
SOUTH AFRICA / JUDGMENT

Jokozela v Ngece and Another (CA137/2014) [2017] ZAECHGC 54 (13 April 2017) [2017] ZAECHGC 54

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B Hartle, P T Mageza

CASE / FILE NUMBER

CA137/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 137/2014

In the matter between

NKOKHELI JOKOZELA

Appellant

versus

LUVUYO CLEARANCE NGECE

First Respondent

LUKHANJI LOCAL MUNICIPALITY

Second Respondent

APPEAL JUDGMENT

HARTLE J:

- [1] The appellant appeals against an order of a magistrate in Queenstown both dismissing a “point in limine” and declining an eviction order from certain immovable property described as Erf [...] Queenstown, situate in the area of the Lukhanji Municipality, Division Queenstown, Eastern Cape Province. (“the property”)
- [2] The appellant holds Master’s Letters of Authority in the Estate Late Chriswell Lunga Siyobi (“the deceased”), who died on 24 June 2013. The appellant brought an application in terms of the provisions of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, no 19 of 1998 (“PIE” Act) for the eviction of the first respondent from the property, in which he alleges that the deceased is the registered owner of it and the first respondent in unlawful occupation thereof. He claims that neither he nor the deceased has given the first respondent consent to occupy the property. He added further that the latter is not paying any rental to him, neither is he paying any rates and taxes in respect of the property.
- [3] The first respondent denies that the property forms part of the deceased’s estate[1] or that he is in unlawful occupation thereof. He avers that he purchased the property from the deceased whilst he was still alive in 2008 and that the latter had handed him the original title deed in respect thereof “upon completion of the transaction”. [2] He claims that he acquired the right to occupy the property pursuant to the sale from the deceased himself who gave him occupation on 21 October 2008.
- [4] It is evident from a copy of the title deed put up by the first respondent that the deceased first acquired the property from the

second respondent on 24 June 2002 for a purchase consideration of R6 450.00. Registration of transfer into his name was effected on 7 November 2002 per Deed of Transfer T 94743/2002.

- [5] The deceased must have received a subsidy for the purchase of the property in terms of a state-subsidised housing scheme, because the following condition is registered against the title deed:[3]

“D. SUBJECT to the following condition imposed by the Province of the Eastern Cape in terms of the provisions contained in section 10A(1) of the Housing Act, 1997 (Act 107 of 1997) reading as follows:

The aforementioned Transferee/s shall not sell or alienate the aforementioned property within a period of eight years from the date

of registration of this Deed of Transfer unless the property has first been offered to the Provincial Housing Department of the

Eastern Cape Province.”

- [6] It is apposite at this stage to refer to the provisions of section 10A of the Housing Act which, together with 10 B, were inserted into the principal act by the Housing Amendment Act, no 4 of 2001, and brought into operation with effect from 1 February 2002. The stated object of the Housing Amendment Act pertaining to these insertions to the principal act is to provide

for the regulation of the sale of state-funded housing by restricting the voluntary and involuntary sale of such houses. The provisions grant the relevant provincial departments of housing the first preference of purchasing the property were it to be sold (during a restricted period of 8 years from the date of registration of transfer in the case of voluntary sales, and as a matter of course in involuntary sales). The purpose is to ensure that properties that have been developed with state subsidies are not sold for less than what the state had spent in their development.[4] By these limitations, the state can keep a tight rein on the resale of properties it has invested in for the greater good of meeting its constitutional imperative of providing access to adequate housing for those who are homeless and qualify for such assistance. It also assists the Department in being able to plan meaningfully for its supply of subsidised housing. The corollary is that those who require such assistance are also protected by the peculiar measures. The relevant section provides as follows:

“10A. Restriction on voluntary sale of state-subsidised housing

- 1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that person unless the dwelling or site has first been offered to the relevant provincial housing department.
 - 2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.
 - 3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.
 - 4) No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor.”
- [7] The first respondent has put up a copy of the deed of sale he concluded with the deceased. It confirms the sale of the property from the latter to him on 21 October 2008 for a purchase consideration of R15 000.00, payable in three equal instalments. Transfer was to be effected in terms thereof “as soon as possible” after the first respondent had paid the purchase price and all transfer costs and charges in connection with and necessary for the registration of transfer into his name, but any delay would ostensibly not affect the sale's validity.[5] He also undertook in the agreement to ‘liquidate all outstanding rates due to the Lukhanji Municipality.’[6] The first respondent does not state why, but evidently transfer into his name

has not hitherto been given effect to.[7]

[8] In his replying affidavit the appellant, now with the benefit of having been apprised of the first respondent's defence, contends that the agreement of sale on which the first respondent relies for his right of occupation is unlawful or illegal on the basis that the sale was concluded in contravention of the restrictive clause outlined above. This he says is on the simple basis that the deceased sold it to him within the eight-year period from date of registration of transfer. Interestingly the appellant does not aver that the deceased did not first offer the property to the Provincial Housing Department during this period as a basis for invoking the supposed illegality, whereas this obligation *ex facie* the Deed of Transfer (and the provisions of section 10 A (1) of the Housing Act) rests squarely on the deceased as the "transferee" in the event of him on selling the property during the restrictive pre-emptive period.

[9] The second respondent, although a party to the proceedings, was not copied in on either the first respondent's answering affidavit

or the reply of the appellant[8]. In fact, neither is the second respondent a party to the appeal proceedings. Given the second respondent's functions and role outlined generally in the Housing Act and particularly in section 4 (7) the PIE Act (on the appellant's version that the first respondent is an unlawful occupier), it is surprising that its

stance on the matter was not canvassed as the property was acquired pursuant to a subsidy scheme, the implementation of which a

municipality is co-tasked with safeguarding. In the judgment of the court *a quo* the magistrate merely observed that the local municipality was given notice of the application but that it did not refer the matter to mediation or intervene.

[10] Be that as it may, the eviction proceedings took a strange turn of events at the hearing. Almost a month after the first respondent filed his answering affidavit to justify his occupation as being entirely lawful, the appellant filed his replying affidavit a day before the hearing together with a "point in limine" document. This document was not included in the record but one can readily assume from the transcript that in it the appellant purported to take the point of the illegality of the sale, in the process seeking to negate the defence of the first respondent that his occupation of the property was lawful, but also seeking to annul the sale. The "point in limine" was not even on the horizon as it were when the matter was initially enrolled for the hearing of the eviction application. One gleans from the transcript of the hearing that the application had previously been enrolled but was postponed in the absence of the respondents at the request of the court so that a notice of set down could be served on them. Now at the hearing, and ostensibly without an amendment first being sought to the notice of motion, the appellant's legal representative asked for an order from the bar declaring the sale transaction to be null and void and a further order directing that the deceased's title deeds be handed over to the appellant.

[11] Regarding the point in limine, the first respondent's legal representative had to concede that the property had indeed been sold within the prohibited period during which such a sale would be forbidden unless the provincial housing department had approved it, but he assured the court that the consent of the Department of Housing in Queenstown had in fact been sought and obtained. He further placed on record that despite the impression created in the deed of sale that occupation was given to the first respondent by the deceased on the date of the transaction, the first respondent had in fact only taken occupation of the property in 2011, which was well after the eight-year period. Given the laconic way the matter was dealt with, the circumstances under which occupation was delayed, and the question whether the provincial housing department was indeed consulted and satisfied that it could relinquish any formal interest in the property, was not formally placed before the court.

[12] On a point of procedure, the first respondent's legal representative objected to the fact that the replying affidavit in which this point of legal invalidity had been taken had, firstly, been filed last minute and, secondly, purported to introduce an

entirely different case to that which he had until then been called upon to meet. The effect of this last-minute scramble was that the first respondent was denied an opportunity to convince the court a quo that the sale transaction concluded with the deceased was indeed lawful vis-à-vis the declarator that was being sought.

On this basis, he requested that the point in limine be dismissed.

[13] Rather paradoxically it was submitted on behalf of the appellant in arguing in reply that the first respondent was bound by his papers in which he had not sought to canvass the issue of compliance with the pre-emptive restrictive clause in the deed of sale, and that it was

not now open to him to simply make assertions from the bar to get around what he perceived to be an obvious contravention simply by the sale on the face of it having been concluded within the circumscribed eight-year period. He refuted any prejudice to the first respondent and was not prepared to agree that the latter would have been taken by surprise by the point in limine.

[14] The magistrate reserved his ruling and on 9 June 2016 dismissed the "point in limine". Leaving aside the fact that that outcome was favourable to the first respondent, the way the magistrate purported to deal with the substance of the "point in limine" under the relevant circumstances without being alive to the dramatic change in relief sought and the resultant prejudice to the first respondent, in my view constituted a misdirection. The manner in which the point had been taken by the appellant was not procedural (the affidavit was filed late and without the leave of the court), and self-evidently prejudicial to the first respondent who had been called upon in the notice of motion to deal with an application in terms of section 4 of the PIE Act. It is quite a different matter to answer the complaint that his occupation of the property was unlawful (which he appeared to have convincingly dealt with by putting up a copy of the deed of sale evincing his right to take occupation of the property), to having to defend the validity of the sale transaction, the threatened assailement

of his real right to take transfer of the property being an entirely different matter. The question of legal invalidity could admittedly have been dealt with as a precursor to considering the merits of the eviction application, but instead the appellant now sought to move the focus away from the PIE Act enquiry and to seek an order declaring the sale null and void, also without joining any other interested party.

- [15] In the latter respect, if one has regard to the provisions and tenor of section 10A of the Housing Act, the provincial housing department would clearly have an interest in the property reverting to its pool of subsidised houses for allocation in the subsidy scheme, once it comes to their attention that a beneficiary who acquired it subject to the provisions of section 10 A (1) of the Housing Act has purported to sell it without complying with the pre-emptive restrictive condition and has (or intends to) vacate it within the

prohibited eight-year period from date of transfer by virtue of the sale[9]. A formal endorsement by the Registrar of Deeds in favour of the Eastern Cape Housing Department would also be expected to flow from any declaratory relief sought relieving the deceased of his title to the property as a result of any supposed illegal sale of the property by him. (The irony that the appellant's locus standi to bring a PIE application under such circumstances might be compromised, by virtue of the effect of the provision in section 10 A

- (3) of the Housing Act that when the beneficiary offers (and vacates) the property as contemplated in sections 10 A (1) and (2) the relevant Provisional Housing Department "shall be deemed to be the owner of the property," appears to have escaped his legal representative.) A non-joinder of the interested parties may have been a basis on its own to have refused the appellant leave to introduce the declaratory relief. What is palpably clear though is that it was not open to the appellant to simply ask for such a declarator from the bar. It was an innocuous request to pray that the deceased's original title deed be returned to the appellant because the property is still registered in the name of the latter, but the irregular and tacit condonation of the introduction of the substantively different relief was undoubtedly prejudicial to the first respondent. Further, inasmuch as the magistrate entertained the new relief and disposed of the entire application argued under the remit of a point in limine only to the obvious prejudice of the appellant, he also erred.

- [16] What ought to have happened in my view is that the first respondent's objection to the point in limine should firstly have been upheld and the appellant ordered to pay his costs.

- [17] The appellant should then have been allowed an opportunity to formally pursue his amendment for the new declaratory relief (assuming it is competent in the magistrate's court), if this was the basis upon which he was advised to proceed, and the respondents afforded an opportunity to answer these new allegations in the ordinary course.

- [18] If the appellant had instead been advised to simply pursue the original application, or to ask that the court first dispose of the question whether in law the first respondent was to be regarded as an "unlawful occupier" within the contemplation of section 1 of the PIE Act on the basis of the supposed illegality (and holding over on the consideration of whether it was

just and equitable to evict him from the property and, if so, on what terms), he should also not have been permitted to do so without first seeking condonation for the late filing of his replying affidavit and the first respondent being allowed an opportunity to file a further affidavit (in the court's discretion) to deal at least with the factual issue of the seller's compliance with the pre-emptive restrictive condition, and or such further issues as would conduce to a proper determination of whether it is just and equitable to evict him from the property in the event that the argument of legal invalidity might be upheld.[10]

- [19] Despite the criticism of the first respondent that he should have reasonably anticipated that the appellant would invoke the illegality which followed as a logical consequence once it was conceded that the deceased had purported to sell the property to him during the restricted pre-emptive period (so it was contended by him)[11], it is so, as was correctly observed by the magistrate, that it is the obligation of the seller, and not the purchaser, to first offer the property for sale to the relevant housing department. This is information peculiarly within the knowledge of the deceased and/or his successors in title. The onus is on the Appellant to prove that the ostensible right of occupation given to him by the deceased in terms of the deed of sale falls to be assailed. Even if the appellant had elected to proceed on the papers as they stood without any amendment, the first respondent would have been prejudiced because he was not allowed an opportunity to respond on the papers to the legal argument that his occupation under the sale agreement is tainted by the supposed invalidity, especially where the deceased himself was ostensibly a party to the alleged illegality.
- [20] Contrariwise the appellant was also prejudiced by the out-of-hand rejection of the eviction application, bringing an abrupt end to the proceedings. It should have been left open to the appellant to consider his options upon the point in limine been given short shrift.
- [21] In my view the interests of everyone would be best served by the matter being referred back to the magistrate to deal with the issues afresh.
- [22] Although the appeal succeeds partially in favour of the appellant in the sense that I intend to set aside the dismissal of the eviction order, it would not be appropriate in my view to mulct the first respondent with the costs of the appeal given the unusual circumstances under which he was ambushed by the declaratory order sought, and the odd outcome which resulted due to no fault on his part. The first respondent did not oppose the appeal, electing instead to file a notice of intention to abide the outcome thereof. The costs order which I make should therefore take account of such anomaly.
- [23] In the premises I issue the following order:
1. The order of the magistrate dismissing the appellant's "point in limine" is set aside and replaced with an order that the first respondent's objection to the "point in limine" is upheld and that the appellant is to pay the first respondent's costs in this regard;
 2. The order of the magistrate that the eviction application is dismissed is set aside;

3. The matter is referred back to the magistrate, Queenstown, in order to make a fresh determination of such issues as will be properly before him upon its re-enrollment;
4. The parties are invited, within a period of one month from the date of this order, to supplement or amend their papers if so advised before the matter is re-enrolled for hearing, and to seek whatever orders of the court as are necessary to regularize their papers;
5. The second respondent is to be furnished with copies of this judgment and the papers exchanged in the PIE application;
6. The second respondent is to file a report for the assistance of the court before the matter is again heard;
7. The first respondent is to be afforded legal assistance on the basis contemplated in section 4 (4) (d) of the PIE Act in respect of the further proceedings in this matter should he require same; and
8. There will be no costs order in respect of the appeal.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

P T MAGEZA

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 31 March 2017

DATE OF JUDGMENT : 13 April 2017

Appearances:

For the appellant : Mr N James instructed by NN Dullabh Attorneys, Grahamstown.

For the first respondent: No appearance.

- [1] It is not clear if the first respondent meant to convey by this allegation that the Appellant has no locus standi to seek his eviction from the property. Since the first respondent is in possession of the original title deed according to his answering affidavit, it must be accepted that the property is still registered in the name of the deceased and that the appellant has been authorised to take control of the Estate.
- [2] See footnote 1. The first respondent appears to be under the mistaken belief that the mere holding of the original title deeds secures his rights as a transferee. Ownership is not necessary however to resist the challenge that he is in unlawful occupation of the property.

- [3] The appellant does not make this averment in his papers at all. The submission that the deceased was a beneficiary of a housing subsidy is mentioned for the first time in the notice of appeal.
- [4] A meeting summary dated 9 March 2001 of a parliamentary briefing by the NCOP Public Services on the Housing Amendment Bill, before it was made law, is illuminating. The following passages are of relevance: "Clause 7 is the central part of the Bill. It restricts the sale of state subsidised houses for eight years after the property has been acquired. In the exceptional case that a property is to be sold within this eight year period, it must be first offered to the Provincial Housing Department, with a purchase price to be agreed on between the MEC and the beneficiary or creditor. These restrictions are in response to the problem of subsidised housing being sold after the beneficiaries have taken possession. Such sales will be blocked. Exceptions will be dealt with on a case by case basis. The Department hopes to "catch" 80 per cent of the culprits but, in reality, is anticipating unregistered sales. Occupancy will be monitored... Mr Suliman (ANC, Northern Cape) asked if the restriction on sale infringes on property rights. He asked if this is constitutional. The DG said this is exactly what the Department was concerned about when the Bill was being drafted. The issue is if government can restrict the property rights of a certain group of people. She said if a person buys property without any subsidisation, this person can sell it or not, as the person pleases. However, when the state makes a contribution with a specific purpose for doing so, the individual's property rights are superceded. The state's intention in subsidising housing is to house the homeless, not to enrich others. Funds for subsidisation are provided by taxpayers and so must be protected and used for their intended purpose."

- [4] A meeting summary dated 9 March 2001 of a parliamentary briefing by the NCOP Public Services on the Housing Amendment Bill, before it was made law, is illuminating. The following passages are of relevance:

"Clause 7 is the central part of the Bill. It restricts the sale of state subsidised houses for eight years after the property has been acquired. In the exceptional case that a property is to be sold within this eight year period, it must be first offered to the Provincial Housing Department, with a purchase price to be agreed on between the MEC and the beneficiary or creditor. These restrictions are in response to the problem of subsidised housing being sold after the beneficiaries have taken possession. Such sales will be blocked. Exceptions will be dealt with on a case by case basis. The Department hopes to "catch" 80 per cent of the culprits but, in reality, is anticipating unregistered sales. Occupancy will be monitored...

Mr Suliman (ANC, Northern Cape) asked if the restriction on sale infringes on property rights. He asked if this is constitutional. The DG said this is exactly what the Department was concerned about when the Bill was being drafted. The issue is if government can restrict the property rights of a certain group of people. She said if a person buys property without any subsidisation, this person can sell it or not, as the person pleases. However, when the state makes a contribution with a specific purpose for doing so, the individual's property rights are superceded. The state's intention in subsidising housing is to house the homeless, not to enrich others. Funds for subsidisation are provided by taxpayers and so must be protected and used for their intended

purpose.”

[5] Clause 7 of the deed of sale provides that the “agreement shall not be subject to the time period and (will be) valid until

cancelled by both parties herein.” (Sic)

[6] Evidently this would be from date of occupation which is the effective date the first respondent agreed to be responsible for

rates and taxes levied in respect of the property, consonant with the risk and benefit having passed to him at this moment.

[7] Reading between the lines the first respondent perhaps made himself guilty of not paying monies due to the municipality which may explain why he has not yet taken transfer. The appellant in his founding affidavit complains that the Estate will incur

(further) debts because the first respondent is not paying for municipal services consumed.

[8] The second respondent was ostensibly only served with a copy of the first respondent’s notice to oppose.

[9] It is unfortunate that the provision doesn’t unequivocally provide what is supposed to galvanize the housing department into action in order to protect its housing development investment. The tautology in the phrase “or otherwise alienate”

after the words “sell”, and the specific reference to the beneficiary’s relocation from or vacating the dwelling or site, seems to suggest that the legislature wishes to avoid any act by which the beneficiary is displaced from the home allocated to him, even, for example, by way of letting it. Since any formal alienation of property is not complete unless transfer passes from the seller to the purchaser, the purported objective of ensuring that the beneficiary doesn’t find himself homeless again within the restrictive pre-emptive period is lost by the parties holding transfer over until after 8 years have passed, or by simply not registering the sale formally.

[10] The court, in determining an application for eviction, must take into consideration various factors set out in the PIE Act. The factors include the length of time during which an unlawful occupier has occupied the land in question (s 4(6) (7)), the rights and needs of the elderly, children, disabled persons and households headed by women (s 4(6) (7)), and (if an unlawful occupier has occupied the land in question for more than 6 months at the time when eviction proceedings are instituted), whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier (s 4(7)). These considerations will certainly be applicable if the court holds the first respondent to be an “unlawful occupier” within the contemplation of that definition of section 1 of the PIE Act. The court has a residual discretion and various factors are to be taken into account in considering the merits of the application where eviction is sought. The courts derive their discretion to impinge on an owner’s right to possession from section 26(3) of the Constitution, which obliges the

courts to address “all relevant circumstances”, and thus considerations of justice and equity in determining an application for eviction. In exercising its discretion, the court must strike a balance between the proprietary rights of the owner and the basic human rights of the unlawful occupier. Considerations beyond those immediate to the parties, such as the national, social and economic context, must also be taken into account. Some leeway should therefore be given to a litigant in the peculiar position of the first respondent who finds himself suddenly and at short notice having to address an argument concerning the legality of the sale on which he relies for his occupation in the circumstances of this matter. More information should be encouraged where this is patently necessary and will self-evidently conduce to a proper consideration of all the issues which are at play here.

- [11] It is clearly not the mere fact that the deed of sale was signed within the eight-year period that renders the sale void without any further enquiry. The question is whether the housing department’s right of pre-emption has been respected before the property is transferred. The endorsement on the title deed, or the recordal of the restrictive condition therein, will obviously ensure that transfer cannot take place without the necessary assurance from the relevant housing department that there has been compliance with the restrictive condition. In that way, the objective of the Housing Act is to an extent realised. Nowhere is it indicated in the Housing Act that the mere disposal of the property of the property on its own (without transfer being effected), or even the rental thereof to a person other than the beneficiary within the eight-year period, attracts any punitive measure. If the beneficiary “offers”

the property he goes onto a waiting list and will be eligible for another state-subsidised house in the programme if he qualifies, but will not be paid for his property. Whilst at first glance he does himself a disservice by not offering the property to the housing department, he is manifestly better off by selling it on the open market. The problem that the department of housing appears to be grappling with (which I glean from press releases), is that sales within the restricted pre-emptive period are indeed unregistered. To get around this the legislation will self-evidently have to be amended to spell out the consequences (to both parties) of any contravention. The mere co-incidental use of peremptory language is not going to assist the department in tackling the issues vexing it.

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