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

Case No.:A73/2021

In the matter between:

GIDEON LENNOX PETER	Appellant
and	
MTHOZAMI INNOCENT NKONDE	First Respondent
BUSISIWE MAJIKI	Second Respondent
CITY OF CAPE TOWN	Third Respondent
CAPE TOWN MUNICIPALITY	
ALL OTHER UNLAWFUL OCCUPANTS	Fourth Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 27 MAY 2022

MANGCU-LOCKWOOD, J

I.INTRODUCTION

[1] This is an appeal against a judgment and order of Francis, AJ (as he then was) in which the appellant's eviction application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*"PIE"*) was dismissed

with costs. The appeal comes before us with leave of the Supreme Court of Appeal (*"SCA"*).

[2] The first, second and fourth respondents' (*"the respondents"*) heads of argument were delivered out of time, and after considering the condonation application, condonation was granted.

II. THE RELEVANT BACKGROUND

[3] The eviction application concerns state-subsidised property located at *Erf* [....] Philippi (*"the property"*) which is colloquially referred to as an RDP house. The property was allocated to the appellant in about 2002, but the registration of its transfer to the appellant was only effected by the Provincial Government of the Western Cape (*"the Provincial Government"*) on 28 October 2014. By that date, the appellant had long since vacated the property, having left the second respondent in occupation since 2003. The exact nature of the second respondent's occupation is in dispute. However, it is not in dispute that on 3 April 2010 the second respondent vacated the property and sold it to the first respondent, who continues to live at the property together with his wife and two minor children.

[4] The appellant brought the eviction application in April 2018, on an urgent basis, attaching a deed of transfer dated 28 October 2014 which indicated that the property was registered in his name on that date. The basis for the eviction application was that the appellant had *"never entered into any agreement of whatsoever nature with first, second and further respondents to occupy my property"*.

[5] In response, the second respondent averred that she had bought the property from the appellant in 2003 for an amount of R15 000, which she paid in two instalments of R7000 and R3000, and later by advancing an amount of close to R5000 for repairs to the appellant's motor vehicle. As proof of the agreement to purchase the property, the second respondent relied on two affidavits which she claimed were deposed by herself and the appellant on 1 May 2003, as well as a deed of sale which she alleged had been concluded by her and the appellant on 17 June 2003 (*"the documents"*).

[6] The appellant denied the second respondent's version, including the documents she relied upon. Faced with this material dispute of facts, the court *a quo* referred the issues relating to the authenticity of the documents, the conclusion of the deed of sale, and the performance in terms thereof to oral evidence.

[7] In order to establish the authenticity of the documents, the second respondent led the evidence of a forensic handwriting examiner, Ms Anne Marie Chantelle Salamon (*"the expert"*), who was the only expert witness called. Based on the evidence and report of the expert, the court *a quo* held that the documents were authentic. Further, on the basis of the documents, the court *a quo* held that the respondents were not unlawful occupiers as defined in PIE in that the second respondent had lawful reason to occupy the property, was the person in charge thereof, and had legal authority to grant permission to the first and fourth respondents to occupy the property. Finally, the court *a quo* held that it was not just and equitable to evict the respondents.

III. THE APPEAL

[8] The appellant has raised numerous grounds of appeal. Many of them revolve around the question of ownership and lawful occupation of the property by the respondents, including the validity of the deed of sale between the parties in light of the requirements of the Alienation of Land Act 68 of 1981.

[9] In our view, the question of ownership and lawful occupation in this case must be determined by reference to the provisions of section 10A of the Housing Act 107 of 1997, which provide as follows:

> **"10A Restriction on voluntary sale of state-subsidised housing**
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> (1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that

person unless the dwelling or site has first been offered to the relevant provincial housing department.

(2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.

(3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.

(4) No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor."

[10] Section 10A and 10B of the Housing Act were introduced in 2001 by the Housing Amendment Act 4 of 2001, came into effect on 15 June 2001, and are applicable to the circumstances of this case. The provisions of section 10A(1) are peremptory. Any sale, lease or other type of alienation of state-subsidised property is strictly prohibited within the first eight years of acquiring it unless the property has first been offered to the relevant provincial housing department. Moreover, once the person who acquired the property vacates it the relevant provincial housing department is deemed to be the owner of the property.

[11] It is common cause in these proceedings that the appellant left the property in 2003, after it was allocated to him in about 2002, and accordingly, the time-limit prohibiting alienation within the first eight years finds application. Further, the Provincial Government was not offered the property prior to the appellant's alienation - whether by agreement of sale or lease between the parties - in terms of section 10A(1).

[12] The result is that neither the second nor the first and fourth respondents acquired any rights in the property, as a purchaser nor as a tenant. In terms of section 10A(3), the ownership of the property reverted to the Provincial Government when the appellant moved out of the property. The alleged deed of sale between the appellant and second respondent, which amounts to alienation of the property, constituted a nullity. [1] The same applies to the lease agreement which was belatedly alleged by the appellant during his oral evidence. And the same applies to the sale agreement concluded between the second and first respondents. All these agreements were void *ab initio*.

[13] All of the above means that neither the appellant nor the second respondent nor the first respondent can be considered 'owners' as defined in the PIE Act. The appellant, although he possesses a title deed, lost his right of ownership when he abandoned the property in 2003, which was less than eight years after being allocated the property. As already mentioned above, in terms of section 10A(3), the Provincial Government is the lawful owner that is entitled, in terms of the PIE Act, to bring eviction proceedings.

[14] This brings into sharp focus the *locus standi* point raised on behalf of the respondents. It is understandable that the court *a quo* declined to determine this point because it was raised for the first time in argument, after oral evidence had been led, and had not been foreshadowed in the papers, including by an application for declaration of invalidity of the deed of sale. In fact, as the court *a quo* pointed out to the respondents' counsel, this belated argument appeared to be in contradiction to the second respondent's reliance on the deed of sale. As a result, the court *a quo* held that it was a collateral issue, and declined to determine it.

[15] In our view, the court *a quo* erred in holding that this issue is a collateral issue, although, given the circumstances in which it was raised, it is understandable. The application of the provisions of the Housing Act is dispositive of the parties'

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[1] See also *Abdul v Williams and Others* (CA227/2018) [2019] ZAECGHC 103 (29 October 2019); and *Tapala and Another v Tlebetla and Others* (89400/16) [2019] ZAGPPHC 46 (22 February 2019).

respective cases both in the court *a quo* and on appeal. Most importantly, the effect of the application of the relevant provisions of the Housing Act is that the appellant did not have *locus standi* to bring the eviction proceedings, and the application should have been dismissed on that basis.

[16] The fact that the Provincial Government was not joined as a party to the proceedings means that the court had no basis on which to determine the merits of the eviction of the respondents - including whether they are unlawful occupiers and whether it is just and equitable to evict them. In terms of the PIE Act, it is an 'owner' or a 'person in charge of land' that is entitled to bring eviction proceedings.

[17] In the circumstances, I propose to make the following order:

The appeal is dismissed with costs.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree and it is so ordered.

E BAARTMAN
Judge of the High Court

I agree.

M SAMELA
Judge of the High Court