

SOUTH AFRICA / JUDGMENT

Michael v Govender Family Trust (AR571/19) [2020] ZAKZPHC 73 (27 November 2020)

[2020] ZAKZPHC 73

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi

CASE / FILE NUMBER

AR571/19

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR 571/19

In

the matter between:

ALBERT

MICHAEL

APPELLANT

And

THE

GOVENDER FAMILY TRUST

Registration

No. IT 000454/2012

RESPONDENT

JUDGMENT

Mngadi, J (dissenting)

- [1] The appellant, Michael Albert, appeals against the decision of the Additional Magistrate of Portshepstone, Mr Munillal. The learned Magistrate granted an order of eviction of the appellant and all those occupying through him from a residential property. The order was at the instance of the respondent, The Govender Family Trust (the Trust). The Ray Nkonyeni Municipality within whose area the residential property was located was cited as a respondent before the learned magistrate but it did not take any part in the proceedings.
- [2] The eviction application was lodged in terms of the provisions of section 2(1) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, Act 19 of 1998 (PIE). The eviction sought was of the appellant and all other persons occupying under or through the appellant from the property described as Lot 1812, 32 Croton Road, Marburg, Portshepstone, KwaZulu-Natal (the property).
- [3] Mr Aranjlam Govender deposed to the founding affidavit in support of the eviction application. In a short affidavit, Mr Govender stated as follows. He was a businessperson and a trustee of the Trust. The Trust purchased the property on or about 12 arch2015. The property was transferred to and registered in the name of the Trust on 10 April 2015. The Trust purchased the property from Michael Gordon and Michael Tamryn. According to the extract from the Deeds Registry, Michael Gordon and Michael Tamryn obtained transfer of the property from Hibiscus Coast Municipality now known as Ray Nkonyeni Municipality. Mr. Govender stated that he does not know under what circumstances the Trust's predecessors in title acquired the property.
- [4] Mr. Govender stated that he bought the property on behalf of the Trust. He ascertained when the Trust purchased the property that the appellant and others including minor children were occupying the property. The property was in a state of disrepair. He advised the appellant and the other occupants that whatever right in terms of which they occupied the property, the Trust was terminating that right on one month's notice, and they were required at the expiry of one month to vacate the property. The Trust needed to effect repairs and renovations to the property. The notice was issued on 22 February 2018 and it required vacation of the property on or before 31 March 2018. The appellant and the other occupiers did not vacate the property.
- [5] Despite the said request to vacate the property, the appellant and the others failed to do so. On 30 October 2018, the Trust launched the eviction application. T e appellant opposed the application.

- [6] The appellant deposed to the answering affidavit. He stated that he was the son of Mutabo Lutchman. Mutabo Lutchman, his mother, died on 1 July 2011. The property formed part of a low cost housing scheme. The government owned the houses in the scheme. Houses in the scheme were allocated to a person who qualified to occupy the house with his/her family. The property was allocated to his said mother in 1994. She stayed with her family including the appellant in the property until her death in 2011. She left her family staying in the property.
- [7] The appellant stated that in 2007 in terms of the government policy, the municipality commenced a process of transferring ownership of the houses to persons to whom the houses were allocated. In a letter dated 16 May 2007 the municipality advised his mother that the long awaited transfers of owners was in progress and that the municipality's officials were visiting the beneficiary homeowners to carry out the necessary verification. In a letter dated 6 April 2009, the municipality advised his mother that the council of the municipality in terms of the Enhanced Extended Discount Benefit Scheme Policy determined that she was a qualifying beneficiary and it had approved the transfer of ownership of the property to her and that all the documents relating to the registration of transfer of ownership of the property had been forwarded to conveyancers. The letter apologized for the delay in finalization of the transfer process and stated that it was due a delay in finalizing negotiations for the write off of significant arrear rates. The letter ended by stating: 'I hope this communicate will provide you and family with a better life as now you will be one of the proud owners of your property'.
- [8] The appellant stated that in January 2008 his mother made a Will (which he attached). In the Will, his mother bequeathed the property to him. In 2009, the appellant and his mother learnt that the property was being transferred to Tamryn Michael, the wife of her grandson, Gordon Michael. The conveyancing attorneys showed them an affidavit directing that the property be transferred to Tamryn and her husband purportedly deposed to by his mother. They advised the attorney that the transfer documents were forged, and that his mother did not authorize the transfer of the property to Tamryn and her signature was forged. They reported the fraud and forgery to the police under CAS 136/12/2009. Police arrested Gordon Michael, the husband of Tamryn Michael, and later released him on bail. The police subsequently advised them that the case was withdrawn. All their attempts to have the transfer of the property to Michael Tamryn and Michael Gordon reversed by the municipality were unsuccessful.
- [9] The appellant stated that in 2014 under case number 715/2014 Tamry launched eviction proceedings against him. The magistrate granted the eviction against him. He appealed the judgement. The appeal court postponed sine die the appeal. In 2014 he received strangers in the property including Mr. Govender who were making enquiries relating to the property. He repeatedly advised them that the property was not for sale. When Mr. Govender on 30 November 2016 served him with a notice to vacate the property and threatened him with violence, he refused to vacate the property. He advised him that the property was his home

and his late mother bequeathed it to him.

[10] The appellant denied that the property was in a state of disrepair, except that it needed a coat of paint. He stated that he has been staying in the property with his family since 2006. He regards himself as the lawful owner of the property. He has no alternative accommodation. He and his wife are unemployed and they have no income. They are not in a position to acquire alternative accommodation.

[11] In the replying affidavit, Mr. Govender attached the following documents claiming that he got the documents from the previous owners of the property; namely; an affidavit by the appellant's mother for the property to be transferred to Rachel Ashela Michael (the

appellant's sister and Gordon's mother); an affidavit by Rachel for the property to be transferred to her son Gordon; a letter

from the municipality for the transfer of the property to Gordon and Tamyrn. The letter from the municipality dated 21 July 2009 states that the purchase price has been paid in full. Further communication attached shows that Gordon and the municipality concluded the purchase agreement and Gordon paid the purchase price to the municipality. The extract from Deeds Registries show that Gordon and Tamyrn each paid R33 000 for the property. It, further, records that the Trust bought the property by paying R250 000 from Tamyrn and Gordon Michael.

[12] The appellant contends that he is the rightful owner of the property. However, the appellant did not, on learning of the transfer of ownership of the property not to his mother, launch court proceedings to set aside the transfer. He only tried to reverse the sale by administrative means including the laying of criminal charges. Before the court aquo, the only application before the court was the eviction application. The Trust as the registered owner of the property established its title to the property, which on the face of it was a good title. The court aquo correctly rejected the appellant's defence to the eviction application that he was the rightful owner of the property.

[13] The learned magistrate found that as opposed to the previous owners of the property there was no contention that the respondent acquired the property other than legal means. Further. The learned magistrate found that the appellant remained in occupation of the property without taking any legal steps to challenge the title of the previous owners of the property. The learned magistrate concluded that the Trust had discharged the onus that it was just and equitable to grant an order evicting the appellant and all those who occupy through him from the property. The learned magistrate noted that he had not been addressed on the issue of availability of alternative accommodation.

[14] The Deeds Registries Act 47 of 1937, section 16, provides that ownership in land must be conveyed from one person to another by a process of publicizing and recording the transfer at the Deeds Registry. The real right created is maintainable against the whole world. See *Cape Explosive Works v Dene/ (Pty) Ltd* [2001] 3 ALL SA 321 (SCA) at 329a-b; 2001 (3) SA 569 (SCA) at 579D-E). Ownership is the real right that potentially confers control over a thing

owned, which means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations imposed by the law. Section 26 of the Constitution of the Republic of South Africa, Act 108 of 1996, (the Constitution) provides that everyone has a right to access to adequate housing and no one may be evicted from their home without an order of court made after considering all relevant circumstances. PIE gives effect to section 26 (3) of the Constitution to the extent, that it guarantees the proper regulation of eviction proceedings. Evictions can only take place in a fair and equitable manner. PIE defines unlawful occupier as a person who occupies land without the express or tacit consent of the owner or without any other right in law. It is the duty of the court to oversee that evictions are in accordance with the law.

- [15] The appellant has shown his close bond to the property. He regards the property, in ignorance of the law, as his. His close connection with the property, which the respondent does not dispute, establishes that the property is his home. His mother with her family including the appellant has since 1994 lived in the property and the regarded the property as belonging to the family and as the family home. The government in an effort to provide adequate housing as required by the Constitution, allocated the property for occupation by the appellant's mother and her family. When the right to occupy in terms of a government policy on low cost housing was changed to a right to ownership to those in occupation of the property, which provided stronger security of tenure, it ended up not being conferred to the mother of the appellant and her family. Section 4 of PIE provides that if an unlawful occupier has occupied the land in question for more than six(6) months at the time when proceedings are initiated, a court may grant an order of eviction, if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances including whether other 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. Subsection 8 provides that 1f the court is satisfied that all the requirements of this section have been complied with and that the unlawful occupier has raised no valid defence, it must grant an order of evict

ion.

- [16] The learned magistrate made no enquiry relating to whether it was just and equitable to evict the appellant and those occupying the property through him. Without such an enquiry, a decision that it is just and equitable to evict is arbitrary and contravenes the provisions of PIE. The facts gleaned from the papers ought to be considered in relation to the question whether it is fair and equitable to grant the eviction. The court, if not so addressed, must invite the parties to address the issue. The onus is on the party seeking an eviction to satisfy the court on the preponderance of probabilities that it is just and equitable to order

the eviction. The section obliges the court to only order eviction if satisfied that the requirements in the provision has been satisfied. See Ndlovu below.

- [17] The right of the respondent in seeking an order in terms of PIE is based on their right of ownership. They took ownership in 2015 from the Gordons who purchased the property from the municipality in 2013. It concerns me that the appellant asserts fraud on the part of the Gordons. However, he did not take any steps to set aside the sale. He now seeks to achieve against the new owners what he could not achieve against the persons who supposedly defrauded his late mother. The best evidence of ownership of immovable property is the title deed to it. See R
- v. Nhlanhla 1960 (3) SA 568 (T).
- [18] In determining whether to grant an eviction order, it calls for the exercise of a discretion based on what is just and equitable. The discretion is one in the wide and not the narrow sense. See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003(1) SA 113 (SCA) paras 18. *Media Workers Association of South Africa and Others v Press Corporation South Africa Ltd ('Perskor')* [1992] ZASCA 149; 1992
- (4) SA 791 (A) at p800; *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) 360G - 362G. Harms JA in *Ndlovu* at para18 said that relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative and advance facts not known to him and not in issue between the parties. The Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another* 2012 (2) SA 104 (CC) paras 30-40 reiterated the requirement of just and equitable and the factors to be considered relating thereto but pointed out that that private entities are not obliged to provide free housing for other members of the community indefinitely. The court held that 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. In *City of Johannesburg v. Changing Tides 74 (Pty) Ltd and Others* 2012
- (6) SA 294 (SCA) at para 25 Wallis JA summarised the requisite approach as follows: 'A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate inquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7), those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant the order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second inquiry it must consider the impact of an eviction order on the

occupiers and whether

they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that he grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both inquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the inquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.'

[19] In the conclusion, the judgment of the learned magistrate falls to be set aside and the matter remitted to the learned magistrate for further hearing for an enquiry envisaged in the case law referred to above.

[20] In the circumstances, I propose the following order.

1. The judgment of the learned magistrate in the matter is set aside.
2. The matter is remitted to the learned magistrate for further hearing taking into consideration this

judgment.

3. The parties are granted leave to reopen their respective cases and to adduce any evidence in relation to the issue of whether it is just and equitable to order the eviction of the appellant and all those who occupy through him from the property.
4. No order as to costs.

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Mngadi, J

APPEARANCES

Case Number

: AR 571/2019

For the Appellant : A. H. Kaloo I

Instructed by

: Legal Aid South Africa

Pietermaritzburg

For the respondent : S Ranjit

Instructed by

: Jay Rambharos Attorneys.

Portshepstone

Matter heard on : 27 July 2020

Judgement

delivered on : 27 November 2020

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