Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case no: A94/2019**

Before: The Hon. Mr Justice Binns-Ward
The Hon. Ms Justice Cloete

Hearing: 14 June 2019
Judgment: 19 June 2019

**In the matter between:**

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| **AMANDA PETERSEN** | Appellant |

and

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| **MAGDALEEN VAN WIELING** | First Respondent |
| **ANDREW VAN WIELING** | Second Respondent |
| **NIEL HENDRICKS** | Third Respondent |
| **ANDY VAN WIELING** | Fourth Respondent |
| **JOSEPH PETERSEN** | Fifth Respondent |
| **WALDA PETERSEN** | Sixth Respondent |
| **NIKKIE JONKERMAN** | Seventh Respondent |
| **BITOU MUNICIPALITY** | Eighth Respondent |

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## JUDGMENT

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**BINNS-WARD and CLOETE JJ:**

[1] This an appeal against the order of the Knysna District Court handed down on 20 March 2018 dismissing the application to that court by the appellant in terms of s 4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE") for the eviction of the first to seventh respondents ("the respondents") from the immovable property situated at […] S Drive, New Horizon, Plettenberg Bay, also known as Erf […]8, Plettenberg Bay ("the property").

[2] The appeal was noted timeously, but the appellant thereafter failed to prosecute it within the 60 day period prescribed by rule 50(1) of the Uniform Rules of Court. That period expired on 17 July 2018, whereupon the appeal lapsed. The appellant therefore applied at the outset for condonation of her failure to timeously prosecute the appeal, together with an order reinstating the appeal.

[3] In his affidavit filed in support of the condonation application the appellant's attorney, Mr Charles Petherbridge of Legal Aid, provided a full explanation for the delay which covered its entire period. In essence, he explained that it was occasioned by various administrative challenges faced by the Legal Aid Board, including the procurement of services for the acquisition of the appeal record.

[4] We were persuaded that the explanation provided was reasonable and that the steps taken on behalf of the appellant showed that she always intended to appeal. Moreover, and for the reasons contained in this judgment, it was in the interests of justice that the appeal be entertained. Condonation was therefore granted and the appeal reinstated.

[5] There was no appearance by or on behalf of the respondents at the hearing of the appeal.

[6] It is settled law that in an application for eviction under PIE the court must undertake a 3-stage enquiry. Firstly, it must be determined whether the occupation is unlawful; if so, secondly, whether it is just and equitable to evict the unlawful occupier(s); and if so, thirdly, the court must fix a date by which it would be just and equitable to require the occupiers to vacate.

[7] As to the first stage of the enquiry, the respondents disputed the legitimacy of the appellant's title to Erf […]0, which forms part of the property in issue, and contended that they also had a proprietary interest in it.

[8] It is undisputed that the appellant is the registered owner of the property. As apparent from the deeds office printouts annexed to the answering affidavit, she acquired Erf […]1 under title deed no. T83740/1996 and Erf […]0 under title deed no. T88457/2004. These two erven were subsequently consolidated as Erf […]8, and registered in the appellant's name under certificate of consolidated title no T53323/2007 on 6 July 2007.

[9] It appears from the papers that at some stage during the 1980's Erf […]0 was leased by the former Plettenberg Bay Municipality to the appellant's late father, Mr Thomas Petersen. During September 1988 a deed of sale was concluded between the same parties in respect of that erf for a purchase price of R3 612.02, payable by way of a deposit, already received, of R300 and the balance of

R3 312.02, plus interest thereon at the rate of 15.5% per annum, in instalments of R12.50 per month over a period of 30 years.

[10] The late Mr Petersen passed away on 7 February 1992 (i.e. about 3 ½ years after conclusion of the deed of sale) and his wife (the appellant's mother, Mrs Jane Petersen) some 7 months thereafter. It is not apparent on the evidence whether their marriage had been in or out of community of property, but both spouses died intestate. It would therefore appear that the sale agreement between Mr Petersen and the municipality in respect of Erf […]0 would have been in an executory state at the time of Mr and Mrs Petersen's respective deaths.

[11] The appellant together with the first, fifth and sixth respondents are the surviving children of the late Mr and Mrs Petersen. Another child, David, had already passed away, seemingly without leaving children.

[12] The fifth and sixth respondents resided on Erf […]0 along with the appellant's late parents and have continued to do so since the latters' demise. The other respondents moved onto Erf […]0 when they needed accommodation (the first and second respondents are married to each other; the third respondent is the first respondent's son and the fourth respondent her stepson; the seventh respondent is the life partner of the sixth respondent). They were all living there when the appellant obtained registered title to the erf in 2004. It is not clear on the evidence on what basis they had occupation of the property between the date of the late Mr Petersen's demise and the acquisition of registered title by the appellant.

[13] According to the appellant, once she became the registered owner of Erf […]0, she agreed that the respondents could remain on the property provided that they all made a financial contribution towards payment of the municipal accounts and other expenses relating thereto. According to her, only the first and second respondents made an effort to contribute, however. The others either failed or refused to do so. She alleged that all of the respondents became verbally abusive towards her when she demanded the agreed upon financial contributions. They accused her of having acquired ownership of Erf […]0 by fraudulent means.

[14] On 8 August 2016, relying upon their failure to contribute and verbal abuse, the appellant terminated the respondents' occupation rights and gave them formal notice through her attorney to vacate on or before 31 August 2016. On 29 August 2016 the respondents, through their then attorney (who has recently withdrawn as their legal representative), informed the appellant that they refused to vacate on the basis that she had acquired *'the property'* in a fraudulent manner, when it should have devolved upon the late Mr Petersen's estate, thus entitling each of his intestate heirs to a proportionate undivided share thereof.

[15] The same defence was raised in the answering affidavit, but amplified to include an allegation that the appellant also defrauded the relevant authorities by obtaining a state subsidy via the discount benefit scheme contained in the National

Housing Code which, according to the respondents, prohibits an individual from receiving state-assisted housing more than once.[1]

[16] It seems to be contended that the appellant made use of a state subsidy to acquire both Erven […]1 and […]0. Although the respondents dispute the allegation that they have not contributed financially towards the property, careful scrutiny of the answering affidavit reveals that their defence is actually that Erf [...]0 was an asset in the estate of the late Mr Petersen at the time of his death in 1992, and that the appellant deprived them of their rightful inheritance and attendant right to occupy that erf. How the appellant allegedly accomplished this was not disclosed in the answering affidavit.

[17] What may be deduced from the undisputed facts, however, is that the contract between the late Mr Petersen for the purchase of the land in instalments (the deed of sale) did not fall within the ambit of Chapter 2 of the Alienation of Land Act 68 of 1981 by reason of s 4 of that Act. It is evident that, although the deed of sale purports to be with the local authority, the terms thereof (see clause 9) suggest that it may have been concluded under the auspices of the Community Development Act 3 of 1966. Clause 12 of the agreement, for example, is not typical of an ordinary agreement at arms' length and closely corresponds with the prescripts of s 18D of the Community Development Act.

[1] The National Housing Code is the document incorporating national housing policy that was required to be published in terms of s 4 of the Housing Act 107 of 1997, which came into operation in April 1998. The provision of assistance to persons to hire or acquire immovable property was previously, and still is, also regulated in terms of other legislation such as the now repealed Housing Act, 1966, and the still extant Community Development Act 3 of 1966.

[18] The functions of the Community Development Board could be delegated to a local authority in terms of s 22 of the Act, whereupon the local authority, in terms of s 22(3), would for the purposes of the Act be regarded as if it were the Board. The disposal of any property that is subject to the condition contemplated in s 18D(1) of the Act[2] is subject to the further provisions of that section.[3]

[19] It would therefore be relevant in the circumstances described in the respondents' answering papers to know what the actual position is, and what the legislative provisions, if any, are concerning what becomes of property purchased under the aegis of that Act if the purchaser dies while the contract is still executory. The local authority, as the seller and apparent proxy for the Community Development Board, is the obvious first resort for this information; and also information as to how the appellant, as only one of the intestate heirs in the estate of the late Mr Petersen, apparently came to be the sole substitute transferee of Erf [...]0 some 12 years after the death of the late Mr Petersen.

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[2] Section 18D(1) has at all times material in the current matter provided as follows:

'*It shall be a condition of every sale by the board, or by a local authority, statutory body or other body corporate in terms of a delegation or assignment of powers, functions or duties under section 22, of immovable property to a person for residential purposes that, notwithstanding the fact that the total amount of the purchase price, together with all interest thereon, has been paid, such person or his successors in title shall not sell or otherwise alienate such property within a period of ten years from the date on which the property was bought by such person, unless it has first been offered for sale to the board.*'

[3] Section 18D(8) provides:

'*No transfer of any property in respect of which the condition referred to in subsection (1) applies, shall be passed to a person other than the board unless there is produced to the registrar of deeds a certificate by the board to the effect that such property has been offered for sale to the board in terms of subsection (1) and that the offer has been rejected and, if the board has issued an order under subsection (6A) in respect of that property, that such order has been complied with or that steps have been taken to the satisfaction of the board to ensure that it will be complied with.*'

[20] The general rule is that the contractual rights and obligations of a deceased person under an executory contract are transmitted to the executor of the deceased's estate. In the current case, having regard to the parties' apparent socio-economic status, it may well be that an executor was never appointed. That is a question that the Master should be able to answer. Suffice it to say that enough has been said in the respondents' answering affidavits, however, to raise the questions of what became of the executory rights and obligations under the deed of sale and how it came about that Erf [...]0 was eventually transferred to the appellant. On the face of it these are plainly possibly relevant circumstances in the context of a determination of the application to evict the respondents. The municipality, both as local authority and as seller in terms of the deed of sale, should have been required to report to the court a quo on them. There was an inquisitorial duty on the magistrate to clarify the position in order to determine whether the respondents are indeed unlawful occupiers and whether the applicant's registered title to the property had been legitimately obtained.

[21] The lack of relevant information before the court a quo was compounded by the fact that, although, on their own version, the respondents obtained access to the records of the local authority in support of their defence, no evidence was produced to show how the interest of the late Mr Petersen in Erf [...]0 by virtue of the executory contract had devolved. Whereas in ordinary litigious proceedings a gap in the evidence redounds against the party bearing an onus of proof, proceedings for an eviction in terms of PIE are not ordinary proceedings. This is by reason of the duty imposed in terms of s 26(3) of the Constitution on courts seized of such proceedings not to grant an eviction without considering all the relevant circumstances.

[22] What became of the executory contract to which Mr Petersen was party was an eminently relevant consideration in the context of the evidence that was adduced in the respondents' answering papers. If further information was required in order for the court to apprise itself of all the relevant circumstances, it was duty bound to give directions to enable the information to be obtained.

[23] In the replying affidavit the appellant stated that she had not been aware of the existence of the deed of sale between the local authority and her late father but that, not only did such contract not constitute evidence of ownership by the late Mr Petersen, any possible claim which her siblings might have had in this regard would long since have prescribed in terms of s 11 of the Prescription Act 68 of 1969. The magistrate rightly discounted the relevance of prescription as an issue in the matter before her.

[24] Extinctive prescription is only relevant as a special defence against a claim for the enforcement of a debt, and such a claim was not competently raised by the respondents in the court *a quo*. In the final paragraph of the answering affidavit the respondents sought an order for the division of the property into its two former erven and that Erf [...]0 be transferred *'…to the heirs in terms of the deceased estate of our late parents of which the applicant* [i.e. the appellant] *is also a beneficiary…'.* However despite the respondents having legal representation at the time there was no counter-application for this relief, and nor were the Registrar of Deeds, the executor of their late father's deceased estate or the Master joined as legally interested parties, as would have been necessary in any such claim. Any claim that the respondents may have in respect of the property would after all lie against the

executor of their late father's deceased estate – not the appellant. Furthermore, the claim would have accrued only when a liquidation and distribution account in respect of the estate was filed with the Master – a matter that is closely bound up with the question identified earlier, being what actually became of deceased estate's rights and obligations under the executory contract of sale.

[25] As was held in *Ransumer NO v The Master (NPD) and Others* 1978 (4) SA 877 (NPD) at 881C-D:

> *'The heirs become owners of the right not the asset and they acquire a* jus in personam ad rem acquirendam *against the executor which is enforceable after the confirmation of the liquidation and distribution account (*Jewish Colonial Trust Ltd v Estate Nathan *1940 AD 163 at 175;* Commissioner for Inland Revenue v Estate Crewe and Another *1943 AD 656 at 669; Wille* Principles of South African Law *6th ed at 252 and 255).'*

[26] If, as mooted earlier, no executor had in fact been appointed to administer the estate, it might be that it was wound up in terms of s 18(3) of the Administration of Estates Act 66 of 1965, which provides that:

> *'If the value of any estate does not exceed the amount determined by the Minister by notice in the* Gazette*, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.'*

These considerations should have suggested the Master's office as an appropriate source of information for the magistrate to be properly informed as to all the relevant circumstances.

[27] In her judgment the magistrate reasoned that, given the respondents' allegations of fraudulent acquisition by the appellant of Erf [...]0, it was incumbent on the latter to prove how she lawfully acquired such ownership. The magistrate found that the certificate of consolidated title did not constitute adequate proof of ownership because, so she reasoned, it *'…speaks nothing to the disinheritance of the other siblings who are entitled to a child share of their father's estate'.* That, with respect, was a misconceived view of the law. Registered title constituted prima facie proof of ownership and in adversarial litigation the evidential burden of rebutting it would rest on the respondents. Moreover, for the purposes of PIE, *'owner'* means the registered owner of land. Section 4(1) of PIE therefore confers *locus standi* on an *'owner'* to institute proceedings for the eviction of an unlawful occupier. The point however is that, although the appellant has *locus standi*, what was raised by the respondents in their answering affidavit should in the peculiar circumstances of the case have put the magistrate on inquiry, because of the incidence of s 26(3) of the Constitution and the fact that eviction applications under PIE are not conventional adversarial proceedings, to investigate how the appellant became the registered owner thereafter so as to be in a position to determine whether or not the respondents are in fact unlawful occupiers (or more specifically the first, fifth and sixth respondents).

[28] While on the matter of the magistrate's duty of enquiry, a related consideration in this case arose from the fact that the respondents' right to occupy was purportedly terminated during August 2016 and the eviction application was launched on 12 May 2017, which was more than 6 months later. That would bring the provisions of s 4(7) of PIE to bear if, upon proper enquiry, the magistrate were to

be satisfied that their occupation was indeed unlawful. The provision reads as follows:

> *'If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'*

[29] Therefore, in the event of the unlawfulness of the respondents' occupation being determined in the appellant's favour, there is in any event insufficient relevant information contained in the record for the purposes of s 4(7). What is disclosed is that the respondents are all adults. The first respondent is unemployed and in her fifties. The second to fifth respondents are employed but no details have been provided of their income. The second respondent is also in his fifties. The sixth and seventh respondents have resided on what was previously Erf [...]0 for more than 27 years. They are both in their sixties. The sixth respondent is unemployed and the seventh respondent does casual work. Both receive SASSA old age pensions, but the amounts that they receive are not known.

[30] The appellant contended that all of the respondents are able to afford alternative accommodation; alternatively that they may obtain assistance from the local authority (including emergency housing). On the other hand, the respondents contended that they will be rendered homeless if they are evicted from the property.

However no steps were taken by the appellant – or for that matter the respondents – to obtain a report from the relevant local authority (cited as the eighth respondent) in respect of the availability of alternative accommodation. In the circumstances the court a quo should have done so.

[31] In all these circumstances it is appropriate for the matter to be remitted to the court *a quo* so that it may give directions to enable all the relevant information to be placed before it for purposes of conducting the three-stage enquiry under PIE.

[32] The following order is made:

**1. The appeal succeeds to the extent set out below.**

**2. The order of the court *a quo* is set aside and substituted with the following:**

***'(1) The application is postponed* sine die *on the terms set out below:***

***(1.1) The applicant shall procure a report from the eighth respondent, within 60 (sixty) calendar days from date of this order, dealing with: (a) what became of the executory rights and obligations under the deed of sale concluded between it and the late Mr Thomas Petersen in respect of Erf [...]0, Plettenberg Bay, during September 1988 (Annexure MVW 6 to the answering affidavit) as well as how it came about that Erf [...]0 was eventually transferred***

***to the appellant; and (b) the availability of alternative accommodation and emergency housing, if required, in respect of the first to seventh respondents or any of them;***

***(1.2) The applicant shall also procure a report from the Master of the High Court, Cape Town, within 60 (sixty) calendar days from date of this order, explaining whether the estate of the late Mr Thomas Petersen (who died on 7 February 1992) was ever reported and, if so, whether an executor was appointed and when such appointment was made; alternatively the steps, if any, taken by the Master in terms of section 18(3) of the Administration of Estates Act 66 of 1965; and annexed to such report shall be a copy of the Final Liquidation and Distribution Account (if applicable);***

***(1.3) The first to seventh respondents shall, if they so wish, file further affidavits, within 30 (thirty) calendar days of receipt of the reports referred to in paragraphs (1.1) and (1.2) above, dealing with the content thereof and disclosing details of their income and expenditure, setting out the steps they have taken to investigate alternative accommodation, whether it be with family, friends, through employer(s)***

***or rented accommodation, and any other information which they believe may be relevant to the determination of whether it is just and equitable to evict them in the event that the court finds their occupation to be unlawful; and***

***(1.4) The applicant shall be entitled to file a further affidavit in response, should she so wish, within 30 (thirty) calendar days of the expiry of the period set out in paragraph (1.3) above, whereafter she shall be entitled, on notice to the respondents, to re-enrol the matter before the magistrate for further hearing.***

***2. Costs shall stand over for later determination.'***

**3. The matter is remitted to the court a quo to be dealt with further in terms of substituted order set out in paragraph 2, above.**

**4. The costs in the appeal, including the applications for condonation and reinstatement, shall be costs in the cause in the court *a quo*.**

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**A. G. BINNS-WARD**
**Judge of the High Court**

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**J. I. CLOETE**

**Judge of the High Court**

**For appellant**: Mr B Nduli – BonginkosiN@legal-aid.co.za; Ms/Mr C Petherbridge

Instructed by: Bonginkosi Nduli/C Petherbridge of Legal Aid – 0214264126

**For respondents**:

Instructed by: Harker Attorneys – notice of withdrawal as attorneys – Knysna – dated 27 May 2019