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

CASE NUMBER: A291/17

In the matter between:

CLARA PHILLIPS — Appellant

and

WILLEM GROBLER — First Respondent

JOHAN VENTER N.O. — Second Respondent

HELDERBERG MUNICIPALITY — Third Respondent

Coram: Le Grange, J and Wille, J

Date of Hearing: 11th of October 2019

(Further Heads of Argument filed on the 11th of November 2019)

Date of Judgment: 21st of November 2019

JUDGMENT

WILLE, J;

INTRODUCTION

[1] This is an appeal against an eviction order[1] issued out by the Magistrate's Court, in Somerset West. Initially, the matter progressed by way of application proceedings which, subsequently morphed into application proceedings with evidence, due to certain limited and alleged disputes of fact. The alleged disputes of fact are connected with the issue of, inter alia, as to "when" the first respondent became aware of the appellant's "right" to reside on the property.

[2] The order is connected with a residential property namely, Erf 1[…] Somerset West.[2] The appellant is Ms Phillips who is represented by Advocate Fagan SC and with him, Mr Morrisey. The first respondent is Willem Grobler, the owner of the property, who is represented by Advocate Vos.

[3] The appellant asserted that her rights to reside on the property had been granted to her by the former owner of a farm that previously incorporated the

[1] The "order"
[2] The "property" (Number 59 Dummers Street, Somerset West)

property. It is not in dispute that a Mr Rack and by implication[3] Quickon Development (Proprietary) Limited[4], granted to the appellant and her husband (since deceased), the right to occupy the property for the duration of their lifetime. These rights were recorded in the sale agreement in terms of which Mr Rack sold the property to Quickon.

[4] The sale agreement[5] provides, inter alia, as follows;

> "*Subject to the provisions of clause 4.2 below, vacant possession and occupation of the property shall be given to the purchaser and accepted by the purchaser on the date on which the purchaser furnishes the guarantee referred to in clause 3.2 above"*
>
> "*Mr and Mrs Adam Phillips presently live in a dwelling in the Southwestern corner of the property. The exact nature of the rights of occupancy they may have, if any, are unknown to the seller and the seller accordingly gives no warranty in this regard. The purchaser and its successors-in-title shall nevertheless not be entitled to evict Mr and Mrs Adam Phillips from the dwelling occupied by them"*
>
> *"However, should the purchaser manage to conclude an agreement with Mr and Mrs Phillips in terms of which they undertake to vacate the property and they renege on such agreement, the purchaser shall be free to act as it deems appropriate, including exercising its right to evict Mr and Mrs Adam Phillips and others who reside with them"*

[5] Quickon was liquidated and the first respondent purchased the property at a liquidation auction. It is common cause that one of the co-liquidators was

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[3] By way of a stipulation alteri
[4] Quickon
[5] The sale agreement concluded during February 2001

informed, prior to the auction, that the appellant claimed that she had been granted some form of “life-right” to reside in the property.

DISPUTES OF FACT

[6] The disputes of fact referred to oral evidence for determination was primarily about whether knowledge of this “life-right” by the first respondent, was acquired before or after the auction was held and also whether this knowledge was acquired before or after registration of transfer into the name of the first respondent.

[7] It was common cause that several meetings took place. It was contested precisely when these meetings had occurred. During subsequent argument before us, it emerged that the first respondent became aware of the life-right by the appellant to reside in the property, prior to the transfer of the property into his name.

[8] The appellant testified that the first respondent had first visited her to enquire about purchasing the property approximately (5) weeks prior to the auction. She testified that she had rebuffed his advances in this connection with the property, as she was granted the right to live in the property by “Mr Ince”.

[9] She testified that the first respondent approached her about selling the property again a few weeks later, and she again declined. She testified that she had the right to live on the property for the duration of her lifetime. She also testified that she advised the first respondent that she had been living on the property for at least, the last (60) years. Finally, according to her, this life-right had been confirmed by the predecessor in title[6], to Mr Ince.

[10] The cross-examination of the appellant probed her alleged failure to mention the pre-auction meetings and her apparent omission to act when the

[6] Mr Raath

auction of the property was advertised. In addition, it focussed on her alleged failure to register her right to occupy the property as an encumbrance against the title deed of the property. The evidence in the appellant's answering affidavit[7], is that she first occupied the property during the course of 1947. She was (11) years old at the time and was (73) years old when she deposed to her answering affidavit.[8] She is now (83) years old.

[11] The first respondent's evidence was, inter alia, that he lived in close proximity to the property. He became interested in purchasing the property when he saw the auction advertisements during October 2008. According to him, he took no further steps and merely attended upon the auction and purchased the property for the sum of R 690,000,00 on the fall of the hammer.

[12] He denied any prior communication with the appellant and testified that the day of the auction was the first time he set foot on the property. His evidence was somewhat confusing on the issue of the occupation of the property. He testified that the auctioneer's conditions of sale were read out before the auction and it was indeed mentioned that the property was occupied. Strangely, he asserted that nothing was said about any "right" of occupation or the nature of the right to occupation.

[13] The auction took place during August 2008. Registration of transfer into the name of the first respondent took place on the 15 September 2008. The first respondent testified that there were three (3) meetings held with the appellant. It was at the last meeting with the appellant that, according to him, he was furnished with a copy of the prior sale agreement, recording the appellant's right to occupy the property. It was put to the first respondent that it was unlikely that he would not have done some research into the property before bidding for it at the auction. He testified that he had not done any research at all. It is unclear from the record before us as to the precise findings by the Court of first instance in connection with the disputes of fact that were raised. In my view, this matters

[7] In the initial application
[8] During August 2009

not, as it is common cause that the first respondent became aware of the life-right by the appellant to reside in the property, prior to the transfer of the property into his name.

THE FACTUAL MATRIX

[14] It is so that the first respondent offered the appellant alternative accommodation before instituting proceedings, but this offer was declined. The appellant is, as we have said, an octogenarian. She is illiterate and indigent, which brings with it its own vulnerabilities. She has lived on the property since the age of (11) years old and this was and is her home. She knows no other home.

[15] This factual matrix raises interesting legal issues that require more and careful scrutiny.

[16] The prior agreement recorded and afforded a right to the appellant, which in law, may be categorized as a personal servitude; a right of “habitatio”; “usus” or a “precarium”. In my view, it matters not what the title is to this right. The essence of the right is that the appellant was entitled to remain in the property for the rest of her natural life. Put in another way, this is the right that gave her permission to occupy the property “lawfully” for the rest of her life.

[17] The evidence tendered undoubtedly supports the view that the first respondent did have some knowledge of the appellant’s occupation of the property prior to registration of transfer. I say this because on the own version of the first respondent (leaving aside for the moment the evidence tendered by the appellant and the seemingly unresolved disputes of fact), the auctioneer’s conditions of sale were read out before the auction and it was specifically mentioned that the property was occupied.

[18] What we are left with is the averment by the first respondent that nothing was said about any "right" of occupation. Whilst it is correct that mere knowledge of the appellant's right to occupy does not make that right enforceable against the first respondent, this right to occupy by the appellant, in my view, must fall only to be terminated (if at all), on "reasonable" notice. The occupation of the property by the appellant must accordingly remain a "lawful" occupation, pending the lawful termination thereof and the lapse of a reasonable time period as set out in the appropriate notice. This even more so in a case where the appellant did not in any manner contribute to the facts and circumstances which made her occupation "unlawful", as contended for by the first respondent.

TERMINATION LETTERS

[19] In my view, the first respondent is unable to contend for the express termination of the appellant's right to occupy the property on reasonable notice and accordingly has to rely on an "implicit" termination, with the rider that subsequent to termination, a reasonable period of time was given to vacate the property. These are two discrete issues. I say this because the lawful occupation of the property by the appellant cannot simply undergo a "*chameleonic change"* into an unlawful occupation, simply because of the registration of the property into the name of the first respondent.

[20] The correspondence upon which the first respondent seeks to rely for the position of "termination" are the letters addressed to the appellant. None of these letters in my view, confer a reasonable time period for the appellant to vacate the property taking into account that she has been living in this property for at least the last (60) years.[9]

[21] Put in another way, the letters claim termination of the appellant's occupation of the property solely on the basis that the appellant has no right to

[9] More accurately now the period of at least (70) years

occupation due to the fact that the first respondent is now the new owner of the property and the first respondent has not given the appellant any right to occupy the property. The letters expressly state in the event of the appellant's failure to vacate the property, an application for eviction would be initiated. This, without any "recognition" of her prior right to occupy, and purportedly simply by the stroke of a pen, converting her "lawful" occupation to that of "unlawful" occupation.

[22] Further, in my view, any reasonable period purportedly given to vacate the property cannot remedy the defect in failing to give reasonable notice of termination of the right to occupy.

[23] This must be so, because a change of the status of the appellant from that of a "lawful" occupier to an "unlawful" occupier cannot, be achieved without the giving of reasonable notice to terminate the right to occupy.

[24] The *"reasonableness"* of the notice period is not only entirely dependent on the facts of each case, but in certain circumstances, where the right to housing is at issue, falls to be infused with *"constitutionality"* within the South African context.

[25] The first respondent's notice of termination (such as it was), was issued out on the 27th of November 2008 and a demand was made that the appellant vacate the property by no later than the 31st of January 2009.

[26] The factual matrix surrounding the reasonableness of this notice is, inter alia, that; the appellant had lived on the property for most of her life and for at least (60) years; that the consent under the right to occupy was for her lifetime; that she had been living in the property with her husband (now deceased) and her children and; that she knows no other home. When the issue of the *"reasonableness"* of the notice is considered, one must of necessity have

regard to the question of whether the occupiers of the subject property are lawful occupiers or unlawful occupiers.

[27] This matter is somewhat more complicated in that the letters sent to the appellant, purporting to convert her status from that of a lawful occupier to that of an unlawful occupier, may be insufficient in law. In my view, the letters sent to the appellant never dealt with the right of her lawful occupation (other than stating that her occupation was now unlawful due to a change of ownership in and to the property) and accordingly her status was not converted from that of a lawful occupier to that of an unlawful occupier, prior to the launching of the application and on this basis alone, the notices of termination were not reasonable.

[28] It is the first respondent's case that when that first respondent's application was launched, the appellant was in unlawful occupation of the premises. The issue is whether on the facts of this case, a cause of action had yet arisen.

[29] In Mbanje v Ngani[10], the following was stated:

> *"It seems to me that the process initiating action in the Court, whether it be by the issue of a writ of summons or notice of motion, has the effect of freezing the rights of the parties at the time that it is filed in the registry. So that, if at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process"*

[30] When the application was launched by the first respondent, he in my view, did not have a "complete" cause of action against the appellant. This in my view, is not a mere technical point affecting some provision of adjectival law, as it strikes at the very root of the application.

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[10] 1988 (2) SA 649 (ZS)

"*There can be no action before anything is due and owing"*[11]*.*

[31] It is so fundamental as to render the initiating process of the application a nullity. If there is no cause of action, then any judgment pronouncing that a non-existent cause exists, is void and of no effect. As Lord Denning observed in MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC) at 1172;

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there"*

[32] The initiating process of the eviction application was taken out before the right to evict had accrued to the first respondent. Thus, at the time the process was issued out, no cause of action had accrued to the first respondent. Without going into all the authorities, it seems to me that the rule of law is stated correctly by Voet (Book 5, 1. 27), in that there can be no action before anything is due and owing. I accept the statement of Voet that there can be no action before anything is due and owing, as correctly stating our law.

[33] It is further clear to me that a notice of motion can be the initiation of an action as this has been repeatedly laid down by the Appellate Division in Paruk and Others v Parker, Wood & Co., Ltd (1917 AD 163), The Master v van Aardt (1926 AD 25), and Lebedina v Haskel and Another (1932 AD 354).

[34] It would therefore follow that the first respondent had no right in law to launch these proceedings in the form it did before dealing in a meaningful and precise manner, with the right afforded to the appellant and placing her in the position of an unlawful occupier. It might have been possible for the first

[11] Voet 5.1.27

respondent to have first made an application for a declaratory order. He has not done so.

[35] Other than the obvious constitutional issues which in my view, also fall to be dealt with in weighing up the reasonableness of the notice period, a purposive approach falls to be adopted which includes a weighing up of the appellant's constitutional rights to adequate housing.

THE NEW ISSUE

[36] A new issue raised by the appellant at the hearing of the matter, contends for a legal assertion that ESTA[12] does afford protection to the appellant based on the facts that appear from the material before the Court, albeit on appeal. Initially, the appellant averred that the protection that would have applied in favour of the appellant under ESTA, disappeared "together with the farm". Now, on appeal, the position is taken that the appellant's protection under ESTA, did not disappear.

[37] In terms of ESTA, an "occupier" is defined in section 1(1) of ESTA as;

> *"a person residing on land which belongs to another person, and who … on 4th of February 1997 or thereafter had consent … to do so"*

[38] It is common cause that as at the 4th February 1997 and thereafter, the appellant had consent to reside on the land and that the land belonged to another person.[13]

[39] The dispute in connection with the new issue is whether or not, the property upon which the appellant resided as at the 4th of February 1997 was

[12] Extension of Security of Tenure Act 62 of 1997
[13] The written agreement supports this factual position.

"land" as defined in ESTA. Although the actual word "land" is not defined in ESTA, Section 2(1) provides that ESTA applies to farmland by virtue of the below mentioned definition:

> *"shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including* …"

[40] Section 2(1) continues by categorizing two instances of land to which ESTA applies, even if the land is in or encircled by a township. Paragraph (a) makes reference to;

> *"any land within such a township which has been designated for agricultural purposes in terms of any law"*

[41] Section (b) makes reference to;

> *"any land within such a township with has been established … after 4th of February 1997, in respect only of a person who was an occupier immediately prior to such establishment…."*

[42] The farm "Parel Vallei"[14], was subdivided from presumably the original farm in 1939. It is described in the deed of transfer by which the late Mr Rex Ince acquired it in 1969 as "redeemed quitrent land". The first respondent also refers to Mr Rex Ince's "plaas". Mr Rack purchased a portion of erf 7124 in 1991. Mr Rack subsequently sold a portion of erf 7124 and not, "*a portion of a portion"* of erf 7124.

[43] The portion of erf 7124, that was sold by Mr Rack had not yet been subdivided from erf 7124. The sale agreement refers in terms to the costs to be occasioned by the subdivision and makes reference to the remainder of erf 7124, after deduction of the sold property.

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[14] Portion 36 of Lot F, in extent 3.6589 morgen

[44] Erf 14421 was subdivided from erf 7124 only after November 2001. In 2002 Quickcon, subdivided erf 14421 into twenty-three (23) erven, one of which is erf 14611, the subject property. The subject property fell within a township during 2002. On this score, the first respondent advances in reply, that when the property was re-zoned from agricultural to residential property, acquisitive prescription ended.

[45] Significantly, no timeframe was allocated to this rezoning process, but in all probability, it would have occurred when the subdivision took place during 2002. In terms of the sale agreement between Mr Rack and Quickcon, the latter specifically consented to the re-zoning and subdivision of the property.

[46] Accordingly, an objective analysis of the material before me exhibits, inter alia, that the subject township[15], was established after the 4th of February 1997.

[47] In terms of Section 2(2)[16];

> *"land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved"*

[48] The appellant contends that the onus was on the first respondent to show that the application for eviction was properly brought in terms of PIE[17], rather than in terms of ESTA. The factual position is that the disputed property only ceased being a farm in 2001 and accordingly section 2(1)(b) of ESTA finds application in favour of the appellant.

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[15] The subdivided erf 14421
[16] In terms of ESTA
[17] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

[49] In terms of section 3(1) of ESTA, consent to an occupier to reside on land shall only be terminated in accordance with Section 8. Section 8(4) affords complete protection from eviction to an occupier in the position of the appellant because she has resided on the land for much longer than ten years and she is much older than (60) years old.

THE APPELLANT'S RIGHT OF OCCUPANCY

[50] The first respondent acknowledged that he was aware that the appellant occupied the property before he bought same at the auction and was also made aware of the nature of her right to occupy the property, prior to registration of transfer of the property into his name.

[51] The appellant contends for the position that there is no dispute about whether the appellant had a right to occupy the property; the dispute is only whether she had a contractual life-long right to occupy. Further, the position is taken that this dispute is in any event irrelevant, as in accordance with Section 8(4) of ESTA, the appellant has a statutory life right. I agree.

[52] In the alternative, it is submitted that should I find that the provisions of ESTA do not apply, then "*but for the fact that what had been a home on a farm, became a home in a township",* should weigh very heavily in determining whether the appellant's eviction is just and equitable, under PIE.

[53] In connection with the new issue, the first respondent (at the hearing), was given the opportunity to file a supplementary note in order to fully deal with this new issue. It is on this basis that the first respondent elected to continue with the hearing of the appeal on the 11th of October 2019. This, in view of the potential prejudice, as the new issue was only belatedly raised at the eleventh hour.

NEW EVIDENCE ON APPEAL

[54] Instead of only filing a supplementary note, the first respondent filed a substantive application[18], seeking leave of the Court, to introduce two further affidavits, one by the first respondent and one by the first respondent's attorney.

[55] The appellant did not oppose this substantive application and took no issue with the content of the two affidavits as the appellant was simply not in a position to admit or deny the content of the new evidence sought to be introduced after the appeal was finally argued.

[56] In my view, this new evidence falls to admitted for the purposes of determining this appeal as nothing material attaches to this new evidence for the reasons set out herein.

[57] The first respondent advances that the entire application was determined in the Court of first instance, on the basis that PIE applied and not ESTA. Despite the fact that this position may be correct on the pleadings "as it were", the important point, in my view, is whether or not the facts presented and relied upon in the Court of first instance, support the new issue raised for the first time during the appeal proceedings.

[58] The facts and material offered up in argument in the Court of first instance are directly linked to the issue of whether or not ESTA finds application and accordingly, our function on appeal is:

> *"to determine whether the Court below came to a correct conclusion"*[19]

[18] The new application
[19] Cole v Government of the Union of SA 1910 AD 263 at 272

[59] The correct test to apply on appeal in these circumstances was further fortified more recently in QuarterMark[20], in which it was stated, inter alia, as follows:

> "*For this reason, the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed"*

[60] The first respondent advances that ESTA finds no application because of the following paragraph in his founding affidavit, namely:

> *"Soos ek kon aflei uit verseie bronne, was die eiendom ter sprake eers deel van 'n plaas. Na afsterwe van die eienaar, ene Mnr Ince, het sy seuns die plaas eerder onderverdeel en verkppo of verkoop as 'n geheel. Wat ookal die geval, die plaas het dekades gelede ontwikkel in 'n hoogs ontwikkelde residensiele woongebied. Een van die oorblywende erwe (ERF 14421) was in 2001 bekom deur Quickon Developments (Pty) Ltd (hierna genoem Quickcon). Die betrokke erf was groot en bewwon deur die Respondent"*

[61] I am by no means persuaded that the averments made in this paragraph are sufficient to discharge the onus falling squarely on the first respondent to the effect that the provisions of ESTA find no application.

[62] This, particularly in light of the presumption alluded to earlier. Further, on the own version of the first respondent this information was "gleaned" from a number of sources and very little probative weight, if any, should be attached to this statement.

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[20] Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014 (3) SA 96

THE APPLICATION OF THE PROVISIONS OF PIE

[63] As far as the PIE issue is concerned, the first respondent's argument is in essence a juristic legal argument which advances, inter alia, that an oral agreement whereby one party affords another an oral servitude of habitation, does not comply with section 2(1) of the Alienation of Land Act. Further, that the right of occupation contended for by the appellant is therefore invalid and of no force and effect.

[64] In addition, that the "*doctrine of notice"* finds no application where an oral servitude of habitatio has been entered into and that such oral servitude of habitatio is not enforceable against the successor in title of the servient tenement (even though such successor had notice of the oral agreement). The final position taken is that such oral habitatio is unenforceable against a successor in title of the property.

[65] In summary, the first respondent contends for the position that no valid defence has been raised as contemplated in terms of section 4(8) of PIE[21]. The first respondent also advances that it was just and equitable to evict the appellant taking into account the circumstances in this matter. I disagree.

[66] Even if I am wrong in my interpretation of the letters (upon which the respondent relies for termination of the appellant's right of occupation) and if I am incorrect in my interpretation that ESTA applies, then in that event, it is my view that when dealing with the "just and equitable" enquiry, the appellant does not have to establish a right of occupation to resist an eviction on the basis that the result, is not "just and equitable".

JUST AND EQUITABLE

[21] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998

[67] The first respondent contends that it would be just and equitable to evict an indigent and illiterate octogenarian so that the first respondent can get vacant possession of property he does not require for his personal use. This despite the following:

[66.1] That it cannot be disputed that Quickon granted the appellant a right to occupy the property for her lifetime and that its liquidators had notice of this right;

[66.2] That the first respondent purchased the property at a public auction and did so “blind” (in the sense that he undertook no investigations prior to bidding for it at the auction;

[66.3] That the appellant has occupied the property for in excess of (70) years (for a period of (62) years at the time the application was originally made); and

[66.4] That the appellant is of advanced age.

[68] The first respondent also relies heavily on the contention that the appellant cannot rely on the doctrine of notice. This according to the first respondent is “absolute”, without the application of a “constitutional lens” to the appellant’s initial and continued lawful occupation of the property. This, despite the fact that the appellant did not in any manner contribute to the alleged “loss” of rights that were deliberately conferred upon her by Quickon.

[69] The Court a quo was critical of the appellant’s apparent delay in seeking legal advice so as to register her rights of occupation by way of an endorsement to the title deed of the property. This, again without the application of a

constitutional “lens” to the appellant’s initial and continued lawful occupation of the property.

[70] In my view, applying the principles as set out in *Scribante*[22], viewed through the lens of fairness and equity, there is no reason for upholding the legal conclusion that the first respondent’s real rights should trump the appellant’s (earlier) personal right taking into account the unique facts of this case.

[71] With reference to the appellant’s historical and lawful occupation of the property, viewed within a proper constitutional context, I am of the view that some preference should be given to the appellant’s position as the party who acquired her rights long before the first respondent.

[72] I say this also because, the property was sold at an auction and purchased “blind” and from the point of view of the liquidator, it is just and equitable that what was sold should be subject to such limitations on ownership that were placed on it by the company in liquidation.

[73] Had the property been sold by private treaty[23], then in that event, the appellant would have been able to pursue a claim for damages against the seller. No claim for damages is open to the appellant in the present circumstances, as such claim would possibly only arise after a “concursus creditorum”.

[74] Even if a belated claim were to be proved against the liquidated estate, it is unlikely to be met in full, as a claim for damages, by its very nature, falls to be a concurrent claim and enjoys no legal preference. A just and equitable way, in these circumstances, to overcome this consequence, would be to treat the sale of the property to the first respondent as being subject to any unregistered servitudes over it.

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[22] Daniels v Scribante 2017 (4) SA 341 (CC)
[23] Not at a liquidation auction

[75] This is so, particularly in this case, as, inter alia, the conditions of sale by the liquidators provide, inter alia, as follows:[24]

> *"Possession and occupation shall be given on registration of transfer subject to any existing tenancies and occupancies"*
>
> *and*
>
> *"The purchaser acknowledges that the seller will not guarantee vacant occupation of the property to the purchaser*"

[76] The appellant seeks not to deny the first respondent's right of ownership altogether and ad infinitum. Taking into account the advanced age of the appellant, the value of her right of occupancy is relatively limited. PIE identifies the elderly as a class that deserves special consideration, together with the appellant's indigence and illiteracy. These are weighty factors that afford the appellant protection.

[77] To this must be added that the appellant would no doubt have been afforded protection under ESTA had the appellant been able to assert her rights to reside on the property granted to her by the former owner of a farm that previously incorporated the property. This position changed (if indeed it did), through no action on her part and her only "participation" is that she remained in occupation.

[78] In my view, the lawful occupation enjoyed by the appellant could not have morphed into that of unlawful occupation as a result of activities taking place around her home. The appellant did not invade or otherwise unlawfully occupy another's property as she simply remained where she was as event unfolded around her.

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[24] Paragraph 6.1

[79] Section 4(7) of PIE, grants to the Court the power to decide whether an unlawful occupier should be evicted, the test being whether it is just and equitable to do so. All relevant circumstances should be considered and in giving this power to the Court, the legislature has expanded upon the provisions of section 26(3) of the Constitution, in terms of which no-one may be evicted from their home;

> *"without an order of court made after considering all the relevant circumstances"*

[80] It must be so that this "responsibility" must be viewed through a "constitutional lens" and the Courts are enjoined to decide on unique cases, not on principles of the law of property, but on principles of fairness and equity. Wallis JA, in Changing Tides[25], held that;

> "*an eviction order may only be granted if it is just and equitable to do so"*

[81] The Court went on to state that;

> *"In considering whether eviction is just and equitable the Court must come to a decision that is just and equitable to all parties.*

[82] In my view, the true test is to determine whether, the first respondent's rights to his property fall to be somewhat diluted (in view of the particular circumstances and the unique facts of this case), with reference to the principles of justice and equity. Taking into account the age of the appellant, coupled with the manner and duration of the occupation of the property, justice and equity undoubtedly demand a limited derogation of the first respondent's rights of ownership in favour of the appellant for at least the duration of her natural life.

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

THE PRE-TRIAL CONFERENCE AND WAIVER

[83] The first respondent and his attorney, in their affidavits filed in support of the introduction of new evidence on appeal take the position that the first respondent falls to be severely prejudiced because of the new issue being introduced on appeal at a very late stage. Their complaint is further that at a pre-trial conference prior to the hearing of the matter in the Court a quo, it was specifically agreed that the application would be determined in terms of PIE.

[84] This pre-trial conference must have taken place after the first respondent issued out his notices in terms of section 4(2) of PIE. The significance of this is that the first respondent had already decided on his course of action under PIE at a time well before the pre-trial was held and the agreement concluded as referred to above.

[85] In my view, it is not for the appellant to raise the defence that the proceedings should be the subject of ESTA, rather the onus rests on the first respondent to advance his case in terms of the correct procedure applicable in law.

[86] In so far as it may be relevant, the appellant advances that any agreement that may have been concluded at the pre-trial meeting that the application fell to be determined in terms of PIE, amounted to a waiver by the appellant of her rights which is void in terms of section 25(3) of ESTA. Again, I agree, as if the appellant was not aware of her rights under ESTA, she could not have possibly waived them in favour of the first respondent at the pre-trial conference.

CONCLUSION

[87] In conclusion, whatever the legal position may be in this connection, this is not decisive of this matter, as undoubtedly the eviction should not have been granted in these circumstances. Viewed through a constitutional lens, it was and is not just and equitable to evict the appellant taking into account the peculiar circumstances of her rights to occupy the property for the duration of her lifetime.

COSTS

[88] On the issue of costs, the appellant seeks costs against the first respondent despite the fact that both her advocates appeared *pro amico*. This is a matter involving socio-economic rights and added to this is the fact that the new issue was raised at the eleventh hour. However, as explained during the hearing, the appellant's legal representatives have incurred costs in pursuing this appeal, albeit predominantly in the nature of disbursements. The appellant has been successful on appeal and is at least entitled, on this basis, to a recovery of these costs, limited as they may be.

ORDER

[89] In the result, I propose that the following order is made, namely;

1. That the appeal is upheld.

2. That the application by the first respondent is dismissed.

3. That the eviction order is set aside.

4. That the first respondent shall be responsible for all the appellant's costs of and incidental to the application (in the Court a quo), and this appeal, on the scale as between party and party, as taxed or agreed.

WILLE, J

I agree, and it is so ordered;

LE GRANGE, J