

SOUTH AFRICA / JUDGMENT

Fourie N.O v Van Der Walt and Another (A3073/2020; 3108/2020) [2023] ZAGPJHC 157 (23 February 2023) [2023] ZAGPJHC 157

COURT

South Gauteng High Court, Johannesburg

BEFORE

G Malindi, L du Bruyn

CASE / FILE NUMBER

A3073/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: A3073/2020

COURT

A QUO CASE NO: 3108/2020

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE:

23 February 2023

In the matter between:

STEFAN FOURIE

N.O. Applicant

And

GERT CHRISTOFFEL VAN DER

WALT First Respondent

CITY OF

JOHANNESBURG Second

Respondent

Delivered: This judgment

was prepared and authored by the Judge whose name is reflected and is

handed down electronically by circulation

to the Parties / their

legal representatives by email and by uploading it to the electronic

file of this matter on CaseLines. The

date of the judgment is deemed

to be 23 February 2023.

JUDGMENT

MALINDI J:

Introduction

- [1] This is an appeal against the judgment and order of Magistrate M. Moodley which was handed down on 23 October 2020.
- [2] The appellant had brought an application for the eviction of the first respondent herein from the property known as 14 Hem Street, Witpoortjie, Roodepoort (“the property”). The learned Magistrate dismissed the application on the grounds that the first respondent was not an unlawful occupier as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”) and by virtue of the first respondent’s bear dominium right that he held over the property.
- [3] The appellant is the duly appointed executor of Ms Schlebusch’s estate. The first respondent is Ms. Schlebusch’s son.
- [4] In her will Ms. Schlebusch bequeathed the first respondent 20% of the remainder of her estate and permitted him and his family to reside on the property for a period of three months after her death.
- [5] In the Magistrate’s Court, the first respondent argued that by virtue of his 20% bare dominium interest he is not an illegal occupier as defined. The learned magistrate agreed with this contention.
- [6] The appellant contended on the other hand, that clause 1.4 of the will states explicitly that the first respondent and all those occupying under him must vacate the property three month after Ms. Schlebusch’s death.

On appeal

[7] An illegal occupier is defined in the PIE Act 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, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996.”

[8] The appellant contends that the first respondent is an unlawful occupier because of the expiration of the three months’ period after the death of Ms. Schlebusch and because the first respondent is without any other right in law to occupy the property. The appellant contends that the first respondent’s 20% legacy in the deceased estate does not give him any dominium in the property. It is contended that the appellant acted within his mandate as executor when issuing the notice to vacate against the first respondent since he was acting within his mandate in terms of section 26 of the Administration of Estates Act 66 of 1965 which gives him as executor the right to

“take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.”

[9] In *Manton v Croucamp NO and Others*[1] it was held that section 26 is designed to give an executor possession of items which the “estate” is entitled to possess but which is withheld by someone without any right to do so.

[10] In argument before us the first respondent’s counsel conceded the correctness of the authority in *Greenberg and Others v Estate Greenberg*[2] that a legatee does not acquire the dominium in the property immediately on the death of the testator. But what he does acquire is a vested right to claim from the testator’s executors at some future date delivery of the legacy.

[11] Mr. Jardien’s submission was merely that the first respondent should not be evicted until the property is ready for sale mainly because clause 1.4 of the will is not definitive of the period by which he should vacate. His submission being that the three months’ limit should be interpreted in the context of the process of the liquidation and distribution account in the estate of the testator. He could not proffer any plausible explanation as to why there should be no vacation of the property during the process of sale as the presence of an illegal occupier may deter potential buyers. It is in fact the appellant’s case that a potential buyer is reluctant to sign the contract or agreement of sale for fear that the first respondent may refuse to vacate after the sale has been concluded, and thereby forcing the new owner to engage in legal proceedings to evict the unlawful occupiers.

[12] The first respondent's reliance on the case of *Keyes NO v Ellinas and Others*[3] does not assist him in his contention that because he has been bequeathed 20% of the residue of the estate he therefore holds an

interest in the estate that prevents him from being evicted. The *Keyes* case confirms Greenberg in that his entitlement to the 20% residue will only translate into full dominium upon the satisfaction of the requirements of

administration leading to the confirmation of a liquidation and distribution account.

[13] In the circumstances, the learned Magistrate erred in finding that the first respondent could not be evicted by virtue of his bare dominium right. That right will vest only after the executor had discharged his mandate in terms of section 26 of the Administration of Estates Act. It might further be added that there is no connection between clause 1.4 of the will and the first respondent's bare dominium in terms of the bequest, of 20% of the deceased's estate. The 20% is not in the property but in the residue of the estate.

Conclusion

[14] The first respondent has no right in and to the property whatsoever. The 20% bequest will vest after the executor has concluded the liquidation and distribution account. The 20% bare dominium does not sound in ownership of property but in the monetary residue of the deceased estate. Clause 1.4 of the will is a stand-alone provision which only entitled the first respondent to remain in occupation for a maximum of three months after the death of the testator. The learned magistrate erred in finding otherwise.

[15] In the circumstances, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is replaced with the following order:
 1. The first respondent and all those holding occupation through him are evicted from the property known as 14 Hem Street, Witpoortjie, Roodepoort.
 2. The first respondent and all those holding occupation through him are ordered to vacate the said property by no later than 30 days from the date of this order.
 3. If the first respondent and all those holding occupation through him have not vacated the said property by the date provided for in the previous subparagraph, the sheriff is authorised and required to carry out the eviction order after the expiry of the 30th day after the date of this order.
 4. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

G MALINDI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

L DU BRUYN

ACTING JUDGE OF THE HIGH COURT

For the applicants:

Adv M. Cooke

Instructed by:

Oosthuizen Sweetnam Reitz & Fourie

For the first respondents: Adv M. Jardine

Instructed by:

Kapp Attorneys

Date of hearing:

11 April 2022

Date of

judgment:

23 February 2023

[1] 2001

(4) SA 374 (W) at 380D.

[2] 1955 (3) SA 361 (A) at 364G.

[3] 2013/62385

[2016] ZAGPPHC 1187 (27 October 2016).

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