

SOUTH AFRICA / JUDGMENT

Dlamini v Lipholo and Another (A166/2009) [2010] ZAFSHC 54 (27 May 2010) [2010] ZAFSHC 54

COURT

Free State High Court, Bloemfontein

BEFORE

K.J. Moloi, S. Ebrahim

CASE / FILE NUMBER

A166/2009

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IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : A166/2009

In matter between:-

KEDIDIMETSE DLAMINI Appellant

and

NICODEMUS LIPHOLLO 1st Respondent

MOTSHIDISI K. M. LIPHOLLO 2nd Respondent

HEARD ON: 3 MAY 2010

JUDGMENT

BY: EBRAHIM S, J et K.J. MOLOI, J

DELIVERED ON: 27 MAY 2010

JUDGMENT

K J MOLOI, J

- [1] This is an appeal against the judgment of the magistrate, Bloemfontein, granting an eviction order in favour of the respondents against the appellant together with ancillary relief. The eviction order was granted under the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No. 19 of 1998 (PIE). The grounds of appeal were several but at the hearing only the question of unlawful occupation of the property by the appellant (which issue was specifically raised by the court) (1.1); failure by the court a quo to consider the rights of the appellant and other occupants of the property (1.7) and failure by the court to take all the relevant

circumstances into consideration for purposes of judgment, were argued.

- [2] The first respondent and the second respondent are married to each other in community of property. They are joint holders of a Deed of Transfer of erf No. 50588 Mangaung township in Bloemfontein. They applied to the magistrate's court for an order evicting the appellant and all the other people occupying the said property unlawfully. They alleged that they agreed to the appellant's

occupation of the property during September 2004 on condition the appellant paid the municipality water and electricity accounts as well as the rates and taxes. The appellant failed to do so. They consulted an attorney who wrote a letter to the appellant to vacate the property as the appellant was in unlawful occupation without stating on which grounds in the face of the agreement they referred to. The said letter did not state whether the agreement was thereby being cancelled. The appellant did not comply with the said demand and hence the application for eviction was launched.

- [3] The appellant acknowledged receipt of the demand but alleged she only became aware of the respondent's purported ownership of the property on receipt of the demand. She was then 29 years old, unemployed, was born on the property, grew up there living with her family, her father, Israel Dlamini, was the holder of a residential permit issued by the local authority and has since passed away in

2004. She continued to live on the property with her children aged 6, 4 and 2 as well as her male friend. She could not understand how the respondents got to be registered as owners of the property because only her late father, as a permit holder, was entitled to have the right to the Deed of Transfer, and, herself, as the only child, she was entitled to have the property transferred to her in succession. She suspected fraudulent activity leading to the registration of the property in favour of the respondents. The second respondent was her cousin and could have known her deceased father had no money to effect the transfer of the property into his name and consequently schemed the transfer to herself and her husband. She attached to her answering affidavit a copy of the said residential permit dated 29th April 1999. She submitted that it would not be in the interests of justice if she was ordered to vacate the property and it would be impractical for her to live in Thaba Nchu where her male friend had property. Her male friend worked for the municipality of

Bloemfontein in the fire department and her eldest child was attending a local school in Bloemfontein. She requested the court a quo to give her an opportunity to challenge the transfer of the property to the respondents and not grant an order of eviction.

[4] In their reply the respondents also attached a residential permit for the same property dated 4th March 1986 with a date stamp showing 23rd March 1997(sic). The permit still indicated the rightful holder as Israel Dlamini, the appellant's father. The respondents further stated that the appellant's contention of fraudulent activity was unfounded as the municipality sold the property to them on the 12th August 1997 as per Deed of Transfer. They contended further that the appellant's circumstances did not justify her unlawful

occupation of their property. They also alleged having engaged the appellant with a view to voluntary evacuation of the property without success.

[5] Based on the above facts and arguments the magistrate found that as the respondents attached a copy of the Deed of Transfer to their founding affidavit; they were "...true owners of this property, what the respondents are saying that this registration is defective, cannot be taken by this court it may fall within the jurisdiction of another court but clearly not the magistrate court, as a result I am satisfied that the respondent is an unlawful occupier of this property" and made an order of eviction. Though the application was served on the Mangaung Municipality, no papers were filed nor appearance made on its behalf. No further enquiries were made. The appellant and any other unlawful occupant were ordered to vacate the said property on/or before Friday the 26th February 2009. The order was made on 29th January 2009.

[6] Before us Adv Johnson, on behalf of the appellant, argued the magistrate failed to consider the factors mentioned in section 4 (7) of PIE totally before making the order she made. According to that section, the court may order eviction only if it is of the opinion that it was just and equitable to do so and only after considering all the relevant circumstances including "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 woman." He argued that since the municipality did not comment or was required to do so before the order was made; the rights and needs of the appellant, a single mother of three children aged 6, 4 and 2 were not considered at all; the magistrate erred in making the order. Adv Johnson further argued that it was not just and equitable for the magistrate to have ordered the appellant to vacate the property in a space of less than a month without taking into consideration all the relevant factors referred to in section 4(9) of PIE including "the period the unlawful occupier and his or her family have resided on the land in question." These factors, it was submitted, were not considered by the magistrate at all.

[7] Adv. Coetzee, for the respondent, on the other hand, argued that the failure by the municipality to respond to the papers filed and to indicate the land where the appellant may be relocated to cannot be held against the respondents. It was not the respondent's duty to provide the applicant with alternative land for relocation. The respondents were entitled to their property that was unlawfully

occupied by the applicant. He also submitted that the appellant's male friend had property in Thaba Nchu where he and the appellant and the appellant's children could resettle. He argued further that the fact that Thaba Nchu was far from Bloemfontein was not good enough reason for the unlawful occupation of the respondent's property by the appellant.

[8] The stark factors and circumstances that were not considered by the magistrate before making the determination, firstly that it was just and equitable to make an order for eviction of the appellant and, secondly, to fix the date for the eviction at less than one month are the following: the appellant was born on the property and lived there with her family for twenty nine (29) years; she was unemployed and was heading her own family of three; the ages of the children were 6, 4 and 2 and the elder one was attending a local school in Bloemfontein; the male friend worked for the fire department in Bloemfontein and might be required to do duty at short notice in an emergency which would be impractical if he (together with the appellant) lived in Thaba Nchu some 70km away; whether or not the appellant, the head of the household still lived together with a male friend or how long that relationship would last; the fact that the appellant alleged that the Deed of Transfer was fraudulently obtained by the respondents in view of the fact that both the appellant and respondents submitted proof that the property was held by the appellant's father, Israel Dlamini, by virtue of a residential permit issued to him by the local authority, in the case of the appellant (annexure A to her answering affidavit), issued on 29th April 1999 and in the case of the respondents, dated 4th March 1986 with date stamp reflecting 23rd March 1997 (sic), (annexure D to respondent's reply); the fact that according to the Deed of Transfer payment to the municipality by the respondents purported to have been made on 12th August 1997 but the transfer itself took place almost two years later on 21st July 1999; the fact that the transfer of property in the black townships could only be effected to residential permit holders in the absence of a legal sale or donation or other legally recognised causa; and why the Magaung municipality would issue a residential permit to the appellant's father on 29th April 1999 whereas the respondents had paid for the same property already on 12th August 1997, almost two years before.

[9] The provisions of section 4(7) requiring the court to take into consideration all the relevant circumstances are peremptory. It is not only those circumstances enumerated in the section such as the rights and needs of the elderly, children, disabled persons, and households headed by women, that must be taken into consideration. This is clear from the wording of the section by stating that the abovementioned rights and needs should be included. One of the relevant factors that cannot be overlooked is the legality and validity of the Deed of Transfer especially where it is challenged. Accepting such a document as legal and valid

without further

inquiries may lead to untold injustice especially in this country where bribery and corruption abound in state institutions and, in particular, the municipalities. This is evidenced by the numerous cases of this nature dealt with in this particular court. In almost all the instances the previous holders of the residential permits, being the only people entitled to obtain a Deed of Transfer by virtue of a clearly stated government policy, are deceased and their children are evicted from the only home they ever knew all their lives. It should be remembered that in Black townships the right to live on a piece of land was ensured by the local authorities issuing a residential permit to the people who qualified and could be withdrawn at the whim of a superintendent of the township. Only post 1994 it became the government's policy that the holders of residential permits convert them into Deeds of Transfer designed specifically to give them better protection and security of tenure. Deeds of Transfer are not Title Deeds as there was no payment required for the piece of land occupied. Only a holder could convert the permit unless he/she alienated his/her right.

[10] See in this regard the provision of section 16D of the Deeds Registries Act No. 47 of 1937 under the subject Registration of Transfer of right acquired in terms of or under the Black Administration Act No. 38 of 1927. The section provides as follows:

“Despite the repeal of the Black Administration Act, 1927 (Act No. 38 of 1927), by the Repeal of Black Administration Act and Amendment of certain Laws Act, 2005 (Act No. 28 of 2005), and despite the other provisions of this Act and other law, a right originally acquired in terms of or under the Black Administration Act, 1927, shall be transferred in accordance with the legislation which created that right”.

This means that if a right was acquired under the Black Administration Act, 1927, even though that Act had been repealed, the transfer of that right shall be effected in accordance with the Black Administration Act, 1927. In terms of the Black Administration Act,

1927, if the holder of a residential permit (a right) passed on, his right shall devolve upon his wife and/or dependants. The rules of the intestate succession would apply. Accordingly the appellant would be entitled to inherit the rights her deceased father had. This is however a circumstance the court should have considered not only because section 4(7) of PIE required it but also because section 26(3) the Constitution of the Republic of South Africa Act No. 108 of 1996 states:

“No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions” (my emphasis).

[11] In this case the respondents themselves attached as Exhibit D to their replying affidavit a copy of a residential permit in favour of Israel Dlamini, the appellant's late father. They do not explain how they got the right to the property except that they paid for the transfer to their names at the local authority. How Israel Dlamini, the only person entitled to obtain a Deed of Transfer relating to the said property disposed of his right in favour of the

respondents is not explained. A Deed of transfer, just like a Title Deed, is prima facie proof of ownership and the Act (PIE) defines the owner of property as the registered owner. The phrase registered owner means a legally registered owner. Mere production of a Deed of Transfer in circumstances such as in this matter does not justify the finding

that the respondents are “true owners of this property” as the court a quo found. The courts must be careful in making decisions that may lead to injustice by neglecting to exercise their discretion judiciously, by making assumptions and ignoring the real issues to be considered.

[12] Had the court considered all the above relevant facts it could have gone so far as to subpoena the relevant officials of the Mangaung municipality to appear before it, to explain why on the 29th April 1999 the municipality issued a residential permit to Israel Dlamini for the property itself sold to the respondents on 12th August 1997; whether there was a deed of sale concluded between Israel Dlamini and the respondents in conformity with section 2 of the Alienation of Land Act No. 68 of 1981 or other causa to enable the municipality to sell the property to the respondents and/or when was Israel Dlamini dispossessed of his title to the property. This lays stress on the importance of the participation of the municipality in such proceedings especially where there are such question marks over this property. See *Blue Moonlight Properties v Occupiers of Saratoga Avenue*, [2008] ZAGPHC 275; 2009

(1) SA 470 paragraph 37 and paragraph 78.1. If the above relevant factors were taken into consideration, the court a quo should have found that it was not just and equitable to order the eviction of the appellant and in a space of less than a month. The court ought to have stayed the action and allowed the appellant to launch her challenge of the validity of the Deed of Transfer to the High Court. There would be no prejudice to the respondents as it appears that they had no desire to occupy the property or rent it out. They had no interest in making profit from the property either, since they had allowed the appellant to stay on it indefinitely, so long as she paid the municipality for services rendered and rates and taxes.

[13] This brings me to the second point that must have been considered by the court. The onus is on the respondents in an application for eviction under the provisions of section 4 of PIE to prove unlawful occupation of the property: *FHP Management (Pty) Ltd v Theron N.D. and Another*, 2004(3) SA 392(C) 401H-I quoting from *Ndlovu v Ngcobo*; *Bekker and Another v Jika*, 2003(1) SA 113 SCA paragraph 19. The respondents alleged an agreement with the applicant in terms of which she could occupy the property indefinitely on condition she paid the municipality water and electricity charges and the rates and taxes. She failed to do so and was in arrears. It was exactly because of this failure to pay that the respondents sought her eviction from the property. They also alleged having negotiated with the appellant to voluntarily vacate the property which she did not do. They consulted an attorney who wrote a demand to the appellant to vacate the property on the grounds of her failure to pay the municipality as per agreement. They, however, never cancelled the agreement, expressly or impliedly. Clearly the magistrate did not inquire as to what made the appellant's occupation of the said property unlawful during the currency of the agreement with the respondents. The appellant denied the existence of such an agreement and based her right to occupy the

property on her entitlement to inherit the property from her deceased father, Israel Dlamini. This issue had not been dealt with as it appears above when the legality and the validity of the respondents Deed of Transfer was discussed.

- [14] Before us it was submitted that the principles laid down in the case of *Plascon. Evans Paints Ltd v Van Reibeeck Paints (Pty) Ltd* 1984(3) SA 623 AD 634H-635C should apply. I do not agree. The two versions of the appellant's occupation of the property are too far apart and the one cannot complement the other nor can any inference be drawn from the other. The respondents could not approach the court for an eviction order on the basis of unlawful occupation without having cancelled or asked the court for cancellation of the agreement as failure to perform in terms thereof, did not make the appellant's occupation unlawful per se. Other remedies were available to enforce the payment of what was owing to the municipality, moreover the appellant conceded she was in arrears with the payments due to the municipality and had made arrangements with it. "Unlawful occupier" is defined in PIE as:

"a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land (my emphasis)".

On the basis of the respondent's version there was an express consent given to the appellant to occupy the property. This is despite the fact that the validity of the Deed of Transfer has not been determined in the light of the discussion above. On the basis of the appellant's version there was another right in law, namely the right to inheritance, that made her occupation of the property lawful. That has, however, not been resolved as the court a quo did not consider all the relevant circumstance as it was expected to do.

- [15] Both the PIE Act and the Constitution puts emphasis on the process of eviction being just and equitable in the opinion of the court. A Deed of Transfer is prima facie proof of ownership and where its validity is challenged it is the duty of the court to determine its validity and legality in order to make a ruling that is just and equitable. Mere production of the Deed of Transfer may justify the inference of ownership unless challenged and on reasonable grounds. It is important to note that only a legally valid Deed of Transfer confers ownership to the property. Equally it must be proved conclusively that occupation of the property is unlawful in that it has not been authorised by the consent of the owner or by any other right entitling the occupier to be on the property. Where it is likely the occupier has a right or might have a right to occupy the property, the unlawfulness of his/her occupation shall not have been proved. Both these aspects require conclusive proof to entitle the court to order eviction that is just and equitable.
- [16] As I am of the view that the magistrate did not consider all the relevant circumstances and the facts of this case and by so doing ignored the peremptory provisions of section 4(7) and 4(9) of the PIE, the appeal must succeed.

The appeal should consequently be upheld with costs.

K.J. MOLOI, J

I concur and it is so ordered.

S. EBRAHIM, J

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