

SOUTH AFRICA / JUDGMENT

Mnguni v Lekalakala and Others (2016/38042) [2022] ZAGPJHC 118 (16 February 2022)

[2022] ZAGPJHC 118

COURT

South Gauteng High Court, Johannesburg

BEFORE

Flatela

CASE / FILE NUMBER

2016/38042

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2016/38042

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED:

DATE:

16/02/2022

In

the matter between:

CHRISTINA
BUSISIWE MNGUNI
Applicant
and
SESI
LEKALAKALA
First Respondent
VUSI
LEKALAKALA
Second Respondent
CITY
OF JOHANNESBURG
Third Respondent

JUDGMENT

FLATELA AJ

Introduction

- [1] This is an opposed eviction application. The applicant seeks an eviction of the respondents from the immovable property described as ERF [...] Meadowlands Township, Registration Division IQ, Gauteng Province, held by deeds of transfer T[...], on the ground that the respondents are unlawful occupiers. The property is situated at [...] R[...] Street, Zoe 3 Meadowlands, Soweto.
- [2] The applicant is the registered owner of the property. The applicant avers that she acquired the property by virtue of a Will of the late Sebueng Mary Lekalakala, the previous owner.
- [3] The respondents are opposing the application on the ground that the property in question is a family house. The first respondent alleges that the applicant inherited the property fraudulently by misleading the Master of the High Court in that she was the late Mr. Karel Johannes Lekalakala's daughter. The late Mr. Lekalakala was married to the late Mrs. Sebueng Lekalakala in community of property. The property was registered in their names. She is therefore not entitled to the relief sought.
- [4] The issue to be determined by this court is whether the respondents are unlawful occupiers. If yes, whether their eviction will be just and equitable.

The Parties

- [5] The applicant is Christine Busisiwe Mnguni, a major female, resident at [...] Mnguni street, Meadowlands, Zone 5, Soweto.
- [6] The first respondent is Sesi Lekalakala, a major female pensioner currently occupying the property.

- [7] The second respondent cited is Vusi Lekalakala, an adult male, whom the applicant alleges that is also residing at the property.
- [8] The third respondent is the City of Johannesburg Metropolitan Municipality.
- [9] In her answering affidavit, the first respondent denied that the second respondent resides at the property. However, the applicant has not withdrawn her case against the second respondent. He thus remains a party to these proceedings.
- [10] The first respondent filed an affidavit in opposition of the application.
- [11] The first respondent contends that she is in lawful occupation of the property as she has been residing in the property since 2005. She alleges that property belongs to her deceased blood relative Karel Johannes Lekalakala who died on 17 April 1999 and Sebueng Mary Lekalakala who died on 29 June 2005 (the deceased'). The deceased' were the registered owners of the property.
- [12] The first respondent alleges that deceased' were married to each other in community of property and had one child, the late Patricia Kabaakae Lekalakala. The respondent alleges that Patricia died on 20 January 2011. Patricia's death certificate was annexed to the answering affidavit.
- [13] The first respondent further alleges that the late Patricia was the only intestate heir of the estate of late Karel Johannes and Sebueng Lekalakala and the property in question was supposed to have been registered in the name of the late Patricia Lekalakala after the owners passed away. It is further alleged that the late Patricia was not married, and she did not have any children.
- [14] The first respondent contends that since there are no direct heirs of the deceased, the property should be distributed to the next in line blood relatives of the late Sebueng Lekalakala. The first respondent avers that the late Karel Johannes Lekalakala had a sibling, David Lekalakala, who is also deceased. The late David was married to Lizzy Lekalakala. Lizzy is still alive. The late David and Lizzy bore one child, Isaac Lekalakala who is also deceased. The first respondent was married to the late Isaac Lekalakala.
- [15] It is the first respondent's contention that she and her mother-in-law, Lizzy Lekalakala are the rightful heirs of the estate of the late Sebueng Lekalakala, and not the applicant.
- [16] The first respondent avers that the late Patricia was residing in the property alone. Patricia fell ill in 2005 and the Lekalakala family requested the first respondent to leave her family home where she stayed with her mother-in-law to live with the late Patricia so she can be properly looked after in the property. The first respondent alleges that she left her husband's family house where she stayed to look after Patricia and she has been residing at the property since 2005 to date.

- [17] The first respondent alleges that she knows the applicant. The applicant attended the same church with the late Sebueng Lekalakala. She believes that the applicant acquired the property fraudulently.
- [18] The first respondent avers that the applicant obtained the property fraudulently by misleading the Master that she was the late Mr. Lekalakala daughter. The first respondent alleges that the applicant was appointed as an administrator of the estate of the deceased and the beneficiary due to misrepresentation. She is therefore not entitled to the relief sought.

The Applicant's case

- [19] The applicant avers that she is the registered owner of the property. She acquired the property by inheritance. The late Mrs. Sebueng Mary Lekalakala appointed her as her sole heir of her estate.
- [20] The late Mrs. Lekalakala died in on 29 June 2005. She approached the Master of the High Court for her appointment as a representative of the estate. She was issued with a letter of authority to control the estate late Mrs. Lekalakala.
- [21] As an heir to the estate of the late Sebueng Mary Lekalakala, the property was registered in her name on 19 November 2015.
- [22] The applicant avers that the respondent unlawfully occupied the property immediately after death of the late Mrs. Lekalakala forcefully as there was no agreement between her and them. The applicant has not consented to the respondents' occupation of the property.
- [23] The applicant disputes that the late Mr and Mrs. Lekalakala had a child.

Legislative Framework

- [24] Eviction processes are governed by the Prevention of Unlawful Occupation Act No. 789 of 1998, and of particular relevance, sections

4(6),(7),(8),(9) as follows;

Section 4(6)

If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

Section 4(7)

If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, 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 women.

Section 4(8)

If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

Section 4(9)

In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

[25] Section 1(xi) of PIE defines an unlawful occupier as follows:

‘An unlawful occupier means 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 31 of 1996.

[26] The first respondent’s alleged right of occupation of the property is based on the grounds that she is the rightful heir to the late Mr. and Mrs. Lekalakala through blood. The respondent believes that the applicant acquired the property fraudulently. Upon receiving the eviction application, the first respondent made enquiries to the Master’s office regarding this matter. The first respondent’s family knew nothing about the Will and the applicant’s claim that she was registered owner of the property. She received the documents that are part of the file of the estate late Karel Johannes Lekalakala. They are as follows:

A. The Will of the late Mrs S.M Lekalakala is dated 22 February 2005.

It reads:

“I Sebueng Mary Lekalakala ID No. [...] residing at [...] Rittle Street Zone 3 Meadowlands.

I hereby appoint Christina Busisiwe Mnguni ID No. [...] to be the beneficiary as I have never bore any children and my blood family is in Botswana and they barely come and see me. So, my last wish when I die.

I want her to bury me and thereafter she will take my house and all the belongings inside the house. I wouldn't like anybody from my family and my husband's family to claim nor share from her (Christina Busisiwe Mnguni).

I would like my wish to be honored especially by (Christina Busisiwe Mnguni) if she buries me then she can be given everything that I own or that bears my name (Mary Lekalakala ID No. [...] residing at [...] Ritille Street Zone 3 Meadowlands) meaning my house, furniture and every money from my policies as and when it matures and/or payout”.

Declaration

I the signatory sign this will and will be binding to all the parties, people, members of the family from both me and my husband and any other persons, organization and whosoever may claim any rights accept the beneficiary of this will.

[27] Mrs S M Lekalakala was 83 years at the time of the drafting of this will. She died on 29 June 2005 three months later after drafting the said Will.

B. ESTATE LATE KAREL JOHANNES LEKALAKALA

[28] The documentation from the file of the late Karel Johannes Lekalakala estate from the Master of the High Court reveals that on 22 August 2013, the applicant was issued with the letters of authority as a representative of the estate and to take control of it in terms of Section 18(3)[1] name the Administration of Estates Act 66 of 1965.

[29] The applicant reported the estate of late Karel Johannes Lekalakala, who died on 17 April 1999, on 01 September 2013.

[30] The applicant signed the death notice of the late Mr. Lekalakala on 1 September 2003. She recorded herself as a daughter of the late Karel Johannes Lekalakala. She claimed that she was present at the time of death of the late Mr. Lekalakala. The applicant attested to the next of kin affidavit.

[31] The applicant signed an inventory for the estate of the late Karel Johannes Lekalakala. She also recorded herself as a daughter and listed the property as the only asset.

[32] The applicant also signed a declaration stating that the late Karel Johannes Lekalakala Mnguni was known to him all her life. She also signed an undertaking and acceptance of the Masters' directions and she also recorded herself as his daughter.

[33] She was appointed estate representative in the late estate Sebueng Mary Lekalakala who also signed power of attorney to pass transfer of the property to her as an heir.

- [34] In her founding affidavit the applicant avers that as the heir of the late Sebueng Mary Lekalakala, she approached the Master of the High Court for her appointment as a representative of the estate. In her response the first respondent denied that there were heirs that accompanied the respondent to the Master. She also stated that the late Sebueng Mary Lekalakala's heirs were not residing in Gauteng, but they are residing in Botswana.
- [35] The first respondent has been adamant that the applicant acquired the property fraudulently. These proceedings were launched in
2016. After receipt of the eviction proceedings the first respondent made investigations from the Master's office regarding the administration of estate of the late Karel Johannes and Sebueng Mary Lekalakala.
- [36] The first respondent had knowledge of these facts regarding the estates at least by 2016 when she received this application. She has been legally represented since then. Except to point out the fraud allegations pertaining to the will in these proceedings, the first respondent has not challenged the validity of the will or brought review proceedings of the Masters' decision to appoint the applicant to take control of the estate of the late Lekalakala even though she remains at liberty to do so. As is, there are no pending actions against the applicant; there is no counter claim before me; and therefore, till such time it is not only alleged but challenged otherwise, the Will remains valid.
- [37] The respondent cannot base her occupation of the property on the ground that the property ought to be given to the family member on the face of an unchallenged Will that bequeathed the house to the applicant. Therefore, on the facts before me, I am satisfied that the first respondent is an unlawful occupier of the property.
- [38] The next issue to be considered is whether it would be just and equitable to grant an eviction order. Section 4(7) of PIE finds relevance.[2]
- [39] Maya J considering the just and equitable order in *Wormald NO and Others v Kambule*[3] said:
- 'Sachs J, dealing with the concept 'just and equitable' in the context of the Act in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005
- (1) SA 217 (CC), referred with approval to the comments of Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000
- (2) SA 1074 (SE) stating in para [33]:
- "In matters brought under PIE, one is dealing with two diametrically opposed fundamental interests. On the one hand, there is the*

traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation...It is the duty of the court, in applying the requirements of the Act, to balance these opposing interests and bring out a decision that is just and equitable...The use of the term 'just and equitable' relates to both interests, that is, what is just and equitable not only to persons who occupied the land illegally but to the landowner as well."

The learned judge continued at paras [36] and [37]:

"[36] The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable

principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of a deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

[40] The nature of the discretion which a court employs in this exercise is described in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) where Harms JA held at para [18]:

"The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s

4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not narrow sense.'

[41] It is common cause that the first respondent is an elderly woman. Prior to 2005 the first respondent was residing with her late husband at their parental home. The respondent avers that she does not have any alternative accommodation as the property she occupied with her late husband is now leased with tenants.

[42] The Municipality has filed a report regarding the provision of an alternative accommodation. The Municipality has conducted an eviction

assessment of the first respondent. The report states that the respondent is receiving old pension grant to the amount of R1 680.00

(one thousand six hundred and eighty rand) per month together with R1 500.00 (one thousand five hundred rand) per month for

domestic work salary and further R800.00 (eight hundred rand) from rentals.

[43] The report states that if the respondent is evicted, she will only lose the R800.00 rental per month and she will be left with old age grant and her salary which will be a total of R3 180.00 (three thousand one hundred and eighty rand) per month. The report disqualified the first respondent as beneficiary to the Temporary Emergency Accommodation. However during the hearing, Mr McMaster on behalf of the Municipality advised the court that he was waiting for the instructions regarding the availability of the TEA accommodation in Region D .

[44] The matter was stood down to enable him to obtain instructions.

[45] Mr. McMaster submitted that should the court decide to grant eviction order against the first respondent, The Municipality will make the Temporary accommodation available at Salvation Army at Ramushu lower Street, Orlando West.

[46] There is no evidence before me that the family home that the first respondent stayed at prior to 2005 is no longer available. It seems to me that the family home is still available but is rented out to tenants.

[47] Regarding her personal circumstance, the first respondent has not disclosed any exceptional circumstance to court to permit her to stay in said property and I therefore found none.

[48] Having considered all the circumstances, I am satisfied that the applicant is entitled to the relief claimed.

Costs

[49] It is an accepted legal principle that costs are at the discretion of the court. The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*[4]

‘The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.’

[50] The motivation for opposing this application was not mala fide. It was premised on the belief that the property was not acquired in a lawful manner. The first respondent cannot be faulted for harboring such suspicions as the applicant is a total stranger unknown to the family who was now claiming to be the sole heir of the estate of the deceased. If regard is had to the way in which the estates were handled, her misgivings were not out of place. Therefore, I make no order as to costs.

[51] In the result, the following order is made

1. The first respondent, is hereby evicted from the property described as ERF [....] Meadowlands Township, Registration Division IQ, Gauteng Province, Held by Deed of Transfer T[....] situated at [....] R[....] Street, Zone 3 Meadowlands, Soweto
2. The first respondent and all other occupants must vacate the said property on or before 30 April 2022.
3. The third respondent must accommodate the first respondent in its TEA facilities for a period of one year.
4. There is no order as to costs

L FLATELA

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 16 February 2022.

Date of Hearing:

13 October 2021

Date of Judgment:

16 February 2022

Applicants' Counsel:

Mr M Khumalo

Instructed by:

Khumalo Attorneys

Respondent's Counsel:

Mr Motaung

Instructed by:

Legal Aid SA

Counsel for Third Respondent : Graeme McMaster

[1] Section 18(3) of the Administration of Estates Act, 66 of 1965, provides that if the value of an estate is less than R125 000 "the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed."

[2] Section 4(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, 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 women.

[2] Section 4(7)

If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, 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 women.

[3] Wormald NO and Others v Kambule 2006 (3) SA 562 SCA, para 20.

[4] Ferreira v Levin NO and others

[1996] ZACC 27; 1996 (2) SA 621 (CC) at 624B—C (par [3]).

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