IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 23332/17

In the matter between:

BERMAN BROTHERS PROPERTY	
HOLDINGS (PTY) LTD	Applicant
and	
S M	
(and all those holding title through her)	First Respondent
N L	
(and all those holding title through her)	Second Respondent
THE CITY OF CAPE TOWN	Third Respondent

Coram: P.A.L.Gamble, J

Date of Hearing: 14 August 2018

Date of Judgment: 25 February 2019

JUDGMENT DELIVERED ON MONDAY 25 FEBRUARY 2019

GAMBLE, J:

INTRODUCTION

[1] This application highlights the plight of the many, many women in South Africa who have worked in the homes of others, cleaning, cooking and caring for children in a desparate endeavour to eke out an existence. The first respondent ("*Ms M*") is but one of those women: she is a 52 year old single mother of 3 who has been employed as a domestic worker in Sea Point since 1987. She currently resides in a single room ("*Room 2*") which forms part of a small apartment ("*Flat 1*") in a sectional title scheme known as "*Canonbury Buildings*" located at […] R Road, Sea Point. For the sake of convenience I shall refer to Room 2 as "*the property*".

[2] The second respondent, ("*N*") is Ms M's 33 year old daughter who, at the time that this application was launched, also resided in the property. She has since left but her 8 year old daughter ("*D*") continues to reside in the property with her grandmother together with Ms M's other 2 daughters, A (aged 17) and L (aged 13).

[3] The applicant ("*the Berman Bros*") is a property holding company which currently owns Canonbury Buildings. Its directors are Messrs. Paul and Saul Berman

as appears from the Berman Bros website[1], which proclaims that the applicant is part of the Berman Bros Group, a company which houses corporate entities that develop, sell and rent luxury properties along the Atlantic Seaboard of Cape Town.

[4] On 20 December 2017 the Berman Bros launched this application to evict Ms M, her daughters and granddaughter from the property. They say that, having purchased Canonbury Buildings in August 2016, they wish to utilize it to accommodate certain of their employees who work at their offices just a short distance away in a building known as "*The Point* ", which is located at 76 Regent Road, Sea Point. The application is opposed by Ms M.

[5] The Berman Bros. were represented by Adv. L. Wilkin and Ms M by Adv. B. Atkins. Ms M is a part time employee of Mr Atkins who was instructed by a public interest law firm in these proceedings. The court is indebted to counsel for their written heads and detailed oral arguments in this matter, which, it must be said, is more complex than initially meets the eye.

BACKGROUND DETAIL.

[6] Ms. M's life history is one with which many working class women in this country will associate. She grew up in rural surroundings in Worcester where she was raised by her grandparents while her parents lived in nearby Ceres. In 1984 and while in Grade 9 at the local high school, Ms M fell pregnant with N who was born in 1985. She did not return to school but stayed home to raise her infant child.

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[1] www.bermanbros.co.za

[7] In 1987 Ms M left N with her grandparents and travelled to Cape Town in search of work. She was fortunate to find employment as a domestic worker with a family in Sea Point and she rented a room in an apartment block in St. John's Road close to her erstwhile place of employment. The locals would most likely have referred pejoratively to such accommodation as "*the servants' quarters*".

[8] After about 4 years in her first job Ms M was retrenched when her employer went overseas. That meant she lost her accommodation in St. John's Road but she was fortunate to find alternate employment close by as a domestic worker with an elderly widow. However, accommodation was not available there and Ms M put up in a room with a man ("*Jonny*") who worked as a caretaker in a block of flats and had a single room there which he shared with his girlfriend ("*Gertie*").

[9] When the widow died in 1997, Ms M was only able to find part-time employment with 2 families in Sea Point while continuing to stay with Jonny and Gertie. When A was born in 2001, she too stayed in the room with her mother, Jonny and Gertie. But in 2003 the body corporate of the apartment block in which Jonny's room was located resolved that only persons who were employed in the block could continue to reside in the domestic workers' accommodation there and so Ms M had to move again. She says that she was fortunate to find a room of her own in a block of flats on Sea Point's Main Road for which she paid R1200/month. That enabled N (then aged 19) to move in with her mother and younger sibling, while Ms M continued to render domestic service to the families of Sea Point.

THE MOVE TO CANONBURY BUILDINGS

[10] In 2005 Canonbury Buildings was owned by a company called Kanirk Investments Share Block (Pty) Ltd ("*Kanirk*"). Kanirk was controlled Mr Dirk Christiaan Johannes Joubert and his wife Elfrede. Mr Joubert was a well-known figure in Sea Point: not only was he a City Councillor for the area but was also the co-owner of a butchery which was famous throughout the Western Cape for its particular brand of biltong.[2] For the sake of convenience I shall refer Mr Joubert as "*Cllr. Joubert*" in order to distinguish him from his son of the same name who features later in the piece. Cllr. Joubert was, by all accounts as the papers reflect, a benevolent, community-spirited person.

[11] In 2005 Cllr. Joubert and Ms M concluded an oral agreement of lease in respect of the property. Ms M says she was introduced to the room by a friend ("*Ivan*") who lived there and was looking for someone to take it over from him when he moved out. Ivan introduced Ms M to Cllr. Joubert and it was agreed between the parties, so she says, that she could rent the room for R2500/month for an indefinite period. Ms M says that she was under the impression that Cllr. Joubert was the owner of the building as he told her that she could live in the property for so long as she needed to. She says, too, that Cllr. Joubert knew that she lived there with N, A and L. Further, after the birth of D in 2009, Ms M says that she gave Cllr. Joubert the child's details and he informed her that he would endorse his records accordingly. The import of this allegation is that Cllr. Joubert accepted that D was lawfully on the property.

[12] Cllr. Joubert died on 27 February 2013. Thereafter his son, Mr Dirk Joubert, ("*Dirk Joubert*") took over managment of the property. On 1 November 2013

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[2] www.joubertandmonty.co.za/about/history/

Dirk Joubert presented Ms M with a written *pro forma* agreement of lease of the variety which is customarily purchased from a well-known stationary chain. For the sake of convenience I shall refer to this as "*the written lease.*" It has a host of standard terms and conditions ("*STC's*") of the type customarily contained in such documents and a variety of manuscript additions and annotations thereto of which the following are relevant –

- The lessor was described as Mrs E. Joubert of Bantry Bay c/o Dirk Joubert;

- The lessee was S M;

- The lessee's address and the subject of the lease was given as Canonbury Flats with the flat and room numbers left open;

- The monthly rental was R2200, payable in arrears on the last day of the month;

- The deposit was 1 month's rent;

- The lease was to run from 1 January to 31 December 2014 whereafter the lessee was to vacate the property;

- The maximum number of persons permitted to occupy the property was 2, unless otherwise agreed in writing.

[13] In the space allocated under the heading "*SPECIAL CONDITONS"* there are further manuscript additions purporting to be an amplification of certain of the STC's.

> "*1. Clause 4a*[3]*: Rental payable by last day of the month.*
>
> *2……..*
>
> *3. Clause 6k*[4]*: A fine of R250 will be payable for any complaints received. After two complaints Lessee will be required to vacate the premises within 7 seven days.*
>
> *4. Clause 9*[5]*: If rent not paid within 7 days, lease will automatically be cancelled."*

ATTEMPTS TO CANCEL THE LEASE AND OBTAIN VACANT OCCUPATION

[14] On 12 January 2015 a letter under the hand of "*DC Joubert, Landlord*" was written to Ms M of "*Unit 1*", Canonbury Flats. It was on the letterhead of "*Kanirk Investments/E.Joubert"* which reflected the business' physical address as "*Canonbury flats* (sic), *Regent road* (sic)*, Sea Point*" and further contained the cellphone number and email address of Dirk Joubert. I shall recite the contents thereof in full.

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[3] Clause 4 fixes the rental at R2200/month, payable in arrears on the last day of the month.

[4] Clause 6k is a warning to the lessee not to cause a nuisance to the neighbours.

[5] Clause 9 is the breach clause.

"*<u>INCREASE OF RENTAL AND TERMINATION OF LEASE</u>*

Please note that rental will increase from 1 February to R2350 per month.

As stated in clause 2 of your lease agreement (see copy attached), the current lease terminates on 31 December 2014 with no option to renew. This letter serves to confirm the termination of the lease. Due however to late notice (delivered on 12 January 2015), you are only required to vacate the premises by 28 February 2015.

Please note that, assuming you occupy the flat until 28 February 2015, that (sic) your outstanding rental and fines are as follows:

- *Outstanding: was due on October 2014: R250 fine (see attached copy of letter delivered on 1 Oct 2014)*

- *Outstanding: was due on 1 January 2015: R100 (only R 2100 rent paid on 7/1)*

- *Due on 1 February: R2350 (February rental)*

Kindly confirm by Friday 23 January at 5pm whether you intend vacating the flat on 31 January or 28 February in order for us to make the necessary arrangements for final inspection.

All the best for your future endeavours."

It would appear, in the circumstance, that the lessor had adopted a lenient and tolerant attitude towards the lessee.

[15] Notwithstanding the terms of the letter of January 2015, Ms M continued to reside in the property for the remainder of that year. On 16 December 2015 a letter on the same letterhead as before was written to her.

> "*INCREASE OF RENTAL, CHANGE OF OWNERSHIP AND TERMINATION OF LEASE*
>
> *Please note that rental will increase from 1 January 2016 to R2500 per month.*
>
> *As stated in the letter you received on 12 January 2015 you (sic) lease was not renewed after its termination on 31 December 2014. You were given until 28 February 2015 to vacate the premises which you did not adhere to. After I confronted you you asked for a few weeks to find alternative accommodation which never materialised and despite several requests and warnings to vacate the premises you have refused to do so and have been illegally occupying the flat ever since.*
>
> *This letter confirms that the flat has since been sold to the Berman Brothers Group who have confirmed that you will be required to vacate the flat by 28 February 2016 to avoid further legal action.*
>
> *Please note that all arrangements stay the same until then except the bank account of E Joubert at FNB which is no longer in use for rental*

payments. All rental payments for January and February must be paid in cash to the caretaker who will issue a receipt at the same time as receiving the money. This letter also confirms that your rent is up to date until, and including your December payment.

All the best for your future endeavours."

Along with other tenants in the block, Ms M was required to sign a form acknowledging receipt of this letter, which she did on 17 December 2015.

[16] Despite the contents of the letter of 16 December 2015, Ms M continued to reside in the property throughout 2016, notwithstanding the aforesaid change of ownership which was effected on 23 August 2016. And, it seems, she continued to pay rent throughout that period, which rental was accepted by the respective landlords. However, subsequent thereto, and during 2017 and early 2018, there were some defaults in the payment of rental, some in part and some in full.

FIRST MAGISTRATES' COURT PROCEEDINGS

[17] On 3 October 2016, and under case no 11821/16, the Berman Bros commenced proceedings under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE* ") in the Cape Town Magistrates' Court for the eviction of Ms M from the property. The founding affidavit therein was similarly deposed to by Mr Paul Berman who, relying on the aforesaid letter of from Dirk Joubert of 16 December 2015, made the following allegations in support of the claim that Ms M was in unlawful occupation of the property.

" *18. The First Respondent, as well as any other persons that may occupy the property vis-à-vis the First Respondent, is presently in unlawful occupation of the property in terms of a written notice to vacate, which was hand delivered to the First Respondent on 17 December 2015.*

19. Despite the above-mentioned demand, the First Respondent has failed to vacate the property on the date (28 February 2016) as provided for in the notice to vacate or at all. Continued occupation of the property is accordingly unlawful.

20. In light of the First Respondent's failure to comply with the notice to vacate, Applicant, as the registered owner of the property, is entitled to take repossession of the property."

[18] That application was opposed and, after opposing papers were filed, it was set down, by agreement, for hearing on 6 July 2017. In the founding affidavit in this matter Mr Paul Berman says that the eviction application in the Magistrates' Court "*was for diverse reasons not proceeded with and subsequently withdrawn."* Ms M suggests in the present application that after she had filed her answering affidavit in the first Magistrates' Court proceedings it was clear that there was a dispute of fact that could not be resolved on the papers and that that was the reason that the Berman Brothers backed off in that forum. She goes on to suggest that the same dispute of fact has arisen on these papers and that for that reason alone this matter falls to be dismissed.

NEW NOTICE TO QUIT

[19] On 18 October 2017 the Sheriff served a fresh notice on Ms M. This was contained in a letter dated 3 October 2017 from Oosthuizen & Co ("*Oosthuizens*"), attorneys acting for the Berman Bros herein.[6] I shall recite only the material portions thereof.

> "We *record that you are currently in occupation of … [the property] which premises you occupy by virtue of a month-to-month lease entered into between yourself and our client, alternatively our client's predecessor in title.*
>
> *We hereby notify you, as we are authorised to do, that the lease agreement between yourself and our client is herewith terminated, alternatively will not be renewed, and you are afforded notice until 30 November 2017 to vacate the property together with all those holding title through you.*
>
> *Further, insofar as you might allege any other right in law to occupy the property, any such right is herewith terminated and you are afforded until 30 November 2017 to vacate the property together with all those holding title through you.*
>
> *Without in any way conceding that it is in any way obliged to do so, our client invites you to approach it, or us as you see fit, to discuss manners in which your vacation of the property can be in as dignified a manner as*

[6] A letter in similar terms was sent to "*ALL THOSE OCCUPYING FLAT 1 ROOM 1,2,3..*"

possible with the minimum disruption to you and your household. Our client in this regard tenders the following assistance.

1. *An agreed vacation of the property on terms convenient to you;*

2. *Assistance in relocating your movable property elsewhere, including the provision of vehicles and labour;*

3. *Liaising on your behalf with the local municipality or other landowners regarding sourcing alternative accommodation;*

4. *Any other assistance which you believe would be helpful to you.*

We wish to specifically record that the aforesaid is in no way a limitation on the assistance which our client is prepared to provide and we record specifically that we can discuss any reasonable manner in which you believe your family's relocation can be dealt with in as dignified a manner as possible and with as little disturbance (sic) you and your family.

The aforesaid is (sic) no way to be interpreted as a concession of any right to occupy the property subsequent to the termination of such rights as set out above.

Please note that in the event of your failure to vacate the property as called upon to do, an application for your eviction from the property will be instituted. Please do not see the institution of this application as a bar

to you contacting either us or our client as set out above and you are welcome at any time in the future to contact us or our client to discuss your application of the property."

[20] Ms M did not take up the offer of assistance to facilitate her removal from the property but took legal advice from the Ndifuna Ukwazi Law Centre ("*Ndifuna*"), a public interest firm which subsequently entered an appearance as her attorneys of record herein. In a letter dated 30 November 2017 Ndifuna wrote to Oosthuizens on a without prejudice basis. Surprisingly, the letter was included in the founding affidavit herein and there was no objection thereto by Ms M's legal representatives. I shall therefore refer to the letter, the relevant portions whereof read as follows.

"*3. We confirm that we have been instructed as follows:*

3.1. Our client resides at the property with her two minor children (aged 16 and 12) and grandchild (aged eight). Ms M (sic) is employed as a domestic worker in Sea Point and earns an average of R2250.00 per month;

3.2. Our client has made numerous attempts to secure alternate accommodation since receiving the letter but despite her efforts, she has been unable to secure accommodation in Sea Point or its surrounding areas as there are (sic) a shortage of affordable and available rentals in the area;

3.3. As such, our client confirms that she is unable to vacate the property on 30 November 2017 as per your letter dated 3 October 2017;

3.4. Our client has further advised that she is not in a position to accept the proposed vacation date of 31 January 2018 as it would, particularly at this time of year, be difficult, if not impossible to secure affordable alternative accommodation within the proximity of the property in which she currently resides and her place of employment. This proposed date would also present various difficulties in relation to our client's minor children and grandchild, and their schooling and related financial and practical obligations.

4. Our client has accordingly instructed that we request that your client agrees to continued accommodation by our client and her dependents for a further period to be mutually agreed upon by all parties. Our client is also willing to arrange a meeting with your client to discuss this, and any further issues and forms of assistance relating to our client's tenancy at the Property."

[21] In the founding affidavit Mr Paul Berman points out that, despite their best endeavours, the parties were unable to reach agreement enabling the Berman Bros to obtain vacant occupation of the property. He further explains that the remaining occupants of Canonbury Flats who were given notice in October 2017 all

vacated their repective premises by 31 January 2018 – effectively they were given an extra 2 months to quit.

[22] When Ms M made it clear that she would not vacate, the Berman Bros initiated the present application on 20 December 2017. The answering affidavit was only filed in April 2018 and the reply early in May 2018.

THE SECOND MAGISTRATES' COURT PROCEEDINGS

[23] In the meanwhile the Berman Bros kept up the pressure on Ms M. On 5 March 2018 they issued summons in the Cape Town Magistrates' Court for a so-called "*automatic rent interdict*" in terms of s32 of the Magistrates' Court Act read with Form 3 in Annexure 1 to the Magistrates' Court Rules, claiming, *inter alia,*

- An order attaching movable property belonging to Ms M to the value R7350,00 in respect of rental allegedly due by her;
- Cancellation, alternately confirmation of cancellation, of the lease;
- Payment of arrear rental in the sum of R7350.00; and
- Interest and costs.

Ms M opposed those proceedings in which judgment is still pending.

[24] On 23 March 2018, Mr Martin Oosthuizen of Oosthuizens deposed to an affidavit filed in support of the s32 application in which he made, inter alia, the following allegations.

"*7. On 1 November 2013 the defendant (sic), acting personally, entered into a written lease*[7]*…. prior to the Applicant having taken ownership of the Flat and Property, with the previous owners, of the Flat and Property, being Kankirk* (sic) *Investments Share Block (Pty) Ltd,…. represented by Mr* (sic) *Elfrede Joubert, duly authorised, and the express, alternatively tacit, alternatively implied terms of the lease were as follows:*

7.1. The Tenant leased the Flat for a period of one year terminating on 31 December 2014.

7.2 Any right of renewal of the lease thereafter was specifically precluded.

7.3 Rental would be payable in the amount of R2200.00…

7.4 In the event the lease agreement was terminated the Tenant would continue paying an amount equivalent to the monthly rental in terms of the Lease in the event the Tenant remained in occupation.

7.5 No 'relaxation, indulgence or waiver' would be binding against the landlord.

[7] A copy of the lease referred to in para 12 above was attached.

8. *On 12 January 2015 the previous owner by written notice reiterated that the Lease was terminated and required the Tenant to vacate by 28 February 2015 and to continue paying the rental[8]….*

9. *A further notice was sent by the previous owner to the Tenant on 16 December 2015[9]…. reiterating that the Lease was not renewed and informing the Tenant that the Flat and Property had been sold and that the Tenant was required to vacate by 26 February 2016.*

10. *On or about 23 August 2016 the Applicant took ownership of the Flat and Property and by operation of law all rights and obligations of the previous owner of the Flat and Property transferred to the Applicant and the Applicant stepped into the shoes of the previous owner as regards all legal obligations that the previous owner had entered into with relation to the Flat and Property in his capacity as owner.*

11. *On 18 October 2017 the sheriff delivered to the Tenant a notice informing the Tenant that any lease agreement between the Tenant and the Applicant and/or the previous owner was terminated[10]…*

20. *Eviction proceedings have been instituted in the High Court, Western Cape Division, Cape Town, under case number 23332/2017, against the*

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[8] The letter referred to in para 14 above was attached.

[9] The letter referred to in para 15 above was attached.

[10] The letter referred to in para 19 above was attached.

Tenant and despite the Termination Notice above the Tenant still remains in occupation of the property…."

[25] When Ms M opposed that application the Berman Bros moved for summary judgment and Mr Paul Berman deposed to the affidavit in support thereof, confrirming the contents of the particulars of claim filed in support of the automatic rent interdict. The allegations in the particluars of claim are, to all intents and purposes, the same as those made by Mr Oosthuizen in his affidavit of 23 March 2018.

[26] The allegations in the automatic rent interdict proceedings rely extensively on facts falling, not within the knowledge of the Berman Bros, but within the knowledge of Dirk Joubert. Such allegations are also material to these proceedings, as the affidavit of Mr Paul Berman suggests. There are however no confirmatory affidavits filed by either Dirk Joubert or his mother, Ms Elfrede Joubert in these proceedings. Such allegations are therefore inadmissible hearsay and fall to be disregarded.

RELIANCE ON THE *REI VINDICATIO*

[27] In seeking to evict, the Berman Bros have relied on the *rei vindicatio,* claiming that they are the owners of the property and that Ms M is in possession thereof. The cause of action is in accordance with the approach set out in *Chetty*[11].

[11] Chetty v Naidoo 1974 (3) SA 13 (A) at 20C-D

> "*It is inherent in the nature of ownership that possesion of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a rei vindicatio need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the res - the onus being on the defendant to a allege and establish any right to continue to hold against the owner."*

[28] This principle has not been eroded by the development of the jurisprudence around PIE but it is now established law that the occupier must disclose circumstances for consideration under s4(7) of PIE which are relevant to an eviction order.[12] Following the decision in ***Ridgway***[13], the onus is on Ms M to show why the ordinary consequences should not ensue, i.e. that the Berman Bros. are entitled to vindicate the property.

[29] The claim under the *rei vindicatio* is resisted on a number of grounds in this matter. Firstly, there is the claim that the case made out by the Berman Bros. is based on inadmissible hearsay evidence on the basis already alluded to – that there are no affidavits in these proceedings by Dirk Joubert or Ms Elfrede Joubert. This leads on to the second point: that there are disputes of fact on the papers regarding the lawful termination of the lease in terms whereof Ms M occupies the property. There is also an attack on the basis for the acquisition of ownership of the property due to certain alleged inconsistencies in the records of the Deeds Registry. Then

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[12] Ndlovu v Ngcobo; Bekker and another v Jika 2003 (1) SA 113 (SCA) at [19]

[13] Ridgway v Janse van Rensburg 2002 (4) SA 186 (C) at 192A-B

there is a point taken under the Consumer Protection Act, 68 of 2008 ("*the CPA*") (which it is common cause is applicable in this matter) that Ms M was not afforded the requisite 20 days' notice to comply with the lease before the Berman Bros purported to cancel it. Finally, there is a claim that the Berman Bros have not complied with their constitutional obligations under PIE and, in particular, failed to submit to mediation under s7 thereof.

[30] The case put up by the Berman Bros is plagued by contradiction and inconsistency. It is suggested, firstly, that Ms M occupied the property in terms of the aforesaid written lease with Kankirk and that that lease had been cancelled by Dirk Joubert prior to the sale of the property to the Berman Bros. The consequence of this allegation is that Ms M's right of occupation terminated when she was purportedly given notice by Mr Dirk Joubert and that she was accordingly in unlawful occupation thereof when the Berman Bros acquired it. If this allegation is well founded then Ms M would not discharge the *onus* of demonstrating a right to occupy which might trump the *rei vindicatio.*

[31] As against that legal stance, there are repeated allegations (both in this court and the magistrates' court) that Ms M occupied the property under a lease concluded with the Berman Bros and that this lease was cancelled by Oosthuizens in their letter to her of 3 October 2017. The claim for the automatic rent interdict is consistent with his approach.

[32] Fundamental to Ms M's case is a determination whether the lease concluded with Cllr. Joubert was ever terminated. If not, then the principle of *huur*

gaat voor koop would have prevailed at the time that the Berman Bros acquired ownership: they were obliged to accept her tenancy and deal with her accordingly.

THE STATUS OF THE WRITTEN LEASE WITH KANIRK

[33] It is beyond dispute that at the time of his death, Ms M occupied the property lawfully with the consent of Cllr. Joubert. At that stage he was the sole director of Kanirk and it can safely be assumed that Cllr. Jobert acted on behalf of the company, and was duly authorized to do so, when he agreed to Ms M and her children continuing to stay in the property. There is no evidence before this court to suggest otherwise and, applying the principle of ostensible authority, common sense and logic suggest that at all times Cllr. Joubert purported to act on behalf of Kanirk and was duly authorized to do so.

[34] The next issue is whether the verbal lease with Kanirk was ever cancelled. The answering affidavit incorporates a companies' search conducted in April 2018 which reflects that after the demise of Cllr. Joubert in February 2013 his widow Elfrede Joubert (born in 1940) was at all times material hereto the sole director of Kanirk. In the absence of any affidavit by either her or Dirk Joubert, there is simply no evidence before this court as to the basis upon which the written lease of November 2013 was concluded with Ms M. To be sure, Elfrede Joubert was not the owner of the property (as the lease suggests) while the reference to the lessor being cited "*c/o Dirk Joubert"* remains unexplained. And, to the extent that it might be suggested that, for example, there was some form of assignment of the verbal lease through the incorporation thereof via the written lease, there is once again no evidence to this effect before this Court.

[35] And, the description subsequently (in the letters of 12 January and 16 December 2015 both written on behalf of "*Kanirk Investments/E.Joubert*") of Dirk Joubert as the "*Landlord"* is equally untenable in the absence of any explanation for these seemingly contradictory allegations. The explanation may be be straight forward but in the absence of any evidence it is not for this court to speculate as to the probabilities in this regard. It must be added that there is nothing to suggest that either Dirk Joubert or his mother are unable (or unwilling) to depose to affidavits in support of this application to evict.

[36] The corporate affairs of Kanirk are conducted by its public officers (its director/s) and any employee or other agent duly authorized to so act.[14] There is no evidence that the company took any decisions in relation to Ms M's tenancy of the property, either in 2013 or subsequent thereto. In the result I am unable to conclude that the verbal lease with Kanirk was ever lawfully cancelled by the company, nor that it was substituted, assigned or novated by the written lease.

[37] The written lease therefore, in my view, is a purported act with no legal consequences. Accordingly, I am driven to conclude that when Kanirk sold the property to the Berman Bros. it did so subject to an existing tenancy in favour of Ms M under the verbal lease with Cllr. Joubert and not the November 2013 written lease as contended for by the Berman Bros.

HUUR GAAT VOOR KOOP

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[14] Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and another 2010 (3) SA 630 (SCA) at [20] *et seq*

[38] In his reply, Mr Wilkin submitted that any reliance upon an indeterminate right to occupy the property was unsustainable in law. He pointed to the fact that a long term lease (in excess of 10 years) was only enforceable if it was registered as such, which was not the case in this matter. There is a long line of cases which hold that the holder of an unregistered long term lease is not without rights in circumstances where the purchaser of the property knew of the existence of the tenancy at the time the property was acquired[15].

[39] Be that as it may, it seems to me that the proper interpretation to be placed on the verbal lease contended for here is that the duration thereof was left up to the determination of the lessee, in which event the lease could not endure beyond the lifetime of Ms M.[16] Such a lease can nevertheless be terminated by the landlord on reasonable notice to the tenant. What constitutes reasonable notice in such circumstances will depend on "*local custom or … the discretion of the judge."* [17]

[40] In *Tiopaizi* de Villiers JA held that

> "*…(I)t may now be taken as settled that in the absence of agreement or custom to the contrary, a monthly contract of letting and hiring for an indefinite period requires a month's notice, to expire, in all cases except in the case of domestic or menial servants, at the end of a month."*

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[15] Kessoopersadh en 'n ander v Essop en 'n ander 1970 (1) SA 265 (A) at 273H; 277A – 278H.

[16] Ebrahim v Pretoria Stadsraad 1980 (4) SA 10 (T) at 15C-D

[17] Tiopaizi v Bulawayo Municipality 1923 AD 317 at 326

[41] The position then is that when the Berman Bros. acquired the property in August 2016 Ms M lawfully occupied the property as a lessee and her tenancy could only be terminated by the landlord on reasonable notice to her. In accordance with the principal of *huur gaat voor koop* the Berman Bros, who manifestly had knowledge of Ms M's tenancy, were obliged to respect such tenancy and could only terminate it on the same basis that Kanirk could.[18] The principle is neatly summed up by Stratford ACJ in *De Wet* thus

> "*This being a contract of lease, the purchaser is bound on it by the doctrine of huur gaat voor koop and bound also by all its material terms.*

[42] Indeed, it seems as if the Berman Bros. accepted this to be the case: that is the only reasonable inference to be drawn from the fact that they tolerated Ms M's occupancy and accepted her rental for about 15 months until they instructed Oosthuizens, albeit in the alternative, to cancel the lease in October 2017. Their conduct in seeking the automatic rent interdict is also consistent with the acceptance of this position in law.

DID THE BERMAN BROS. LAWFULLY CANCEL THE LEASE?

[43] The letter written to Ms M by Oosthuizens on 3 October 2017 (and which is referred to in para 19 above) makes it clear, at the very least, that the Berman Bros. respected the existence of the verbal lease with Kanirk. But the letter goes further: it asserts that Ms M occupied the property on a month-to-month basis in terms of a lease concluded with the Berman Bros. No substance, however, is given to

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[18] De Wet v Union Government 1934 AD 59 at 63

the alleged leased in the founding affidavit and, in particular, there is no allegation by Mr Paul Berman as to what the contractual notice period was.

[44] If the allegation of a month-to-month lease is correct, the notice period would ordinarily be one month. A similar notice period would apply on the basis of the approach in ***Tiopaizi***. Notice was given to Ms M on 18 October 2017 when the Sheriff delivered the letter to her. That notice required her to vacate by the end of November 2017, which is more than the applicable period of one month. In the circumstances, I must conclude that reasonable notice was given and that the lease with Ms M was properly cancelled by Berman Bros.

[45] Significantly, the response by Ndafuna on behalf of Ms M to the letter of cancellation does not dispute the Berman Bros. entitlement to cancel the lease. Rather, the attorneys convey their client's predicament and her inability to move immediately, asking for an indulgence to accommodate the plight of her children and grandchild.

APPLICATION OF THE PROVISIONS OF PIE – WHAT IS JUST AND EQUITABLE?

[46] In light of the finding that the lease was lawfully cancelled by the Berman Bros., it must follow that Ms M is now in unlawful occupation of the property. The owners are therefore fully within their rights to seek her eviction from the property and are constrained only by the provisions of s4(7) of PIE, given that Ms M has been in unlawful occupation for more than 6 months.

[47] The jurisprudence that has developed in cases such as *Blue Moonlight*[19] and *Changing Tides* [20] establishes that where the eviction is at the behest of a private landowner (as opposed to an entity bearing a constitutional obligation to provide housing) there is no duty on such private entity to provide alternatve accommodation to the occupier. In *Changing Tides* the court made the following observations;

> "*[18]…. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers. That approach makes it difficult to see on what basis the availability of alternative land or accommodation bears on the question whether an eviction order* ***should*** *be granted, as opposed to the date of eviction and the conditions attaching to such an order. One can readily appreciate that the date of eviction may be more immediate if alternative accommodation is available, either because the circumstances of the occupiers are such that they can arrange such accommodation themselves, or because the local authority has in place appropriate emergency or alternative accommodation. Conversely, justice and equity may require the date of implementation of an eviction order to be delayed if alternative*

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[19] Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another 2012 (2) SA 104 (CC)

[20] City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012 (6) SA 294 (SCA)

accommodation is not immediately available. It is, however, difficult to see on what basis it affects the question whether it is just and equitable to make such an order. Perhaps, in the case where the occupiers would be entitled to a lengthy period of notice before being required to vacate, the unavailability of alternative land or accommodation might operate as a factor to persuade the court that the issue of an eviction order, at the stage that the application came before it, would not be just and equitable, but such cases are likely to be rare. This does not mean that court may disregard the question of the availability of alternative land or accommodation - that would ignore the express requirements of s4(7) - but the weight this factor will carry in making the initial decision whether an eviction order is just and equitable may not be great.

[19] In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and if there is no valid defence to the claim, it will be just and equitable to grant an eviction order. That is consistent with the jurisprudence that has developed around this topic…

[20] Where the eviction is sought by a private landowner the availability of alternative land or accommodation assumes greater importance in the second enquiry, namely, what is a just and equitable date for eviction? It is here that the constitutional obligations of the appropriate form of government - in our cities this is inevitably the

municipality - come into focus and assume their greatest importance. The reason is that, even if it is just and equitable to grant an eviction order, that is not the end of the enquiry, because any eviction order must operate from the date fixed by the court and that date must be one that is just and equitable.

[21] Accordingly the availability of alternative land or accommodation is relevant to both enquiries into what is just and equitable. That link between the first and second stages of the enquiry underpins the numerous decisions in which our courts have held that, before determining whether an eviction order should be granted, the relevant authorities must be engaged in order to ensure that they will discharge their obligations to the evictees……

[25] Reverting then to the relationship between ss4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s4(7) those factors include the availability of alternative accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s25 of the Constitution, and on the footing that a limitation of those rights in

favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it is just and equitable to grant an eviction order, it is obliged to grant to that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of the order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity."

[48] In this matter there was some debate at an earlier stage as to whether there had been proper engagement between the City of Cape Town and Ms M in relation to the mediation process contemplated by s7 of PIE. That process has since run its course: a mediation report was placed before the court and it appears that nothing productive has emerged from the process. On 14 August 2018 the City indicated to the court that there was then emergency housing immediately available to accommodate Ms M and the girls at its temporary relocation facility at Wolwerivier, adding that due to demand it was only available for a day or two. Ms M declined the

offer on account of the long distances the girls would be required to commute to their schools and the unavailability of suitable public transport. She was entitled to adopt such a stance but cannot then be heard to complain that the City has not discharged its obligation regarding the provision of emergency housing.[21]

[49] The Berman Bros put up evidence of alternative accommodation available at rentals potentially affordable by Ms M and she did likewise. It seems as if the prospects of Ms M finding suitable accommodation in Sea Point are remote in the extreme: the going rentals in the area are now simply beyond her means. She will now have to relocate to an area much further away than where she has lived for more than 30 years and such a move has implications for the schooling of the girls. It appears to me as if the 2 younger girls may well be able to relocate to another school without too much disruption but the same cannot be said of the eldest.

[50] At the time of the hearing A was in Grade 11 at Sea Point High and was about to enter her matric year. It is to be assumed now that she has done so. L was in Grade 7 at Walmer Estate Primary and D was in Grade 4 at Sea Point Primary. It was said that A and D walked to school in Sea Point while L made use of the MyCiti bus service to travel to Walmer Estate.

[51] It is of course necessary to have regard to the provisions of s28(2) of the Constitution in this matter and consider the paramountcy of the childrens' interests. In that regard, it is my considered view that to expect A to change schools at this stage of her education (or for her to be subjected to a transport regime that would cause a

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[21] Baron and others v Claytile (Pty) Ltd and another 2017 (5) SA 329 (CC)

similar disruption in this critical year of her life) is not in her best interests. She does not deserve to follow the misfortune which befell her mother all those years ago. In the constitutional democracy in which she is growing up she is entitled to the advancement of her best interests.

[52] In my view, then, it is just and equitable to order the eviction of Ms M from the property but this should only occur when A has finished her matric year. I am fully aware that such an arrangement will negatively affect the rights of the Berman Bros. but that effect will only be in respect of the accommodation prospects of one or perhaps two of their employees. After all, it is not as if the Berman Bros. intend to develop the property and are being held up with their plans in that regard. And, in any event, they would be entitled to recover rental income from Ms M for holding over.

[53] It is a matter of considerable irony that a person who has managed to avoid domestic relocation under the oppressive apartheid legislation designed to ensure separate residential areas for different race groups is now required to move to an area distant to her place of employment and suitable schools for her children. No doubt the legislature had regard to this social dynamic when it enacted PIE which must thus be applied to ameliorate, in so far as it is possible, the suffering of those who are the innocent victims of the advancement of commercial interests.

[54] In the result, I conclude that the demands of justice and equity will be met if Ms M is ordered to be evicted from the property at the end of November 2019. As far as the question of costs is concerned, it is apparent that Ms M is a person of limited means and that those means should be put towards the maintenance of the

girls. Further, the matter has involved the vindication by both parties of constitutionally protected rights and fairness demands that there should be no costs orders made.

ORDER OF COURT

Accordingly it is ordered that:

A. The First Respondent and all those occupying under her are ordered to vacate Section 1, Room 2, Canonbury Building, situated at number […] R Road, Sea Point, Western Cape ("*the property*") by Sunday 30 November 2019.

B. In the event that the First Respondent and all those occupying under her fail to vacate the property as aforesaid, the Sheriff of this court is authorized and directed to evict them therefrom on Tuesday 17 December 2019.

C. There will be no order as to costs

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GAMBLE, J