

SOUTH AFRICA / JUDGMENT

Ngema N.O v Gumbi and Another [2023] ZAGPPHC 96; 60442/2020 (10 February 2023)

[2023] ZAGPPHC 96

COURT

North Gauteng High Court, Pretoria

BEFORE

D Van Den Bogert

CASE / FILE NUMBER

60442/2020

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FLYNOTES:

EVICTION

AND EMPATHETIC CONSIDERATION

EVICTION –

Date – Just and equitable – Occupant having been in
long-term relationship with deceased –

Fathered his children

and was dependent on him – Stayed in the house for over 20
years – House to be sold and

executrix seeking eviction –

An equitable date would be to allow at least 5 months to find
accommodation for her and

her family – Prevention of Illegal

Eviction from and Unlawful Occupation of Land Act 19 of 1998, s
4(8).

SAFLII

Note: Certain

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and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

PROVINCIAL DIVISION, PRETORIA

CASE

NO.: 60442/2020

REPORTABLE: NO.
OF
INTEREST TO OTHER JUDGES: YES / NO.
REVISED.
15/02/2023
Case
heard: 7 February 2023

Judgement: 10 February 2023
In

the matter between: YOLANDA
NGEMA
N.O.
Applicant
and
THULI GUMBI
1st
Respondent
CITY
OF JOHANNESBURG METROPOLITAN MUNICIPALITY 2nd
Respondent

JUDGMENT

1. This eviction application raises the question what would be a just and equitable date on which an unlawful occupier must vacate a property in circumstances where there was a prolonged occupation period, prior to the sudden termination of consent to occupy. The peculiar facts of this case require an empathetic consideration of the requirement of section 4(8) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (herein referred to as “PIE”).
2. In this eviction application, the first respondent occupies the property which is described in the notice of motion as Erf [...], Kensington, Gauteng, held under Title Deed Number [...], which is 496 square meters in extent (herein referred to as “the property”).
3. The applicant is the executrix in the estate of the late Jabulani Simon Ngema (herein referred to as “the deceased”). This fact is not in dispute. The executrix was, at the time of the passing of the deceased, also the wife of the deceased. The first respondent was involved in seemingly a long-term relationship with the deceased’s predeceased son, and with the deceased himself. They both fathered children with her, and with the consent of the deceased she was allowed to live in the property.
4. Until his death in the year 2017 he also maintained her and the children. This continued into the year 2018, because one of the deceased colleagues in the Taxi Industry, Mr. Dube, continued to pay maintenance, presumably earned from the deceased taxi business.

5. This all changed when, after his death, the applicant became the executrix of the deceased estate, and had instructed Mr. Dube in the year 2018 to stop contributing towards the maintenance of the first respondent and her children. Dube told the first respondent that she had to approach the applicant for maintenance money. When this eventually occurred, and the first respondent herself became angered by the applicant's refusal to contribute towards the maintenance of the children, she started insulting the applicant, which obviously did not result in a proper resolve of the impasse.
6. In paragraph 8 of the replying affidavit, the applicant states that the paternity of the first respondent's children is irrelevant for purposes of the liquidation application. It is her stance that an eviction order is justified since the property belongs to the deceased estate, and if the first respondent continues to occupy the property without paying municipal accounts, the beneficiaries of the estate are prejudiced. She also states that the first respondent has failed to claim against the deceased estate.
7. Paternity may indeed be irrelevant to the question of lawful occupation, and ownership, being only two of the considerations in an eviction application but taking into consideration the prolonged occupation period and the fathership question, and family ties, it most certainly has a bearing on "just and equitable" principle, that I am duty bound to consider.
8. The applicant had married the deceased somewhere in the year 2016 in community of property. It is common cause on the papers that the relationship between the applicant and the first respondent is troubled. This notwithstanding, I cannot ignore the uncontested

facts

that the municipal services account is in arrears with a substantive amount, and that this indebtedness increase monthly. It therefore decreases the possibility of a free residue in the deceased estate monthly.

9. The applicant had appointed a certain Mr. Bester of Kruger and Partners to assist her with the winding up of the deceased estate. The latter attorneys instructed an estate agent in Kensington to market the property and to find a buyer, presumably in the execution of the applicant's duty to wind up the deceased estate.
10. The applicant alleges that, due to the first respondent refusing the estate agent access to the property for purposes of marketing the property, she was provided by Kruger and Partners with a letter that she had to hand over to the first respondent. The applicant explains that she visited the property in September 2020 and that the first respondent refused to open the door and take the mentioned letter. She then left the letter at the property.
11. It is unfortunate that that letter has not been attached to the founding affidavit. It found its way to the replying affidavit. In paragraph 4 of the letter, the following sentence is included:

“You are further advised to find alternative accommodation. The property will be purchased, and you will in any case have no option but to vacate.”

12. Counsel for the applicant confirmed in court that this was the notice to the first respondent telling her that her right to occupy the property has been terminated. One does not find in the answering affidavit a categorical denial that that letter was received. Instead, the correct inference to draw is that the first respondent was knew of the fact that an eviction would follow. In paragraph 15 of her answering affidavit, she states that when she heard that she and her children are to be evicted she became gravely concerned. The concern arose from the fact that she earns no income herself, and they would be left vulnerable.
13. This application was allocated to be heard before me on 7 February 2023. It is regrettable that shortly before the hearing, being on 1 February 2023, the first respondent's attorney of record withdrew as her attorney. Some informal indications were given to court that the first respondent would appear in person, but when the matter was called there was no appearance by the first respondent in person.
14. The attitude adopted by the applicant in the application is that once the procedural requirements have been met, an owner is entitled to approach a court based on confirmation of the applicant's ownership and a respondent's unlawful occupation. From a reading of the affidavits, it appears that the applicant mainly relied on the first respondent, being the occupier, to disclose her circumstances relevant to the eviction order. This approach found approval in the case of *Ndlovu v Ngcobo; Bekker and Another v Jika*.^[1]
15. Although not clearly set out, the first respondent's defense to the eviction application seems to be premised on the fact that the deceased gave her consent to reside in the property. In addition, she tells this court that the deceased's predeceased son, fathered two children with her and that the deceased himself also fathered two children with her. In respect of the latter contention, she tells the court that she is not that sure about the paternity of one of the children. As such, she further requests this court to hold the eviction in abeyance pending the outcome of such paternity tests. This, again not clearly explained, would be necessary, because if they prove to be the children of the deceased, they would somehow be entitled to inheritance (or some other benefit from the deceased estate).
16. Save for the fact that the first respondent had ample time to complete paternity tests prior to the hearing of this application on 7 February 2023, the speculation about whether the children should have (or not) inherited something from the estate does not allow her to continue occupying the property unlawfully. Since it is not disputed that the true executrix of the estate is the applicant, a termination of consent to reside in the property by the executrix, makes the continued occupation of the property unlawful.
17. It follows that the applicant has established that the deceased estate is the owner of the property, and that the first respondent

unlawfully occupies the property. That is, however, not the end of this court's duty or considerations. It is undisputed that the first respondent occupied the property from 2002, whereafter she took up work in Secunda in the year 2010, but only for a short period. She, also in the year 2010, received a telephone call from the predeceased son of the deceased, requesting her to return to the property, as he became seriously ill. She obeyed and returned. After his passing away in October 2010 she remained in the property with the consent from the deceased until date hereof. It is undisputed that, at least, until the passing of the deceased, she had express consent to remain in occupation of the property. This consent has been terminated by the applicant in the year 2020.

18. Save for the fact, as I will deal with later in this judgment, that the first respondent became in toto dependent on the deceased, she occupied the property for an extensive and extended period. At present it is, disregarding the break in the year 2010, a period of more than 20 years. I am therefore obliged to accept that the uprooting of the respondent with her children, after such a protracted time will have an adverse effect on their rights protected by section 26 of the Constitution.
19. In this respect, I am bound to consider circumstances as set out in Section 4(7) of the PIE.[2] Bearing further in mind that it seems, at least prima facie, that the first respondent has two children with the deceased and two children with the latter's predeceased late son, the question whether it is just and equitable to evict, taking into consideration the circumstances as highlighted in section 4(7) of PIE, are to be considered with compassion and deserve the scrutiny of this court.
20. Although the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[3] dealt with an eviction in terms of section 6 of PIE, the cautionary words of the Constitutional Court remain an important guideline because, by large, section 6(3) of mirrors section 4(7):

"[32] The obligation of the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfill its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully appraised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation of the enquiry, not its subject matter. What the court is called upon to do is to decide whether, bearing in mind the value of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their home. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leave important questions or facts obscure, contested or uncertain, the court may be obliged to procure ways of establishing the true state of affairs,

so

as to enable it properly to 'have regard' to the relevant circumstances."

21. In this respect, since the first respondent's attorney had withdrawn, I instructed the registrar to make enquires about whether

the first respondent would be present in person. Her telephone number was provided to the court by here erstwhile attorney, who informally informed this court that he had advised his client to be present. Her number was provided, and the registrar made numerous attempts to call the first respondent to ensure here presence in the proceedings. She failed to answer these calls, and as indicated did not attend court. In the circumstances, I am solely reliant on what she had set out in her answering affidavit.

22. In paragraph 33 of the Port Elizabeth judgment *supra* the Constitutional Court confirms that the words "just and equitable" relate to both parties' interests, being what is just and equitable to the occupier as well as the owner. In this respect I enquired with counsel for the applicant, bearing in mind that the first respondent was not personally present, what would be an equitable time to order an eviction should I exercise my discretion in that respect. It was submitted, for the applicant, that this court should *inter alia* give due consideration to the following predicament that the landowner finds itself in:

22.1. the executrix is duty-bound to wind up the affairs of the deceased estate and, to do so, the property ought to be sold; and

22.2. that the debt due to the municipality increases monthly due to the first respondent's failure to pay anything for services. *Prima facie* it seems, from a consideration of an invoice of Johannesburg Metropolitan Municipality, which is dated 10 May 2019, that the account was then already in arrears with an amount exceeding R300 000.00. One can safely accept that the liquidity position of the deceased estate has since deteriorated.

23. This brings me to the plight of the first respondent. I indicated earlier in my judgment that it is unfortunate that the first respondent did not attend court which would have allowed me to enquire into the circumstances as at the date of the hearing of this eviction

application. I therefore am left and must consider the evidence as it appears in the answering affidavit.

24. Before I do so, I deem it apposite to make mention of the following. The applicant complains in the founding affidavit about the first respondent being abusive towards her. This seems to have happened more particularly as from the day she had refused to pay maintenance, and when she asked the first respondent to leave the property. In response thereto the first respondent tells this court that she should not have uttered all these disparaging remarks towards the applicant but being faced with a scenario where she might be left destitute, she acted in such an unbecoming fashion. The fact that there is no love lost between the applicant and the first respondent, is problematic in the sense that the first respondent

might experience difficulties in dealing with claims against the deceased estate.[4]

25. It is the following facts that are to be considered. The facts are found in paragraph 22 of the answering affidavit. I list them:

25.1. the first respondent has three minor children that reside with her in the property.

25.2. the first respondent is the head of her household and is unemployed.

25.3. the first respondent is dependent on her family for financial support.

25.4. the first respondent does not receive maintenance payments.

25.5. prior to the death of the deceased, she received a monthly allowance of R8 000.00 to take care of the children and herself.

25.6. those monies are withheld on the instruction of the applicant and left her and her children financially destitute.

25.7. the first respondent sets out facts that there is simply not alternative “free” accommodation in the City of Johannesburg.

25.8. the first respondent left her employment in 2010 because of undertakings made by the deceased pre-deceased son and relocated with all her children from KwaZulu-Natal.

25.9. that left the first respondent vulnerable and exposed, but until his death the deceased maintained her properly.

25.10. she has done everything in her power to obtain employment but is unable to secure any form of employment. As such, she cannot pay for alternative accommodation and her access to housing by government.

26. What is lacking from this exposition is an explanation by the first respondent telling this court how her family supports her. It seems also factually so that previously the first respondent and her children lived somewhere in KwaZulu-Natal. One would have expected the first respondent to have elaborated upon these issues and more particularly she should have told this court whether her family is able to re-accommodate her and her children.

27. On the other hand, the applicant tells this court that the first respondent has been invited with her children to come and live with the applicant’s family in Piet Retief. Whether this, against the backdrop of the patent hostilities, is practicable, is somewhat doubtful.

28. The fact that the first respondent has family who provides her with the necessary means to maintain her children and herself, leaves the hope that they would also be able to take her and her children in should the need arise. On the other hand, the first respondent is not entitled to retain her position as unlawful occupier indefinitely. Alternative accommodation seems therefore a possibility.

29. The applicant proposes a date for eviction within 14 days after the court order. Taking into consideration all the facts and circumstances of the first respondent, that proposal is plainly untenable in the circumstances. It negates the facts, which remain largely uncontested, that the first respondent and her children are largely destitute (was it not for the support of her family); it fails to give due weight to the fact that more than 20 years have been spent in the property. It does not take cognizance of the fact that prima facie alternative accommodation (subsidized by government) cannot be sourced within a short period of time. The approach to evict the

first respondent, who is clearly vulnerable, after a grace period of 14 days lacks compassion.

30. Although an eviction order is warranted in this case, I must determine a just and equitable date for the eviction. Having regard to the fact that the first respondent has occupied the property for a period exceeding 20 years, an equitable date would be to allow the first respondent at least 5 (five) months to find accommodation for her and her family.

31. Having regard to the financial circumstances of the first respondent, and the fact that she and her children, undisputedly so, receive no benefits from the deceased estate, I exercise my discretion not to grant a costs order against the first respondent. It is apparent that exceptional circumstances exist in this case that allows me to exercise my discretion to deviate from the normal order that a successful party ought to be awarded costs.

32. Having decided to grant an eviction, I make the following order:

32.1. The first respondent and all those who occupy the property with the first respondent shall vacate the property, described as Erf [...], Kensington, Gauteng, held under Title Deed Number [...], which is 496 square meters in extent, on/or before 31 July 2023.

32.2. Should the first respondent fail to vacate the property by 1 August 2023, the sheriff of this court having jurisdiction in the area where the property is located, shall be authorized to take all reasonable steps, which shall include but not be limited to obtaining the assistance of the South Africa Police Services, and evict the first respondent and all those who occupy the property with her from the property.

32.3. The applicant shall serve this order upon the first respondent on/or before the end of February 2023.

32.4. No order as to costs.

D VAN DEN BOGERT

Acting Judge

High Court of South Africa

Gauteng Division, Pretoria

Counsel for the applicant F Storm Instructed by: Kruger and Partners Inc Nelspruit C/O
MacRobert Inc Ref: G Dreyer/ps/00063126

[1] 2003 (1) SA 113 (A) para. 19.

[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):

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[3] 2005 (1) SA 217 (CC)

[4] These issues have been raised in the affidavits.

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