

SOUTH AFRICA / JUDGMENT

CUF Properties (Pty) Ltd v Mthimkulu and Others (2011/53946) [2018] ZAGPPHC 491 (23 April 2018) [2018] ZAGPPHC 491

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

2011/53946

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IN THE HIGH COURT OF SOUTH
AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 2011/53946

Date: 23 April 2018

In

the matter between:

CUF
PROPERTIES(PTY)
LTD
Applicant
and
TSIETSI
SIMON
MTHIMKULU
1st
Respondent
NOMSA
JOHANNA
MTHIMKULU
2nd

Respondent
CITY
OF TSHWANE METROPOLITAN
MUNICIPALITY
3rd
Respondent

JUDGMENT

1. Applicant has launched an application for the eviction of 1st and 2nd Respondents from the immovable property situated at [...] Pretoria ("the property").
2. No relief is sought against 3rd Respondent.
3. There are two issues that require determination, firstly whether applicant has proved its ownership of the property, and secondly, whether it is just and equitable, given the provisions of sections 4 (6) and (7) of The Protection from Illegal Evictions and Unlawful Occupations of Land Act, 1998 ("the PIE Act"), that Respondents be evicted from the property.

OWNERSHIP

4. In the founding affidavit applicant alleges that it purchased the property on 31 March 2009 from the then owners, CC Trade 57 CC. The property subsequently becomes registered in its name by the Registrar of Deeds on 28 February 2011.
5. In support of its allegation that it is the registered owner of the property applicant attached a Windeed enquiry, and a deed of transfer. The Windeed enquiry reveals that the property was registered in applicant's name on 28 February 2011.
6. An application for eviction is by its very nature vindicatory in nature, and an applicant is required to prove its ownership of the property from which it seeks to evict the respondent. [1] It has to do so by providing admissible evidence of its ownership. Applicant had certain difficulties.
7. The deed of transfer does not bear a date. It is incomplete, in that the last page bearing the registrar's signature is missing. Of further concern is that the front page of the deed bears a stamp that states that the property was transferred to one T Phahlane and S Nkosi. That stamp is crossed out and the words "in error" are inserted in manuscript.
8. A deed of transfer is a public document,[2] and has to be proved in accordance with the normal rules of evidence. Section 18 (1) of the Civil Proceedings Evidence Act, Act no. 25 of 1965 creates a method of proving a copy of a public document, and it reads as follows:

"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be an examined copy or extract or purporting to be signed and certified by the officer to whose custody the original is entrusted, shall be admissible in evidence."

9. The deed of transfer that applicant relies upon is not so signed and certified. The Court invited applicant to make the original deed of transfer available for inspection. The complete document was handed up. Respondent did not take any issue with the title deed that was handed up, but rather argued that the underlying transaction was

tainted, and that even though the property was registered in applicant's name, ownership had not transferred.

10. Respondent relied on two cases in support of its argument. In *Rigacraft CC v Pholoso and another*[3] applicant sought the eviction of respondent on the basis that it was the owner of an immovable property. In that matter the property had been fraudulently transferred in the so-called "Brusson" scheme in which a number of investors were duped into signing transfer documents. The court found that the underlying transaction was tainted by fraud, which vitiates consent, and that ownership had consequently not passed.
11. In *Nedbank Ltd v Mendelow and another* NNO[4] the SCA held that it is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer.
12. Both those cases are distinguishable on the facts from this matter. In both the cases relied upon by respondent, the underlying transaction, and the resulting transfer of ownership, was the result of a fraud.
13. That is not the case in this matter. There is a dearth of evidence as to what transpired in the period after respondent entered into a payment arrangement with Peoples Bank (Nedcor) in 1998, and until transfer of the property was effected to Nedcor in 2000. Respondents' counsel has argued that 1st Respondent had entered into a payment arrangement with the bank pursuant to having fallen in arrears with his bond obligations, and that he was given the assurance that his property would not be sold.
14. The Peoples Bank letter, that 1st Respondent contends supports his version, refers to a lease having been entered into between Peoples' Bank and 1st Respondent, and it states that his house would not be sold if he kept to the payment arrangement. There are no details as to what the exact arrangement was supposed to be. It seems to me to be more probable that applicant's contention is correct, that by that time, when the letter was written, the property had already been bought in by the bank pursuant to a judgment against respondents.

15. Nevertheless, respondent has not taken the Court into his confidence. One would expect of a respondent ,who wishes to attack the underlying transaction upon which ownership was transferred, to proffer some factual basis for his attack. There is no evidence at all that the registration of the property in the name of the bank in 2000, or the eventual registration in the name of applicant in 2011 was fraudulent. The absence of such evidence distinguishes this matter from the cases relied upon by respondents.
16. 1st Respondent also does not provide any explanation why, if the property was indeed fraudulently transferred, he has not in the seven years since this application was served on him, taken steps to have the transfer of ownership set aside.
17. I find therefore that ownership lawfully passed to applicant upon registration of ownership in the deeds office, and that applicant is the lawful owner of the property.

COMPLIANCE WITH THE PIE ACT

18. Section 4 (6) and (7) of The Protection from Illegal Evictions and Unlawful Occupations of Land Act, 1998 requires a Court to consider the rights and needs of the elderly, children, disabled people and households headed by women who reside on the property, when considering whether it is just and equitable to grant an eviction order.
19. The duty of a Court, when considering whether to evict or not, was dealt with at length in *Occupiers of Erven 87 and 88 Berea v De Wet N.O.*[5]It was held:

"It deserves to be emphasized that the duty that rests on the court under section 26 (3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all the relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction..... The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a)."

20. The information provided to Court in this application is paltry, to say the least. Applicant did in fact attempt to inspect the property on one occasion but was prevented from doing so. Applicant alleges that it is not:

"aware of any special circumstances relating to the needs of elderly, children or disabled persons residing in the property other than to state that the Respondents are running a 'Shebeen and Spaza Shop ' from the property. Hence it is clear that the 1st and 2nd Respondents earn an income".

21. This is the full extent of the evidence presented by applicant relating to the circumstances of the occupants of the property. There is no evidence that applicant attempted to make further enquiries regarding the occupants and their circumstances
22. 1st Respondent has not dealt with his circumstances at all. His response to the extract quoted above is merely to deny same. Applicant has urged the Court to find that, because of the fact that 1st Respondent has not disclosed circumstances relevant to the eviction

order, applicant is entitled to its order. Applicant has relied on Johannesburg Housing Corporation v Unlawful Occupiers of Newtown Urban Village[6], a judgment of Willes J (as he then was).

23. I have much sympathy with the argument that an applicant is often in an invidious position and unable to provide much information regarding the unlawful occupants of a property. However, it seems to me that it is not sufficient to say "I do not know" when dealing with the occupants' circumstances. The Constitutional Court in the Occupiers of Erven 87 and 88 Berea matter makes it clear that there is a positive duty upon all the parties, specifically on the legal representatives, to provide all the information in their possession, so that the court can exercise its discretion properly.
24. What is known at this stage is that 1st Respondent is 79 years of age. Applicant's argument that he runs a shebeen from the property, and that he consequently has an income, is disingenuous in that, if 1st Respondent is evicted, he obviously will not be able to run his business from the property, and he will not have an income.
25. Whilst applicant has made some effort to present some facts to Court, respondents' representatives have utterly failed in the obligation

placed upon them by the Berea matter. I believe that, before an order is granted, it is in the interests of justice that respondents be given an opportunity to place evidence before Court in respect of the matters dealt with in section 4 (6) and 4 (7) of the PIE Act.

26. In the result, I make the following order:

26.1 A rule nisi is hereby issued with return date, 19 JUNE 2018, calling upon respondents to show cause, if any, why the following order should not be made final on the return date:

26.1.1 The respondents, and all persons claiming right of occupation through or under them, to the property: [...], are evicted from the property;

26.1.2 Respondents and all those persons mentioned above shall vacate the property within 30 days of the above return date, failing which the Sheriff of Court is authorized and ordered to evict them.

26.2 Respondents may file supplementary affidavits within 15 (fifteen) days hereof where after applicant may reply within 10 (ten) days.

26.3 The supplementary affidavit referred to above shall only deal with the provisions of section 4 (6) and 4 (7) of the Prevention of Illegal Evictions from, and Unlawful Occupations of Land Act, 1998, specifically relating to the circumstances of the persons currently residing on the property.

26.4 1st and 2nd Respondents shall pay the costs of the application to date on an opposed scale, jointly and severally, the one paying the other to be absolved.

Swanepoel J

Acting Judge of the High Court,

Gauteng Division

[1] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA (A) at 82

[2] Northern Mounted Rifles v O'Callaghan 1909 TS 174 at 177

[3] An unreported case no. 6967/2014 heard on 8 May 2015 in the Gauteng Division

[4] 2013 (6) SA 130 (SCA) at 135

[5]

[2017] ZACC 18 (heard on 14 February 2017)

[6] [2013] 1 ALL SA 192 (GSJ)

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