

SOUTH AFRICA / JUDGMENT

Mvelase v Nerinda and Others

(D546/2022)

[2023] ZAKZDHC 47 (19 July 2023)

[2023] ZAKZDHC 47

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D546/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D546/2022

In

the matter between:

NJABULO
MVELASE
APPLICANT
and
AHMED
NERINDA
FIRST RESPONDENT
MARIAM
NERINDA
SECOND RESPONDENT
WASEEMA
NERINDA
THIRD RESPONDENT

NASEEMA
NERINDA
FOURTH RESPONDENT
NAZIR
NERINDA
FIFTH RESPONDENT
eTHEKWINI
MUNICIPALITY
SIXTH RESPONDENT

Coram: Mossop J

Heard: 19 July 2023

Delivered: 19 July 2023

ORDER
The

following order is granted:

1.
The matter is adjourned to 5 September 2023;
2.
The registrar of this court is to cause a copy of this judgment and this order to be delivered to the sixth respondent.
3.
The sixth respondent is directed to deliver a detailed and personalised report that deals with the first to fifth respondents and sets out suitable available accommodation for them.
4.
The report is to be delivered five days before the date mentioned in paragraph 1 of this order and upon receipt by the Registrar is to be delivered to the attorneys for the applicant and the first to sixth respondents.
5.
The applicant and the first to fifth respondents may deliver a further affidavit each in respect of the report but only in respect of that report.
6.
Today's costs are reserved.

JUDGMENT

Mossop J:

- [1] This is an ex tempore judgment.
- [2] On 8 October 2019 the applicant attended a sale in execution where he purchased the immovable property with a street address of 6[...] M[...] Street, Mobeni Heights, Chatsworth (the property) for the sum of R196 000.[1] Contrary to what the applicant states in his founding affidavit, the conditions of sale pertaining to the property did not warrant that it would be sold free of occupants. On the contrary, those conditions specifically record that no warranty is given that a purchaser will be able to obtain vacant occupation of the property or that the property is unoccupied. In February 2020, the applicant discovered that the first to the fifth respondents were in occupation of the property. He now seeks their eviction in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the Act).
- [3] I mention at this point that the respondents' legal representative withdrew from proceedings by way of a written notice dated 6 July 2023. The matter was set down for argument today on 1 August 2022, when the respondents were still represented. Notwithstanding this, the applicant persists in seeking the relief claimed against the respondents.
- [4] I revert to the facts of the matter. Transfer of the property to the applicant consequent upon him purchasing it at the sale in execution occurred during September 2020. The applicant has no lease with the first to fifth respondents, who continue to occupy the property contrary to his wishes. When a letter of demand dated 3 August 2021 was sent to the first to fifth respondents on behalf of the applicant demanding that they quit the property, and was ignored by them, the applicant launched this application. The first to fifth respondents gave notice of their intention to oppose the application and have delivered an answering affidavit.
- [5] From the answering affidavit, not many facts emerge. The answering affidavit has been answered tersely in the style of a plea to particulars of claim, with allegations either being admitted or denied. This is obviously most unsatisfactory as the court has been denied an understanding of all relevant facts. What does emerge is that apparently the second respondent is the mother of the third, fourth and fifth respondents and she is the only person employed of the first to fifth respondents. It appears that additional persons beyond those cited in the application also reside at the property, namely Z[...], aged 8, N[...], aged 7 and N[...], aged 8 months. What relationship exists between the first respondent and the second to fifth respondents is not disclosed in the answering affidavit. Neither is it disclosed to whom the additional children just mentioned belong.

- [6] The second respondent states that her income amounts to R8 000 per month and that all who reside on the property are dependent upon her income for their survival. However, she puts up no proof of her income. It appears that the first respondent was the previous owner of the property but was unable to maintain his payment obligations to the bank that had funded the acquisition of the property and accordingly lost it.
- [7] In his replying affidavit, the applicant draws to the court's attention that in order to acquire the property, he was required to settle the amounts that were owed to the sixth respondent in respect of municipal rates. He had to pay an amount of R340 000 in in this regard. He has had to bond the property and is presently servicing the bond without enjoying any of the benefits of ownership. The first to fifth respondents continue to consume electricity and water whilst they occupy the property, for which they do not pay but for which the applicant is obliged to pay.
- [8] On all versions this is an intolerable situation. It cannot be pleasant for the first to fifth respondents to scratch out a living at the property on very limited income. It is offensive to their dignity as human beings. And it is intolerable that the applicant cannot enjoy the fruits of ownership and, effectively, to have to subsidise the first to fifth respondent's unlawful occupation of his property when he is under no obligation to do so. For there can be no doubt that the first to fifth respondent occupy the property unlawfully. They have no entitlement to be, or remain, in occupation of the property: they have not suggested any such right in their answering affidavit nor have they suggested that they continue to occupy the property in terms of a lease. In short, they have no defence to the application to compel their eviction. The only basis upon which they continue to occupy appears to be that they have nowhere else to go. It is impossible not to feel some empathy for their predicament.
- [9] The approach to determining applications brought in terms of this section of the PIE Act was set out by Wallis JA in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others*,^[2] where the learned judge held that the provisions of this section trigger a two-stage enquiry:

'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

enquiries. 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 enquiry 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 it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries had 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 enquiry 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.'

[10] In *Ndlovu v Ngcobo; Bekker and another v Jika*,^[3] the Supreme Court of Appeal, considered what would constitute relevant circumstances that a court should consider when determining

whether it would be just and equitable to order eviction and held the following:

'Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.'

[11] The first to sixth respondents have made the disclosures regarding their personal circumstances. That disclosure is open to criticism, for example, in the absence of supporting documents relating to the family's income. But all the signs point to the family living in straitened circumstances, as evidenced by the extent of the arrear rates owed in respect of the property to the sixth respondent. I have already found that the first to sixth respondents have no defence to the application. It appears to me therefore that it is just and equitable that they be directed to vacate the property.

[12] The second part of the enquiry is what conditions should be attached to the order to vacate. I have no intention of rendering the first to fifth respondents homeless. But I simply have no information at my disposal about alternative accommodation for them. While the application papers have been served upon the sixth respondent it has, true to form, shown no interest in these proceedings and provided no assistance to the court. That assistance must be provided. I require to be informed what arrangements can be made for the rehousing of the family.

[13] I accordingly intend adjourning this matter to seek a report from the sixth respondent on what opportunities for social or alternative housing may be considered in respect of the respondents. I do so with profound sympathy for the applicant who is being kept from his property by unfortunate circumstances. I am sure, however, that he acknowledges the importance of treating fellow human beings with kindness, dignity and respect.

[14] I consequently intend adjourning the matter for as short a period as possible that would still afford the sixth respondent time to report fully to this court. I am aware that the sixth respondent has a general report that it ritually presents to demonstrate that it lacks the means to assist indigent residents of the city. I make it plain that I do not wish to receive that report. I wish to receive a report that is specifically focussed on the first to fifth respondents

and which sets out all the potential opportunities for assisting them to find acceptable alternative accommodation.

[15] I accordingly grant the following order:

MOSSOP J

APPEARANCES

Counsel for the applicants: Ms P Bramdhew Instructed by: Chapman Dyer Incorporated 7th Floor 300 Anton Lembede Street Durban Counsel for the respondent: No appearance Instructed by: Not applicable Date of argument: 21 July 2023 Date of Judgment: 21 July 2023

[1] The formal description of the immovable property is Erf 1[...] M[...], Registration Division FT, in extent 465 square meters, first transferred by Deed of Transfer Number T[...] with Diagram annexed thereto and held by Deed of Transfer Number T[...].

[2] City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012

(6) SA 294 (SCA) para 25.

[3] Ndlovu v Ngcobo; Bekker and another v Jika 2003

(1) SA 113 (SCA) para 19.

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