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

Case No: 10857/2020

In the matter between:

RORY WILLIAMS	First Applicant
JEDD WILLIAMS	Second Applicant

and

GRANT STEWART WILLIAMS N.O.	First Respondent
RAYMOND RIX N.O.	Second Respondent
VIVIA FRANCIS WILLIAMS (and all persons who occupy the property through 1st, 2nd and 3rd respondents)	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent

Coram: Justice J Cloete

Heard: 29 April 2021

Delivered electronically: 30 April 2021

JUDGMENT

CLOETE J:

Introduction

[1] This is an opposed application for the eviction of the third respondent from an immovable property owned jointly by the applicants which is situated in Panorama, Cape Town ("the property").

[2] Although relief is sought in the notice of motion for the eviction of the first to third respondents and all persons occupying *'on its behalf'*, there is no dispute that in truth it is only the eviction of the third respondent (the sole occupier of the property) which is sought.

[3] The first and second applicants are brothers. The first respondent is their father who is a co-trustee with the second respondent (his cousin) of The Williams Family Trust ("the trust"). The third respondent is the first respondent's mother and the applicants' paternal grandmother. It is common cause that the third respondent is not, and never has been, a beneficiary of the trust.

[4] The application was duly served on the fourth respondent ("the City") but it has not participated in these proceedings and nor have the applicants made any attempt to obtain a report from the City in relation to alternative accommodation for the third respondent. For convenience I will refer to the first to third respondents collectively as "the respondents".

[5] Given that these are proceedings for final relief, the application falls to be determined on the version of the respondents, taken together with those facts which are admitted by the applicants, unless the respondents' version is so far-fetched and untenable that it must be rejected on the papers as they stand in accordance with the trite Plascon-Evans rule. To this it must be added that if the third respondent is found to be in unlawful occupation, the Court must also adopt a judicial inquisitorial oversight role, given the nature of the proceedings which are based on PIE.[1]

[6] It is thus incumbent upon the applicants to prove that the third respondent is an "unlawful occupier" of the property as contemplated in s 1 of PIE and if so, the Court must be satisfied that it would be "just and equitable" as contemplated in s 4(7) thereof to order her eviction.

Factual matrix

[7] Some 20 years ago, after his father (the third respondent's husband) passed away, the first respondent persuaded her to move closer to his home in Panorama. For this purpose the trust purchased the property as a vacant erf. Using the proceeds of the sale of the home she had shared with her late husband of R150 000, the third respondent funded the construction of the residence on the erf, which was built to meet her requirements, on the understanding that she could reside there for the remainder of her life. The first respondent categorises the arrangement with the third respondent as a lease at her will.

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[1] Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

[8] The first respondent, a property professional, attended to the construction of the residence on the erf, using sub-contractors as required. Upon completion the third respondent took occupation and has resided there ever since. The sum of R150 000 was advanced to the trust as an interest free loan and subsequently repaid in full by the first respondent.

[9] The arrangement between the trust and the third respondent was known to the applicants who are also beneficiaries of the trust along with the first respondent and his former or estranged wife (their mother). This is confirmed in three later emails from the first applicant dated 30 August 2016, 15 November 2017 and 1 January 2018 (none of which were annexed to the founding affidavit) in which he expressed the wish *'to put something in writing'* for the third respondent *'stating that she will always have the property free of charge… in essence usufruct of the property'*; that *'I have not slept trying to think of solutions that involve Gran staying in her house… I say her house because, in my and my brother's mind Granny's house is morally and ethically Granny's house, although legally, it is not'*; and *'we have always said that Granny will stay in that house until her last day'.*

[10] The reason for the applicants' stance that the property is not *'legally'* the third respondent's – which the respondents have not suggested – is that during 2011 the trust sold it to the applicants in equal shares. There is a dispute of fact as to the (unrecorded) terms of that transaction insofar as the third respondent's continued occupation is concerned.

[11] In the founding affidavit the applicants alleged that the oral agreement concluded between them and the trust at the time of the sale was that they would not charge the third respondent rental for so long as they could reside free of any monetary consideration in other properties owned by the trust. Once their relationship with the first respondent became strained during 2017 the trust demanded that they vacate those properties which they duly did. They alleged that *'in so doing the trust thereby breached and/or cancelled and/or repudiated the above agreement'.*

[12] It was further alleged that the applicants thereupon demanded that the trust pay a fair rental for the third respondent's continued occupation of the property, and when it declined to do so, the applicants launched a PIE application for the third respondent's eviction in the magistrates' court (my emphasis).

[13] Although also not annexed to the founding affidavit (which one would have expected of the applicants) the verbal agreement upon which they relied is contradicted by the contents of their own erstwhile attorney's letter of demand dated 17 January 2018 annexed to the answering affidavit. This letter was addressed to the first and third respondents in their personal capacities and paragraph 2 thereof reads as follows:

> *'It is our instructions that you entered into a verbal agreement with our clients in respect of the property… during June of 2011. The agreement determined that you may reside on the property until further notice was given to you or until such time as the agreement had to be renegotiated…'*

[14] The respondents' attorney replied to this letter on 19 January 2018. Having briefly set out the respondents' version, it was stated that as a consequence the third respondent enjoyed a *'usufruct'* over the property of which the applicants were aware. It was further stated that the trust transferred the property to the applicants in 2011, primarily as part of an estate planning exercise. The price was set at the lowest possible level (R1.2 million) for transfer duty purposes and the transfer and attendant costs were paid by the trust as seller.

[15] It is undisputed that the third respondent was not aware of the 2011 transaction until years later when the applicants first sought to evict her. In the founding affidavit the applicants dealt with the issue of the *'usufruct'* by alleging that *'however no such right has ever been registered against the title of the property, or agreed to by me or the second applicant'.*

[16] In a letter from their erstwhile attorney dated 29 January 2018 the applicants changed tack and relied instead on the so-called "reciprocity agreement" allegedly verbally concluded between themselves and the trust in June 2011. They relied on the trust's alleged breach of that agreement as the basis for their entitlement to seek the eviction of the third respondent from the property. They also complained of suffering financially as a result of the third respondent's continued occupation in having to fund the monthly bond instalments in respect of the bond registered over the property to secure the purchase price of R1.2 million; and further that this bond had limited their capacity to raise finance to purchase other properties. This allegation is belied

by the objective fact, reflected in the deeds office search annexed to the founding affidavit (and not dealt with at all by the applicants) that during 2019 they registered a further bond over the property of R1.5 million.

[17] On 8 April 2018 the trust concluded a written lease with the applicants in respect of the property at a monthly rental of R12 000 commencing 1 May 2018 and terminating 30 April 2019, subject to it continuing thereafter on a monthly basis. The trust is reflected as the tenant. No mention is made of the third respondent. It is common cause that the third respondent was also not aware of the conclusion of this lease until much later.

[18] The reason for its conclusion is also in dispute. The applicants maintain that its purpose was to settle the eviction proceedings pending in the magistrates' court. They submitted in the founding affidavit that its conclusion *'undoubtedly confirms that the third respondent never had any usufruct to use or enjoy the property, because if she did… there would have been no need for any lease…'*.

[19] The first respondent's version is that the written lease was not concluded in settlement of those eviction proceedings, and nor did it serve to confirm that the third respondent had no right of occupation. According to him, it was negotiated between himself and the first applicant for the latter's exclusive benefit on the basis that it would assist him in demonstrating affordability in the form of additional income to acquire a property of his own with home loan finance. The so-called rental payments provided in this lease thus had to be

made, which resulted in the trust making these payments for two years. According to the first respondent, the trust gave the first applicant an undertaking that it would pay for that period but not beyond it, and accordingly they ceased upon expiration thereof. No further payments were made after April 2020 as a result.

[20] The first respondent's version is supported by the fact that the first letter of demand emanating from the applicants' current attorney is dated 21 May 2020. It was addressed only to the trust and threatened cancellation of the written lease if payment of alleged arear rental was not made within 20 business days. It was followed by a purported letter of cancellation dated 8 July 2020.

Discussion

[21] During argument *Mr Bence* who appeared for the applicants conceded that no case was made out in the founding affidavit that the third respondent was only entitled to occupy the property as a consequence of the written lease which has come to an end. He was constrained to submit that this was an inference which the Court should draw since, as he put it, the conclusion of the written lease could only have been for the benefit of the third respondent.

[22] However he fairly accepted that during the period of the written lease the applicants caused a second bond to be registered over the property in the sum of R1.5 million. In my view, on the probabilities, this ties in squarely with the first respondent's version of how that lease came to be concluded, and his

version cannot be considered so far-fetched or untenable that it falls to be rejected.

[23] There can be little doubt that at the time the property was transferred to them, and for many years thereafter, the applicants were well aware of the arrangement in terms of which the third respondent occupied the property, even if not privy to the finer details. Even if any reciprocal arrangement came into effect upon transfer of the property to the applicants as they allege, this was one concluded between themselves and the trust and the third respondent had no part of it.

[24] Self-evidently, the trust could not have waived the third respondent's right to continued occupation in these circumstances, and there is no suggestion that the third respondent herself has done so.

[25] Both counsel made submissions on how best the third respondent's occupation of the property should be categorised insofar as her pre-existing arrangement with the trust is concerned. *Mr Bence* submitted that it could not be a lease at will since one of the essential elements of a lease is the payment of rental (save in certain limited circumstances in relation to leases of agricultural land which are not relevant for present purposes).

[26] On the other hand *Mr Rogers* who appeared for the respondents relied on *Rubin v Botha*[2] and the commentary thereon in Kerr's Law of Sale and Lease[3] where it is stated that:

> *'…the respondent purported to lease to the appellant and his partner a piece of land for a period of ten years. No money was to pass but the purported lessee was to erect a dwelling house, stable and fowl-run for which no compensation was to be claimable at the end of the lease. In the court* a quo*, Smith J said:*
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> > *I do not think that the plaintiff can be regarded otherwise than as a tenant merely because he was under no obligation to pay rent [in money], but intended that the buildings he erected should become the property of the lessor at the expiration of 10 years and so to compensate the latter for the use and occupation of the land on which the buildings were erected…*
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> *In the Appellate Division, De Villiers CJ, with whom Maasdorp JA concurred, proceeded on the same basis, but noticed a statutory bar to the validity of the agreement. He said:*
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> > *That lease proved to be null and void by reason of its not being notarial…*
>
> *The case could not have been disposed of in this way if the contract had not been considered to be a valid lease in all other respects.'*

[27] The third respondent clearly contributed to the increase in value of the property as the result of her capital injection of R150 000 for purposes of construction of the residence thereon. She had already resided in the property for a period in excess of 10 years when it was sold by the trust to the applicants below market value. They received the benefit of the capital growth as a direct consequence of the third respondent's financial contribution and continue to do so.

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2 1911 AD 69.
3 4ed at 361.

[28] In the replying affidavit the first applicant himself admitted having invited the trust to repurchase the property for an amount of R2.2 million during 2018, which according to him was below its municipal value. This accords with the first respondent's averment that the municipal valuation of the property in 2018 was R2.35 million. Logic dictates that the property's current value must be more than R2.7 million given the granting of approval for registration of the second bond of R1.5 million in 2019.

[29] In my view therefore, as submitted by *Mr Rogers*, the arrangement between the trust and the third respondent at the time of her taking occupation is indeed capable of being construed as a lease. This would have been binding on the applicants when they purchased the property under the principle *'huur gaat voor koop'*.

[30] Section 1 of the Formalities in respect of Leases of Land Act[4] reads in relevant part as follows:

> *'**1 Formalities in respect of leases of land***
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> *(1) Subject to the provisions of subsection (2), no lease of land shall be invalid merely by reason of the fact that such lease is not in writing.*
>
> *(2) No lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee… or which is renewable from time to time at the will of the lessee indefinitely… shall, if such lease be entered into after the commencement of this Act, be valid against… a successor under onerous title of the lessor for a period longer than ten years after having been entered into, unless…*

[4] 18 of 1969.

> *(b) the aforesaid… successor at the time of… entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof, as the case may be, knew of the lease.'*

[31] On the evidence before me I am persuaded that the third respondent's occupation of the property also meets the requirements of s 1 of the aforesaid Act, although I would prefer to categorise the nature of the lease as one concluded for the natural life of the lessee rather than renewable from time to time at her will on an indefinite basis.

[32] Having regard to all of the above, I conclude that the applicants have failed to prove that the third respondent is an "unlawful occupier" for purposes of PIE, and I do not intend dealing with the alternative arguments raised on behalf of the respondents in relation inter alia to a *precarium*.

[33] If I am wrong in reaching this conclusion I nevertheless believe it prudent to deal with the *'just and equitable'* requirement in s 4(7) of PIE in order to avoid the potential of piecemeal litigation, with reference to the established principles set out in *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others*[5] and *Occupiers, Berea v De Wet NO & Another*[6].

[34] On the undisputed facts the third respondent is 89 years of age. She has no significant cash reserves. She is a State pensioner and receives another small stipend. She has no assets apart from furniture and effects.

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5 2012 (6) SA 294 (SCA).
6 2017 (5) SA 346 (CC). See also *Phillips v Grobler and Others* [2020] 1 All SA 253 (WCC).

[35] On 20 February 2021 she was diagnosed by geriatric psychiatrist Dr Surita Van Heerden as suffering from both an adjustment disorder with significant depressed mood triggered by family conflict and concerns about her living arrangements, as well as a mild neurocognitive disorder suggestive of early dementia with significant impairment in memory, orientation and language function.

[36] She is also in poor physical health and takes chronic medication for atrial fibrillation and congestive heart failure. She thus falls into one of the most vulnerable categories envisaged in s 4(7). The Constitutional Court has recognised as relevant the emotional trauma of being evicted from one's home.[7] In a case such as the present, that trauma would undoubtedly be severe.

[37] The applicants' attitude is that the first respondent must find alternative accommodation (presumably at his own expense or that of the trust) for the third respondent, which he disputes he is able to do. In any event this misses the point, since the applicants themselves have an obligation to place all relevant information before the Court insofar as they reasonably can, including potential suitable and affordable alternative accommodation for the third respondent.

[38] They have not done so. They have not even bothered to obtain a report from the City, or disclosed information relating to the factors in regulation 73(2) of

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[7] *Machele v Mailula* 2010 (2) SA 257 (CC) at para [30].

the Covid-19 alert level 1 lockdown regulations under the Disaster Management Act.[8]

[39] On the other hand it is not suggested by either applicant that they require the property for purposes of their own occupation. They wish to rent it out or sell it. Both applicants are successfully and gainfully employed in their chosen fields of work, live comfortably and are well able to provide for their respective immediate families.

[40] There is furthermore nothing to prevent the applicants from selling the property (subject to the third respondent's continued occupation) and any potential prejudice they may suffer as a result of such occupation is likely to be of limited duration given the harsh reality of the third respondent's life expectancy which is around 4 years.[9]

[41] I am accordingly firmly of the view that in any event it is not just and equitable for the third respondent to be evicted and it is therefore not necessary to consider a just and equitable date for eviction in terms of s 4(8) and (9) of PIE.

Costs

[42] The respondents seek a punitive costs order against the applicants, advancing two reasons. The first is that the trust should never have been joined as a party. The second is the manner in which the applicants have

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8 Section 57 of 2002.

9 https://www.saipa.co.za/wp-content/uploads/2019/12/Taxation-at-Death-Annexure-7-life-expectation-tabe-0001.pdf.

treated the third respondent. As to the first, while it was open to the trust not to have opposed the relief sought, common sense dictates that, given the manner in which the applicants set out their case in the founding affidavit, there was always a risk that relief of some kind might have been granted against the trust. As to the second, this is a family feud in which the third respondent has unwittingly been caught up. To me what is of greater importance is that the applicants clearly did not play open cards with the Court in their founding papers. They distorted the true position and opportunistically tried to avoid grappling with it for their own advantage. To my mind this warrants a punitive costs order.

[43] **The following order is made:**

1. **The application is dismissed.**
2. **The applicants shall pay the respondents' costs on the scale as between attorney and client, jointly and severally as taxed or agreed, the one paying, the other to be absolved, and including any reserved costs orders.**

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J I CLOETE