
SOUTH AFRICA / JUDGMENT

Jhinabhai v Jhinabhai and Another (75807/2013) [2016] ZAGPPHC 1094 (3 November 2016) [2016] ZAGPPHC 1094

COURT

North Gauteng High Court, Pretoria

BEFORE

Louw

CASE / FILE NUMBER

75807/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

[GAUTENG

DIVISION, PRETORIA]

3/11/2016

CASE

NUMBER: 75807/2013

In

the application of: JAYANTA
KESAW
JHINABHAI
APPLICANT
and
CHOONILAL
JOGIBHAI JHINABHAI
FIRST RESPONDENT
CITY
OF TSHWANE METROPOLITAN
MUNICIPALITY
SECOND RESPONDENT

JUDGMENT

- [1] The Applicant applies for the eviction of the First Respondent and anyone else occupying the property known as Erf [...] situated in the Township Laudium Extension 3, Registration Division J.R. Gauteng, also known as [...] L. S., Ladium (and hereinafter referred to as "the property") within 30 days from service of the court order alternatively within such a period of time as this Court deems just and equitable from the property and for ancillary relief. The application is dated the 15th January 2014. There is compliance with the requirements of Section 4(2) of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as "PIE") in terms of a separate Notice of Motion dated the 15th January 2014. The application (that is both Notices of Motion and founding papers) were issued on the 15th January 2014. The application was served on the First Respondent personally on the 24th February 2014. An order for directions regarding service of the application in terms of Section 4(4) of PIE was made on the 18th March 2014 as is evidenced by the order granted by Hughes, J at page 70 to 72 of the paginated papers.
- [2] The First Respondent's opposing affidavit was delivered on the 1st April 2014 and the Applicant's affidavit on the 3rd June
2014. The matter was enrolled for hearing during the week of 4 May 2015.
- [3] Before dealing with the facts of the matter I need to refer to the fact that I took time to deliver this judgment. I reserved

judgment

after hearing argument in order to consider what my judgment and order must be. The matter arises

from what I regard as a distressful set of circumstances where the Applicant and the First Respondent, who had been married to each other, divorced and then for many years on some, now disputed, basis both utilised the property. Due to other commitments I unduly delayed in producing this judgment. I profoundly and sincerely apologise to the parties for this delay.

[4] The Applicant and the First Respondent were married to each other in community of property on the 5th July 1971. A final divorce order, dissolving the marriage of the Applicant and the First Respondent, was issued on the 3rd November 1982. This much is common cause. There is a dispute on the papers as to the reasons for the divorce and the precise nature of the relationship between the parties since the divorce. It is however common cause that the Applicant married Mr

Ishwar Bhaga on the 7th April 2013. It is further evident that the relationship between the Applicant and the First Respondent has deteriorated to the extent that one may describe it as acrimonious now.

[5] It is common cause that after their divorce (despite a submission to the contrary in the Heads of Argument of the Applicant) the property was transferred into the name of the Applicant ostensibly for payment of the amount of R80 000.00. There is a dispute as to whether the R80 000.00 was paid by the Applicant. However, the ownership of the Applicant of the property since the 3rd November 1989 is not disputed and in any event cannot be disputed as the Applicant produced the deed of transfer T74342/1989 evidencing ownership and stating that the First Respondent transferred ownership thereof for the purchase price of R80 000.00 in terms of a sale dated the 23rd May 1989.

[6] It is common cause that the Applicant and the First Respondent resided together at the property despite their divorce of the 3rd November 1982. It is in dispute whether they lived together as husband and wife after their divorce. The Applicant admits that there was a time when they attempted to restore their relationship. She denies the allegation that they lived together as husband and wife. According to the Applicant the First Respondent was allowed to live with her whilst he seeks employment and alternative accommodation on an as soon as possible basis. This is disputed by the First Respondent. There is a dispute as to who precisely of the Applicant and the First Respondent paid for the upkeep and the water and electricity usage of the property. It is common cause that the First Respondent and his niece were in India during a period in 2012 but there is a dispute on the question since when the First Respondent, after his return from India in June 2012 moved into the home on the property again. On the First Respondent's own admission he resides on the property together with his niece from the 14th June 2013. The nature of the relationship between the First Respondent and his niece is a further disputed issue.

- [7] The First Respondent was at the time of his opposing affidavit, namely the 31st March 2014, 70 years old and thus at this time 72 years of age. He says that he familiarised himself with his surroundings and that the home on the property has been his home for many years. He states that it would be unjust to force him to leave the place at his age and in his state of health. However, no specific ailments or health problems are mentioned.
- [8] He says that he made arrangements to settle in his "current home" being the home on the property and live a comfortable and peaceful life. He denies having received payment of R80 000.00 from the Applicant entitling the Applicant to be the sole owner of the property.
- [9] He states that it would be unjust to move him from the home on the property in circumstances where it appears that the Applicant wishes to sell the property and to relocate to India together with her husband.
- [10] The Applicant made the allegation that the First Respondent is the co owner of an immovable property with his sister. The First Respondent denies this allegation. The Applicant attached a "Searchworks" record of the Deeds Office information indicating that the Applicant is a co owner, together with one Gheenah Maneebhan of an immovable property in Laudium. The Searchworks document is no official deed of transfer and in the circumstances of the matter I am not in a position to accept the veracity of the said document. There are a number of further allegations and counter allegations on the relationship

of the First Respondent with his niece, on whether there was theft of R12 000.00 of the Applicant's money, on whether the First Respondent and his niece are maintaining the property or make contributions to the upkeep thereof.

- [11] It is common cause that the Applicant intends to sell the property and she informed the Court in the founding affidavit that she would be moving to India at the end of September 2013. It is furthermore common cause that after the Applicant had informed the First Respondent of her intention to bring an application for the eviction of the First Respondent from the property, the First Respondent issued summons in this Court against the Applicant. The combined summons and particulars of claim are attached to the founding affidavit. The case number thereof is 33834/2013 and the summons was issued on the 30th May 2013. The particulars of claim sets forth a purported claim (the validity and cogency whereupon I do not make any pronouncement).

According to the particulars of claim the divorce proceedings between the parties were purely for convenience and financial expediency and after the divorce they continued to live together as husband and wife. On this basis the First Respondent then claims in the

particulars of claim that the Applicant shall be unduly benefitted if she is allowed to sell the house and not to divide the proceeds thereof between herself and the First Respondent. In addition

the First Respondent also alleges in the particulars of claim that he shall be prejudiced should the estate which was not dissolved in 1982 (at the time of the divorce) and to which he contributed to is not divided on the basis of a marriage in community of property.

- [12] All these allegations are disputed by the Applicant in her plea, which is also an attachment to the particulars of claim.
- [13] The argument on behalf of the Applicant is that the Applicant is indeed the owner of the property as is evidenced by her deed of transfer. It is submitted that the First Respondent is not entitled to claim 50% of the Applicant's estate and that he is not entitled to reside in the home on the property and that there is no reason to suspend his eviction from the property. It was submitted that the First Respondent has no right to remain in occupation of the property even if he did make improvements to it and the pertinent point was made that the First Respondent did not set forth the nature of such improvements.
- [14] Submissions were made in support of the fact that the application must be granted and in support of the eviction order.
- [15] The First Respondent's argued that the First Respondent is a pensioner, aged 71 (as stated now already 72 years of age), that there are numerous factual disputes and that the First Respondent contends that he is not in unlawful occupation of the property despite the fact that the property was transferred into the name of the Applicant. The submission is then made that in view of the numerous factual disputes oral evidence will be necessary as regards the question whether the First Respondent could be evicted in terms of the provisions of PIE. Alternatively it is submitted that the action as instituted by the First Respondent must first be determined as the factual disputes can be ventilated in that action. The submission is made that the Applicant continued by way of motion proceedings despite knowing of the factual disputes. A submission is made that the First Respondent, on his version, invested money in the property over the years and that he would have a lien over the property.
- [16] With regard to the requirements under PIE, submissions are made on behalf of the First Respondent that the First Respondent has over years settled himself on the property together with the Applicant and that the First Respondent now faces an eviction from the property whilst the Applicant only intends to sell the property and to move to India with her new husband, factors that, according to the submissions, cannot tip the scale in favour of it being just and equitable to evict the First Respondent.
- [17] The Second Respondent did not take part in the proceedings.
- [18] The matter can be finalised on the common cause facts as well as those facts that cannot be disputed. On the common cause facts the Applicant clearly is the sole owner of the property. The fact that the First Respondent occupies the property is also a common cause fact. Purely on these facts the Applicant is entitled, on common law grounds, to the eviction order.

See: *Graham v Ridley* 1931 TPD 476;

Krugersdorp Town Council v Fortuin 1965 (2) SA 335 (T);

Chetty v Naidoo 1974 (3) SA 13 (A);

Singh v Santam Insurance Company Limited 1997

(1) SA 291 (SCA).

[19] I have not lost sight of the requirements of PIE and will deal with same later on.

[20] The dispute regarding payment of the R80 000.00 is irrelevant for purposes of the question of ownership. The title deed proves

ownership conclusively and any dispute as regards payment of the R80 000.00 could only possibly be relevant for purposes of the requirements of PIE that I will deal with herein later.

[21] In any event, not even in the First Respondent's combined summons is there any claim for payment of the R80 000.00 that allegedly remains unpaid. Any claim for the R80 000.00 as purchase price for the property, *prima facie* prescribed.

[22] As regards the purported lien the First Respondent himself nowhere alleges that he has a lien over the property, nor does he in any fashion explain the nature of the improvements that he might have effected to the property. No exposition is given indicating whether any such improvements were necessary or useful or luxurious improvements. The value of any such improvements and the increase in value of the property as a result thereof are nowhere explained. In the circumstances I cannot find that such a lien exists and, as was found in *Rhooode v De Kock* 2013 (3) SA 123 (SCA) at par 17, it would be to allow an abuse of the process of court to find the existence of a lien on the contents of the opposing affidavit of the First Respondent. In any event further the fact that the First Respondent utilises the property to reside upon, is wholly contrary

to the obligations of a retentor who is entitled to only hold the item over which he/she/it has a lien as security and who may not make use thereof. See: *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (CPD) at 6540 E.

[23] Accordingly, apart from considerations arising from PIE, the Applicant is entitled to evict the First Respondent from the property. The litigation under the First Respondent's combined summons does not require that the Applicant remains the owner of the property nor does it require that the First Respondent be in possession thereof. In fact the very litigation in terms of the First Respondent's combined summons envisages that the purported joint estate be divided in equal halves in favour of each of the Applicant and the First Respondent. That inevitably will result in a sale of the whole or at least one undivided half of the property or a payment of some nature by one or the other of the Applicant or the First Respondent or a liquidation of the purported joint estate.

[24] Accordingly, subject to the considerations under PIE, the Applicant is entitled to evict the First Respondent.

[25] In terms of Section 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so. The eviction order can only follow after the Court has had regard to all the relevant circumstances, including the availability of land for the relocation

of occupiers and the rights and needs of the elderly, children, disabled persons and households headed by woman. If the requirements of Section 4 are satisfied and no valid defence to the eviction order has been raised, the Court must, in terms of Section 4(8), grant an eviction order. When granting such an order the Court must in terms of Section 4(8)(a) determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The Court is empowered in term of Section 4(12) to attach reasonable conditions to an eviction order. See: *Prinsloo NO and Others v City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at par 11.

[26] The first inquiry that must be undertaken under Section 4(7) is that it must be determined whether it is just and equitable to order eviction having considered all relevant circumstances. The issue of no valid defence to an eviction order refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property. The order must be just and equitable to all the parties. Once the conclusion is reached that the eviction will be just and equitable, the conditions that should attach to the eviction order and the date thereof must be considered. See: par 12 of *The Changing Tides* judgment.

[27] The question of onus of proof must not be overemphasised but if there is doubt on the issue whether it would be just and equitable to order an eviction, the Court must refuse an order. See: *Changing Tides* par 29.

[28] The Applicant is a private person and has no constitutional obligation to provide housing. In this regard the following is said in paragraph 18 of *Changing Tides*:

"The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community

indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers. That approach makes it difficult to see on what basis the availability of alternative land or accommodation bears on the question whether an eviction order should be granted, as opposed to the date of eviction and the conditions attaching to such an order. One can readily appreciate that the date of the eviction may be more immediate if alternative accommodation is available, either because the circumstances of the occupiers are such that they can arrange such accommodation themselves, or because the local authority has in place appropriate emergency or alternative accommodation. Conversely, justice and equity may require the date of implementation of an eviction order to be delayed if alternative accommodation is not immediately available."

[29] In paragraph 19 of Changing Tides it was found that where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. In this regard the availability of alternative land or accommodation is of greater importance in the second inquiry, namely what is a just and equitable date for eviction.

[30] The First Respondent opposes an eviction order on grounds thereof that:

30.1 He is 70 years old;

30.2 He is familiar with his surroundings and the property has been his home for many years;

30.3 He cannot obtain alternative accommodation due to his age and health. He has made arrangements to settle in the property and to live a comfortable and peaceful life;

30.4 The Applicant has no emotional ties to the property, wishes to sell same and is either in the process of relocating or intends to relocate to India.

30.5 He refuses to look for alternative housing.

[31] The Applicant is a private person and is not obliged to provide housing on a long term basis to any other person and that includes the First Respondent. Furthermore the First Respondent's own particulars of claim in the action that he instituted envisages a division of the purported joint estate. Such division would include the property. Accordingly on the implications of the First Respondent's own particulars of claim there must be an end to the purported joint estate and an end to the purported joint ownership of the property. Secondly there is the unproved allegations that the First Respondent is the co owner of other land in Laudium. I return to this issue in due course.

[32] I find on the facts that this is a case where the Applicant indeed is entitled to an eviction order.

[33] The question of what is a just and equitable date for eviction arises. In this regard the disputed existence of the immovable

property purportedly held by the First Respondent and his sister is of some relevance. A further aspect of relevance is the fact that, on the First Respondent's version, he has a connection and a residency of some sort at the property for many many years.

[34] According to the submissions on behalf of the First Respondent the period of the First Respondent's involvement

with the property is 33 years (1982 to 2015). The further submissions were that the issues of the intentions of the parties must be referred to trial for oral evidence. This is not necessary. As explained earlier, on the First Respondent's own combined summons and particulars of claim it is envisaged that there will be a break with the property for either one of the Applicant or the First Respondent or both of them. That is the clear implication of the form of litigation that was

instituted by the First Respondent. In those circumstances it cannot be said that the Applicant is not entitled to, as owner, to evict the First Respondent from the property. On his own version, the effect of the relief prayed for in the combined summons and particulars of claim would be that the First Respondent (should he attain the property) will have to buy the undivided half of the Applicant. (Any such relief is naturally dependant upon the question whether the Applicant will be successful with the claim as formulated in his particulars of claim).

[35] The parties have been involved in protracted litigation, not only in these proceedings, but also in terms of the separate action that the First Respondent instituted and in terms of a protection order that the Applicant obtained against the First Respondent. Accordingly the First Respondent must be aware of the real prospect of eviction at least since the legal proceedings commenced. In the circumstances a reasonable period for the First Respondent to vacate the premises would be a period of 6 (six) months except if it is indeed so that he is the coowner of the immovable property allegedly registered in both his and his sister's names. In those circumstances I am of the view that a reasonable period for the First Respondent to vacate the premises would be a period of 3 (three) months from date of granting of this order.

[36] The property allegedly held in ownership by the First Respondent and his sister, according to the document annexed at pages 103 to 104 (Annexure "JAA5") to the Applicant's replying affidavit is Erf [...], Ladium, Pretoria that is held under title deed T49495/1986. I intend to make an appropriate order for the filing of an affidavit together with a copy of the title deed of that property, duly and properly certified for legal purposes, for purposes of issuing of a warrant of execution. If it appears that the Applicant's version in this regard was incorrect, then the time for eviction is 6 (six) months after granting of this order.

[37] It also follows, insofar as it might still be necessary to expressly make a finding in that regard, that I find that there is no valid defence to the Applicant's claim for eviction of the First Respondent.

[38] In the circumstances I make the following order:

1. The First Respondent and anyone else occupying the property through him must vacate the property situated at Erf [...] situated in the Township Ladium Extension 3, Registration Division J.R., Gauteng, also known as [...] L. S., Ladium (hereafter referred to as "the property") not later than 6 (six) months from date of service of this order by the Sheriff of the Court on the First Respondent, subject to the contents of prayer 2 hereunder.
2. The period of 6 (six) months provided for in prayer 1 above will be reduced to a period of 3 (three) months after service of this order by the Sheriff of the Court on the First Respondent if the Applicant files an affidavit of the Applicant or her attorney of record to which is attached a copy of the title deed of the property known as Erf [...], Ladium, Registration Division J.R., Gauteng that proves that the First Respondent is either together with any other person or alone the owner of the said Erf [...], Ladium. The

period of 3 (three) months is to be calculated as from date of service of this order together with the said affidavit and attachment

on the First Respondent. The copy of the said title deed must be certified by the Registrar of Deeds for use for legal purposes.

3. Should the First Respondent as well as anyone else occupy the property through him not vacate the property as provided for in prayers 1 and 2 above, the Sheriff is authorised to request any person, including members of the South African Police Service, to assist him in the eviction and/or removal of the First Respondent and all those occupying the property through him together with their possessions (if any) from the property, provided that the Sheriff must at all times be present during such eviction and/or removal.
4. The First Respondent is ordered to pay the costs of the application.

AJ LOUW AJ

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