

SOUTH AFRICA / JUDGMENT

Dlamini v Chuene and Others

(61528/2021)

[2024] ZAGPPHC 332 (15 April 2024)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa

CASE / FILE NUMBER

61528/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE Number: 61528/2021

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

15/04/2024

In the matters between: -

TEBOGO LIZA DLAMINI

APPLICANT

And

JM CHUENE

FIRST RESPONDENT

UNLAWFUL OCCUPIERS RESIDING AT

ERF 6[...],2[...] N[...] CRESCENT

NELLMAPHIUS, EXTENTION 6

TOWNSHIP

SECOND RESPONDENT

CITY OF TSHWANE MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

BAQWA, J

Introduction

- [1] The applicant seeks an eviction order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) as amended, against the first and second respondents.
- [2] The applicant has complied with the requirements of PIE in that she obtained an order in terms of section 4 (2) thereof on 18 March 2022.
- [3] The first respondent, an adult female of erf 6[...], Nellmapius, Extension 6 Township, Pretoria opposes the application for eviction.
- [4] The second respondent is the City of Tshwane Metropolitan Municipality situated at 3[...] M[...] Street, Pretoria.

Background

- [5] On 3 October 2016 applicant bought the immovable property situated at Erf 6[...], Nellmapius, Extension 6 Township, Pretoria (the immovable property for sum of R170 000.00)
- [6] She viewed and inspected the immovable property and was satisfied with it.
- [7] When she again approached it during 2016 she noticed that there were people residing on it. The first respondent informed her that she had no right and title to the property as she had bought the property from Oupa Mogale. At that time the property was already transferred and registered into her names.
- [8] Upon approaching Oupa Mogale he assured her that he did not sell the house to the first respondent and undertook to evict the first respondent and the unlawful occupiers. However, he failed to comply with his undertaking.
- [9] On 4 November 2019 the City of Tshwane connected the services of the immovable property to the applicant’s name.

[10] Despite numerous requests the first and second respondents refused to vacate the premises until the applicant decided to launch the present application.

[11] On 9 December 2022 applicant's attorneys received a letter from Sihlangu Attorneys indicating that their client purchased the property from Oupa Mogale on 4 August 2009.

Prejudice

[12] The applicant submits that she and her minor children have no alternative accommodation and that the first and second respondent infringe on her constitutional rights of access to housing and that she is prejudiced by their failure to vacate the premises.

Respondent case

[13] The respondent entered into a contract of sale of the immovable property in question on 4 August 2009 and the purchase price was R30 000.00. The seller had been allocated the property by the housing department even though it had not been transferred into his name.

[14] Subsequently to the said sale the first respondent made several efforts to have the property transferred into her names but the seller could not be located.

[15] In the interim the first respondent made improvements to the property up to its current state and at the time of the sale (to the applicant) the first respondent had been residing on the property for about ten years.

[16] The applicant believes she is entitled to ownership of the property as she is the current registered owner with a title deed; the applicant seeks no order from this court for declaration of the 2009 sale agreement invalid and for it to be set aside.

[17] It is further the applicant's case that the 2009 sale agreement could not have been valid due to the restriction in section 10A of the Housing Act.

[18] In *Brisley v Drotsky*[1] the court held that in terms of section 26 (3) of the Constitution, from PIE partly derives "no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances."

[19] It is submitted by the first respondent that PIE requires a party seeking to evict another from land to prove not long only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the provision and that on a consideration of all the relevant circumstances an eviction order is "just and equitable".

[20] The relevant circumstances as mentioned in *Brisley*, so the first respondent argues, include the situation the applicant and first respondent find themselves in, that the seller initially sold the property to the first respondent, and later sold the property to the applicant despite the fact that they had entered into a written agreement and the purchase price paid.

Compliance with s10A and 10B of the Housing Act 107 of 1997

- [21] On 4 August 2009 Oupa Mogale did not have a right or title to the immovable property to sell it to the first respondent. The property was only transferred and registered in his name on 14 January 2013, some four years after he sold the property to the first respondent. He could thereof not have been able to transfer more right than he had to another. By the same token the first respondent could not acquire any rights from him.
- [22] The provisions of s10A (1) of the Housing Act 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. Once the person who acquired the property vacates it, the relevant housing department is deemed to be the owner of the property. There is no evidence that Oupa Mogale resided on the property when he sold the property to the first respondent.
- [23] The peremptory language and the use of the word “shall” in sections 10A and 10B means the sale, lease or other type of alienation of state subsidised property is strictly prohibited and the conclusion of transactions in breach of the restrictions contained in those sections are a nullity. *Abdul v Williams and Others*[2]
- [24] In compliance with the Act, the Gauteng Department of Housing granted consent for the sale of the immovable property to the applicant on 10 December 2018.

Abstract approach

- [25] In *Legator Mckenna v Shea and Others* [3] The Supreme Court of Appeal held that the abstract theory of transfer applies to the transfer of both immovable and movable property. Since there was no defect in the real agreement, the property was validly transferred to the applicant, (at para 21-24).
- [26] The abstract approach is further endorsed in the judgment of Shongwe AJ in *Oriental Products (Pty) Ltd v Pregma 178 Investment Trading CC*[4] as follows:

“It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are ad idem regarding the passing of ownership.”

- [27] The applicants have complied with the procedural requirements of the PIE Act regarding unlawful occupiers who have no express or tacit consent of the applicant to reside on the property.

Just and Equitable determination

- [28] In these circumstances the court is called upon to engage upon a sensitive process of balancing the rights in order to achieve a just and equitable outcome.
- [29] The first respondent is already aware of the fact that the applicant is the registered owner since 2019 and the eviction application was served on the first and second respondent on 2 March 2022.

[30] The first respondent has tendered evidence of her personal circumstances as alluded to above. What is notable is that she is an elderly person with children and grandchildren who have resided on the property for about ten years. The challenge is that the circumstances of the applicant, even though she is a younger person who is still employed, their circumstances as described by respondent's counsel are similarly as dire.

[31] It is cold comfort to make reference to the possibility of recourse against Oupa Mogale and that first and second respondent could bring their special circumstances to the Housing Department where Oupa Mogale works (and possibly is still employed).

[32] It is true that the issue of availability of alternative accommodation is complicated where eviction is requested by a private

owner of property relying on her constitutional rights to property. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [5] the Constitutional court held that a private person's "rights as property owners must be interpreted within the context of the requirement that eviction must be just and equitable."

[33] In the absence of information or evidence by the first and second respondents regarding the availability of alternative accommodation with family members this court is unable to make any order in this regard.

Prejudice to applicant

[34] The applicant's circumstances are dire as alluded to above. She is living in a room with her daughter and her other child has to reside with family members due to the fact that he cannot be accommodated in the same room.

[35] The applicant is currently liable for municipal service charges without being able to access the property.

[36] It was in *Marlboro Crisis Committee v City of Johannesburg* [6] that it was said "it must be instilled in the minds and consciences of potential land grabbers and unlawful or illegal occupier, that land-owners and contractors of space are bearers of Constitutional rights and that conduct violating those rights tramples not only on them but on all."

[37] Applicant submits and I accept that her right to be arbitrarily deprived of a home as guaranteed in section 26 (3) of the Constitution is currently violated and she has no alternative remedy.

[38] The first respondent has had ample opportunity to obtain alternative accommodation or challenge the validity of the applicant's title deed as they obtained knowledge of the eviction application on 2 March 2022.

Conclusion

[39] In light of the above I conclude that a proper case for the eviction of the first and second respondent has been made out in terms of the PIE Act.

Order

[40] In the result, I make the following order

40.1 That the First and Second Respondent and all who resides with them are hereby directed to vacate the property known as 2[...] N[...] Crescent, ERF 6[...], Nellmapius, Extension 6 Township, Gauteng (the “property”).

40.2 That the First and Second be ordered to remove all their personal belongings from the said property within 90 days from the date of this order

40.3 In the event of the First and Second Respondent failing to comply with the provisions of paragraphs 1 and 2, within 90 days from the date of this order, the Sheriff of the High Court or his Deputy is hereby authorized to remove the First and Second Respondents and their belongings from the property situated at 2[...] N[...] Crescent, ERF 6[...], Nellmapius, Extension 6 Township, Gauteng (the “property”).

40.4 The First and Second Respondents are directed to pay the costs of the application.

SELBY BAQWA

JUDGE OF THE HIGH COURT

Date of hearing: 7 February 2024

Date of judgment:

Appearance

On behalf of the Applicants Adv M Steenekamp Instructed by Legal Aid SA, Pretoria Office
advsteenekamp@yahoo.com On behalf of the Respondents Adv GW Mashele Instructed by GW
Mashele Attorneys gwm607@gmail.com enquiries@gwmattorneys.co.za

[1] 2002 (4) SA (1) SCA.

[2] (CA 227/2018) [2019] ZAECGHC 103 (29 October 2019) para 23.

[3] (143/08)

[2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 ALL SA 45 (SCA).

[4] CC 2011 (2) SA 508 (SCA) para 12.

[5] 2012

(2) SA 104 (CC).

[6]

[2012] ZA GPJAC 187 para 100.

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Prepared on 9 October 2026 · Esheria