of the Matrimonial Property Act. It stands to be determined whether the actions or conduct of the first respondent complained of contravened the said provisions. It is in that sense that the declaratory order is sought.

[13] The declarator that is sought in the notice of motion reads as follows:

“1. That any contractual agreement concluded by and between the first and second respondents in relation to the occupation of the property referred to as Erf: [...]; under the Deed of Title referred to as [...], be and is hereby declared invalid and void ab initio.”

[14] It is trite that the requirements in respect of the granting of a declaratory order are two-fold:⁵

- (a) The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and
- (b) once a court is so satisfied, it must be considered whether or not the order should be granted.

[15] Furthermore, in terms of the provisions of section 21 of the Superior Courts Act, 10 of 2013, the High Court may grant a declaratory order with or without any consequential relief being sought. In the present instance consequential relief was sought, that of eviction. Whether that relief stands to be granted is of no consequence. Section 21 of the Superior Courts Act nevertheless applies.

[16] The wording of section 15 of the Matrimonial Property Act clearly indicates what action or conduct on the part of a spouse is prohibited in respect of the community of property that exists between spouses.

⁵ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005(6) SA 205 (SCA) at 213E-G

- [17] In the present instance the declaratory order that is sought would flow from the finding that the action or conduct of the first respondent complained of is in contravention of the provisions of section 15(2)(a) and (b) of the Matrimonial Property Act. The declarator would then address the consequence of such finding.
- [18] The quoted dictum on which reliance is placed on the part of the second respondent would find application if the declaratory was sought only in terms of the provisions of section 14 of the Matrimonial Property Act. It finds no application on the provisions of section 15 of the said Act, for the reasons recorded earlier.
- [19] It is clear from the common cause facts already recorded that the first respondent contravened the provisions of section 15(2)(a) and (b) of the Matrimonial Property Act, in that:
- a. The said property is registered in the names of the applicant and the first respondent;
 - b. The applicant had not consented to the second respondent occupation of the said property;
 - c. The applicant would not have reasonably granted her consent for such occupation in view of the particular and common cause illicit liaison between the first and second respondents;
 - d. The second respondent was acutely aware that the applicant would in the circumstances not have granted her consent for the occupation of the disputed property. The second respondent knew that the property would be registered in the

names of the applicant and first respondent and had never objected thereto;

- e. The second applicant was acutely aware that the applicant and the first respondent were married, and that the marriage was in community of property. This is so in view of her admission that the said property was to be registered into the names of both the applicant and the first respondent, albeit for 'administration purposes'. That could only be interpreted that they were married in community of property.
- f. The second respondent's unsupported allegations, raised in eviction proceedings brought against her, that she had occupied the property for value, do not disturb the balance of the allegations that she occupied the disputed property for no value and was solely dependent upon the continued existence of the illicit relationship between the second and first respondents.

[20] It follows that the agreement or arrangement between the first and second respondents in respect of the occupation by the second respondent of the said property contravened the provisions of section 15(a) and (b) of the Matrimonial Property Act, and was void, and consequently unenforceable.⁶ The second respondent's continued occupation of the disputed property is unlawful.

[21] In view of all of the foregoing, the applicant is entitled to a declaratory order as prayed for in prayer 1 of the notice of motion.

[22] Due to the non-compliance of the technical, but peremptory, requirement of the serving of two notices for the eviction of the second respondent from the disputed property, the consequential relief sought in prayer 2 of the notice of motion cannot be granted at this juncture.

⁶ *Schierhout v Minister of Justice* 1926 AD 99 at 109; see further *Marais N.O. et al v Masopa et al* 2020 ZSCA 23

I grant the following order:

1. It is declared that any contractual agreement concluded by and between the first and second respondents in relation to the occupation of the property hereafter referred to as [...]; held under the Deed of Title referred to as [...], be and is hereby declared void and unenforceable;
2. The second respondent is ordered to pay the costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of Hearing: 5 October 2021

On behalf of Applicant: T Daniels
Instructed by: B L Nkuna Inc Attorneys

On behalf of Respondent: A A Basson
Instructed by: B M H Inc Attorneys

Judgment Delivered; 15 November 2021