

SOUTH AFRICA / JUDGMENT

Molatedi and Another v Lempe and Others (4236/2018) [2019] ZAFSHC 27 (14 March 2019)

[2019] ZAFSHC 27

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

4236/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 4236/2018

In

the matter between:

SEIPHEMO
ABRAHAM
MOLATEDI 1ST
APPLICANT
GABAIKANGWE
SARAH
NKHASHU 2ND
APPLICANT
and
NKGONO
PAPADI
LEMPE 1ST
RESPONDENT

ALL OTHER OCCUPEANTS
OF THE
PROPERTY ERF [...],
MANGAUNG,
DISTRICT BLOEMFONTEIN,
FREE
STATE
PROVINCE 2ND
RESPONDENT
MANGAUNG LOCAL
MUNICIPALITY 3RD
RESPONDENT
HEARD
ON: 7 FEBRUARY 2019

JUDGMENT

BY: CHESIWE, J

DELIVERED ON: 14 MARCH 2019

[1] This is an application in terms of which the Applicants seek an eviction order against the 1st Respondent Ms Nkgono Papadi Lempe and those occupying with her at the property ERF [...] Mangaung District Bloemfontein which

application is brought in terms of Section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). The 1st Respondent opposed the application.

[2] On 30 August 2018 Loubscher J granted Part A of the Notice of Motion. On the 6 December 2018 the matter was before myself and it was postponed to 7 February 2019 with 1st and 2nd Respondent ordered to pay the costs.

[3] The 3rd Respondent is the is the Mangaung Local Municipality as defined in Section 10B of the Local Government Transition Act 209 of 1993, situated at Cnr of Nelson Mandela Drive and Markgraaff Street, Bloemfontein.

[4] The issue is whether the 1st Respondent and her children are unlawful occupiers of the Applicants' property and if it is just and equitable to order the eviction of the 1st Respondent and her minor children.

[5] The Applicants in 2010/2011 purchased an empty Erf [...] from a Mr Molefi Raymond Modise with the intention to erect a proper residence when they obtain the necessary funds. The Applicants registered a title deed with transfer number 75836/2011 attached as annexure A to the paper. According to the 1st applicant in 2011 he noticed a corrugated iron structure erected on the Erf [...] and it was occupied by the 1st Respondent. The 1st Applicant approached the 1st Respondent to inform her that the Erf [...] was registered in his name and that she must vacate the property and take her corrugated

iron structure with her. The 1st Respondent refused to vacate the Erf [...]. The Applicants launched an eviction application at the Magistrate Court in 2015, under case number 1281/20154. The court granted an eviction order on the 17 April 2015. The 1st Respondent was evicted by the Sheriff in Bloemfontein. However, after being evicted the 1st Respondent moved back into the Erf [...]. The 1st Respondent alleges that the 3rd Respondent erroneously transferred the Erf to Molefi Raymond Modise and that the said Mr Modise had never occupied the property.

[6] The 1st Respondent approached the Magistrate Court for an application to rescind the court order granted on the 17 April 2017. On

the 13 September 2018 the court rescinded the eviction order. According to the 1st Respondent the matter is still pending at the Magistrate Court. The 1st respondent is currently occupying the premises with her two (2) minor children of school going age and her 23 year old daughter.

[7] The 3rd Respondent attempted to intervene between the parties in order to resolve the matter. The parties were called to a meeting on the 7 September 2017 with the HOD of Human Settlement, Adv. MJN Phaladi and SJ Letawana, General Manager for Implementation Support; and the letter read as follows:

“It was resolved as follows:-

- i. The site in dispute has a title deed in the names of Seiphomo Abraham Molatedi;
- ii. There is also court order on the above mentioned site number [...] Extension 5, Rocklands;
- iii. The order of the court and title deed must be taken into serious cognisance that no person or institution may ignore or interfere with them, since it will constitute contempt of court;
- iv. The aggrieved party i.e. Nkgono Papadi Lempe have a right to challenge the matter in the High Court;
- v. Molatedi families has the right to approach the court to inform it that the other party is committing a contempt of court if she fails to abide by it;
- vi. Nkgono Papadi Lempe must vacate the place on or before the 6 December 2017; and
- vii. Nkgono Papadi Lempe must contact SJ Letawana and MA Makhetha to assist her with an alternative site. If she is working she will to procure the site as per council policy made available to her.”

[8] Adv. Johnson on behalf of the Applicants submitted in oral argument that the Applicants have a registered title deed on Erf [...] Manguang, Bloemfontein. He mentioned that the Applicants purchased the site as an empty site. Adv. Johnson stated that the 1st Respondent's denial that she was not at the meeting held by the 3rd respondent is disputed as it was common course that the 1st Respondent was at the meeting that was held at the offices of the 3rd respondent. The 1st Respondent was not satisfied with the resolution of the 3rd Respondent and proceeded to apply for a rescission of the eviction order granted at the

Magistrate Court.

- [9] Adv. Johnson argued that the confirmatory affidavit had a wrong name of SA Mbali instead of the deponent, Sephemo Abraham Molatedi, he submitted that the signature on the affidavit is that of the 1st Applicant and that it was an error on the part of the attorney who has attached a confirmatory affidavit to confirm the contents of the affidavit. He further mentioned that the document that the 1st Respondent relied upon that she had a deed of sale transaction with the 3rd Respondent is questionable as the name of MJ Matlole is not the same name as that of the person who signed the document. In conclusion

Adv. Johnson submitted that this matter comes as far back as 2002 and the Applicants are being prejudiced by not being allowed to take possession of their property.

- [10] Mr. Litheko on behalf of the 1st and 2nd Respondent submitted in oral argument that the 1st Respondent took possession of a property that belonged to the 3rd Respondent and that the 3rd Respondent had the intention to transfer the property to the 1st Respondent. He indicated that the 3rd Respondent in spite of having been served the papers elected not to come to court to explain whether it is just and equitable to evict the 1st Respondent whilst the 1st Respondent is in possession of a deed of sale issued by the 3rd Respondent. Mr Litheko argued that the 3rd Respondent's conduct is also questionable in not investigating how an irregularity occurred in that the property has been

transferred to the 1st Applicant. Whereas the 1st Respondent was allocated the same property by the 3rd Respondent. He went further to submit that the 1st Respondent has been waiting for the 3rd Respondent to transfer the property into her name and only discovered that the 3rd Respondent has sold and transferred the property into the 1st Applicant's name. He submitted that the court is not to grant an eviction order until the 3rd Respondent has completed an investigation into the irregularity that occurred.

- [11] With regard to the commission of oath Mr Litheko submitted that the court is to disregard the version that the affidavit as signed by the Applicant was indeed the Applicant as there is no explanation before court as to who is SA Mbali and that the affidavit should be inadmissible.

- [12] Regulation 2 (1) of the Justices of Peace and Commissioner of Oath Act, 16 of 1963, (Oath Act) read as follows:

“(1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulations he shall ask the deponent:

- (a) Whether he knows and understand the contents of the declaration;
- (b) Whether he has any objection to taking the prescribed oath; and
- (c) Whether he considers the prescribed oath to be binding on his conscience.

- [13] In terms of Regulation 3 (1) of the regulations the deponent shall sign the declaration in the presence of the commissioner of oath. And Regulation 4 (2) of the regulations the commissioner of oath shall sign the declaration and print his full name and business address below his signature and shall state his designation and area for which he holds the appointment or the office held by him if he holds his appointment ex officio.
- [14] The 1st Respondent contends that the applicant's affidavit does not comply with the regulations as set out and nor has the applicant's proven that they met the requirements of proper commissioned affidavit.
- [15] The 1st Applicant in the replying affidavit explained that he signed the founding affidavit and that it is his signature that appears on the founding affidavit, that it was merely an administrative mistake by the office of his legal representative. According to the 1st Applicant, neither the attorney nor the 1st Applicant noted that the name SA Mbali appeared where the 1st Applicant was supposed to sign the affidavit. However the Attorney for the Applicants Mr Jaques Van Der Vyver filed a confirmatory affidavit to confirm the contents of the founding affidavit of the 1st Applicant. This clarified the true deponent of the founding affidavit and in fact the SA Mbali was indeed an administrative oversight.
- [16] Having regard to the nature and purpose of the directory provisions of the Regulations, regulation 4(2) of the regulations issued in terms of Section 10 of the Justice of the Peace Commissioner of Oath Act 16 of 1963 which require a commissioner of oath to state his/her designation and area for which he/she holds the office of appointment. The stamp of the commissioner of oath on the founding affidavit of the 1st Applicant clearly states the required provisions in terms of section 10 of the Oath Act have been complied with. Regulation 2 of the Oaths Act is in any event directory and not pre-emptory.
- [17] I am inclined in the context of this application to exercise my discretion in accepting this document relied upon by the Applicants as an affidavit that was properly signed by the 1st Applicant. I therefore accept the founding affidavit of the 1st Applicant as a truly signed and commissioned document.
- [18] The procedure to follow in initiating an eviction process is set out in s 4 (20) of the PIE Act which provides that: "4 (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction."
- [19] The substantive requirements for lawful eviction the relevant sections are ss4 (6), (7), (8) and (9) of the PIE Act which provides that:

“(6) If an unlawful occupier has occupied the land in question for less than six months at the time when 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.

- (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, where the 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, and including the rights of and needs of the elderly, children, disabled persons and households headed by women.
- (8) If the court is satisfied that all requirements of this section had been complied with and 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 (9) In determining a just and equitable date contemplated in sub-section (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or his family have resided on the land in question.”

[20] Sections 26 and 28 of the Constitution are the fundamental constitutional provisions to be taken into consideration respect of eviction. Section 26 provides that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances, No legislation may permit arbitrary evictions.”

[21] And Section 28 reads:

“Children-

- (1) Every child has the right
 - (a)

(b)

(c) To basic nutrition, shelter, basic health care services and social services

(d)....

[22] It is trite that in considering an application for eviction of an unlawful occupier of a property the court has the discretion to

exercise based on what is just and equitable in the particular circumstances. This principle is clearly set out in *Ndlovu n Ngcobo; Bekker and another V Jika*,^[1] the court stated that:

“[18] The court in determining whether or not to grant an order in determining the date on which the property has to be vacated (s4(8)) has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense.” [2]

[23] In *Dwele v Phalatse and Others*,^[3] the court said: “essentially there are two inquiries by these sections. In terms of section 4 (7) of the PIE Act, an eviction order may only be granted if it is just and equitable to do so, determined after the court has had regard to all the relevant

circumstances, including the availability of land for relocation of the occupiers and the rights and needs of the elderly, children,

disabled persons and household headed by women. If the requirements of s4 are satisfied and no valid defence to an eviction

order has been raised, a court ‘must’, in terms of s4 (8) grant an eviction order. When granting such an order, the court must in terms of 4 (8)(a) of the PIE Act, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered in terms of s49(12) to attach reasonable conditions to an eviction order. The date that is determined must be one that is just and equitable to all parties.”

[24] In considering an application for eviction of an unlawful occupier of the property the court has to exercise discretion based on what is just and equitable and after considering all the relevant circumstances, including whether land has been made available or can be reasonably be made available by the municipality or other organs of the state for the relocation of the unlawful occupiers and including the rights and needs of the elderly, children, disabled persons and households headed by women.^[4] With regard to just and equitable the court in *Capricorn Vrygrond Development and Others*^[5] held that just and equitable would differ from one person to another.

[25] The parties with the assistance of the 3rd Respondent were a meeting was held to resolve this issue the 3rd Respondent in a letter dated 7 May 2017, annexure ‘C’ which indicated that an alternative site will be allocated to the 1st Respondent if she contact a SJ Letawana and MA Makhetha. The 3rd Respondent in another correspondence dated 21 May 2018 annexure ‘B’ which reads as:

“We therefore recommend that should the respondent be willing to be assisted with an alternative emergency accommodation, he/she must take note that no basic services are connected to the site and he/she must be ready to settle for shared services in respect of communal taps, as beneficiaries will provide themselves with pit latrines.”

[26] The 3rd Respondent has been involved in this matter before it commenced at the Magistrate court. The 3rd Respondent during their investigation wrote a letter dated 16 October 2015 that: “The current occupant must not move out of the site till the matter is officially finalised; there must not be any tussle on aforesaid site; No arrest should take place without the office concern; Mr. Molatedi to remain where he is currently staying till the matter is officially finalised.”

[27] Further meetings have been held to which resolutions were made and it appears that the 1st Respondent was not satisfied with these resolution. The 3rd Respondent intervention in this regard must be commended. The 3rd Respondent went further and made the 1st Respondent aware that: “The order of the court and the title deed must be taken into serious cognisance that no person or

institution may ignore or interfere with them, since it will constitute contempt of court.”

[28] According to the 1st Respondent she has occupied the site from 2002 as it was allocated to her by the ward Councillor. The 1st Respondent relied on annexure ‘NPLC’ which is the confirmation of the allocation of site as well as annexure ‘NPLA’

the deed of sale between the 1st Respondent and the 3rd Respondent. However these documents are not the title deed for the court to rely upon. Before me is the title deed with deeds number T000005836/2011 as issued by the Registrar of Deeds and this cannot be simply be ignored by this court.

[29] Indeed it would be ideal that every person has a perfect and suitable place to reside in, but the 3rd Respondent as the Municipality can provide this services only within its means and resources. The 3rd Respondent is offering the 1st Respondent an alternative accommodation under the circumstances. Though there is no proper services for example the pit latrines are offered. It is a known problem that the South Africa government has a problem in offering proper toilet services to the people. Having regard to the matter of Johannesburg Housing, [6] Willis J said: “[92] The high courts are duty bound to have regard to the provisions of PIE and the injunction of the Constitutional court to apply their minds to the contribution which municipalities make to the resolution of the problems of housing. In doing so, it would be intellectually dishonest for a court not to take into account the real problem that exist at a municipality level, with its capacity in terms of both of finances and its administrative personnel, to solve problems. If a city cannot even mend potholes properly and resolve billing crises expeditiously, what hope does it have of addressing adequately the needs of housing? Courts cannot blink, Bambi-like, at the real dangers that are posed through a lack of capacity at a municipal level.....”

[30] As correctly stated by Willis J in the above matter it will indeed be intellectually dishonest for a court not to take into account the real problem that exist at municipality level. In this instance the 3rd Respondent as the municipality as attempted to assist the 1st Respondent with what is available for accommodation and it is up to the 3rd Respondent to take the offer for an alternative accommodation.

[31] In the leading cases on eviction, Blue Moonlight Properties and City of Johannesburg, the Constitutional Court recognised that the right to adequate housing is limited by the resources the 3rd Respondent has available. This means occupiers cannot avoid eviction simply by claiming that the alternative accommodation

offered by the 3rd Respondent is unsuitable.

[32] The Legal Counsel for the 1st Respondent raised an allegation during oral argument that the 3rd Respondent has irregularly transferred the property to the Applicants, and that the 3rd Respondent must investigate this irregularity. However, there is nothing in the papers before court that indicated an irregularity

was raised as a defence by the 1st Respondent. Nor was this allegation take up with the 3rd Respondent during the meeting between the parties and the 3rd Respondent. It was rather evidence raised from the bar.

[33] On the other hand one has the Applicants who have a proper Deed of Transfer. The best evidence of ownership of a immovable

property is the title deed to it.[7] A title deed conforms to the preconditions specified for a public document and is thus admissible as evidence to proof ownership to it.[8] In terms section 4(1) of the PIE Act only the owner or person in charge of a land may apply for the eviction of an unlawful occupier. The Applicants having proved ownership through their title deed are therefore allowed to evict the 1st Respondent.

[34] Considering that the relevant circumstances in this matter and that alternative accommodation which is specifically spelled out in subsection (7) as one of the factors to be considered in eviction proceeding, the eviction will not render the Respondent and her children homeless. In oral argument it was raised by Counsel of the Applicants that the 1st Respondent's mother lives in the same street and likely to also offer the 1st Respondent accommodation. As already mentioned that 3rd Respondent has offered the 1st respondent alternative accommodation.

[35] I am satisfied that the Applicants have followed and complied with the eviction proceedings in terms of Section 4 of the PIE.

[36] In the circumstances I find that the 1st Respondent and those occupying the property with her are doing so without consent of the Applicants and their occupation is accordingly

unlawful. There is thus no reason in fairness or equity considering the facts of this matter why the relief sought by the

applicants should not be granted. In other words it is just and equitable to order the eviction of the 1st Respondents and those occupying the property with her. As the 3rd Respondent has offered the 1st Respondent alternative accommodation.

[37] The immediate question is when should the Respondent be order to vacate the property and having regard to the date of implementation of the eviction order, I am of the view that it is just and equitable to afford the Respondent sixty (60) days from the date that this order is served on her for her to vacate the property.

[38] As far as costs are concerned Counsel for the 1st Respondent submitted that as the trial started in the Magistrate court it would be fair to grant cost on the magistrate scale. I found that should the proceedings have continued at the Magistrate court as in the first instance an eviction order was granted in favour of the Applicants at the magistrate Court, though it was successfully rescinded by the 1st Respondent. I agree with the Counsel for Respondent that this matter would have been dealt properly in the Magistrate court and thus costs being in the discretion of the court it seems fair that to me that costs be ordered to be on the Magistrate scale.

[39] It is accordingly ordered as follows:

1. That 1st and 2nd Respondents be ordered to vacate the property known as Erf [...], Mangaung, District Bloemfontien, Free State Province, in compliance

with section 4 (1) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998 on or before 14 May 2019,

on the grounds that the 1st and 2nd Respondent and any other occupiers are in unlawful occupation of the said property and further that it is just and equitable that they be evicted from the property.

2. That the Sheriff of the above Honourable Court be authorised to with or without the assistance of the South African Police services evict the 1st and 2nd Respondent, together with all other occupants and their movables from Erf [...], Mangaung Disrict Bloemfontein, Free State Province, in the event of them failing to vacate as ordered.
3. That the Sheriff of the above Honourable Court be authorised to remove from the property all and any structures erected on and all other goods from the property.
4. That the 1st and 2nd Respondents be ordered to pay cost of this application on the Magistrate scale.

S. CHESIWE, J

On behalf of 1st and 2n Applicant: Adv. Johnson

Instructed by: Kramer Weihmann & Joubert INC

BLOEMFONTEIN

On behalf of 1st and 2nd Respondent: Mr M Litheko

Instructed by: Litheko Motsoeneng Incorporated

[1] 2004

(1) SA 114 (SCA) para 18

[2] See also Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd Perskor) [1992 ZASCA 149.] 3(11112/15)

[2017] ZAGPJHC 146 (7 June 2017)

[2] See also Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd Perskor) [1992 ZASCA 149.)

3(11112/15)

[2017] ZAGPJHC 146 (7 June 2017)

[4] See subsection (7) of section 4 of PIE n

[5] [2003] 3 ALL SA 371 (C)

[6] “City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 38 (Pty) Ltd and Another 2012 (2) SA 104 (CC).

[7] see R V Nhlanhla 1960 (3) SA 565)

[8] (cf Hoofman and Zeffert op cit 150; Schmidt Bewysreg 3rd ed 331)

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Prepared on 13 October 2026 · Esheria