

SOUTH AFRICA / JUDGMENT

Nkonyane and Another v Nkonyane and Others (2020/43035) [2023] ZAGPJHC 395 (28 April 2023)

[2023] ZAGPJHC 395

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

2020/43035

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case Number: 2020/43035

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

In

the matter between:

NOEL

TSHEPO NKONYANE

First

Applicant

NOLUSAPHO

MARY NKONYANE

Second

Applicant

and

SIFISO

NKONYANE

First

Respondent

ALL

OTHER UNLAWFUL OCCUPIERS OF ERF 115 MOFOLO NORTH TOWNSHIP

Second

Respondent

THE

CITY OF JOHANNESBURG

Third

Respondent

Neutral Citation: Noel

Tshepo Nkonyane & Another v Sifiso Nkonyane & Others (Case
No. 2020/43035) [2013] ZAGPJHC 395 (28 April 2023)

JUDGMENT

STRYDOM, J

Introduction

[1] This is an opposed eviction application brought by Noel Tshepo Nkonyane (the First Applicant), and Nolusapho Mary Nkonane (the Second Applicant) in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) against Sifiso Nkonyane (the First Respondent), together with all the Unlawful Occupiers of the property forming the subject matter of this application, described as Erf 115 Mofolo North Township, Gauteng (the Property). The Third Respondent is the City of Johannesburg, cited herein in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the PIE Act, which require notice on the municipality having jurisdiction over the immovable property. The Third Respondent has elected not to participate in the proceedings.

Background

[2] The First Applicant and the First Respondent, who are cousins, were intestate heirs of the property in question in the estate of the late Fakazi Petrus Nkonyane (main estate), in which the main heirs were the First Applicant and the deceased mother of the First Respondent, Judy Mpheladi Nkonyane, under whose late estate (the second estate) the First Respondent together with his siblings

are heirs per stirpes.

[3] About 22 November 2018, the heirs of the main estate concluded a redistribution agreement in terms of which, inter alia, the beneficiaries were all given first preference to purchase the property. The executrix of the second estate have not exercise the right to purchase the property. The Applicants exercised such right and bought the property after a valuation was obtained. A power of attorney was subsequently concluded for the transfer of the property to the Applicants as per the agreement, and the Applicants accordingly bought out the First Respondent together with other heirs of the estate and the property was transferred and

registered in the names of the Applicants. The final liquidation and distribution account was approved by the Master. The First Respondent received his portion of the second estate.

- [4] Following the registration of the property in the names of the Applicants, the first Respondent was requested to vacate the property but he failed, neglected and/ or refused to vacate the property. He, inter alia, averred that the property was undervalued and that the executor of the main estate should not have accepted the valuation at which the Applicants bought the property.

The application for eviction

- [5] On 10 December 2021, the Applicant issued an application for the eviction of the First and Second Respondents, and such application was served on the First respondent on 5 February 2021 who, in turn, served and filed a Notice to Oppose on 5 February
2021. It should be noted that the application was stamped by the registrar on 10 December 2020 but only later served. The Third Respondent was served on 17 February 2021 and no notice to abide to or to oppose this application was filed.
- [5] Only the First Respondent opposes the application on the basis that the property was transferred to the Applicants by the Executors who have always acted as the First Applicant's attorneys, and in transferring the property to the Applicants acted in the interest of the first Applicant as opposed to the interest of all the heirs.
- [6] The First Respondent further opposes the application on contention that the Applicants have no basis for seeking an eviction order against him, as he is not in occupation of the property; and the transfer of the property from the deceased's estate to the Applicants was unlawful and stands to be set aside on the grounds that the Executor of the main estate acted in the interest of the First Applicant at the expense of the other heirs.

Applicable legal prescripts and analysis

- [6] After argument of the matter it became common cause between the parties that it would be expected of this court to make two findings: first, whether the First Respondent is still in occupation of the property; secondly, and in the alternative, should the court find that the First Respondent was an unlawful occupier, whether it would be just and equitable to order the eviction of the First Respondent in light of the relevant considerations in terms of the PIE Act, and more pertinently, all the relevant circumstances in this application pertaining to the allegations of impropriety when the Applicants bought the property.
- [7] It was argued on behalf of the First Respondent that he was no longer in occupation of the property, and thus could not be an unlawful occupier of the property as defined in section 1 of the PIE Act. He wanted to enter the property during December 2020 but was prevented from doing so. It became common cause that prior to service of the application to evict on the First Respondent, which took place on or about 5 February 2021, the first Respondent no longer resided in the backroom of the property and that only some of his belongings were

still left in the room. Previously requests were made for the first Respondent to remove his belongings from the property, but this was never done.

- [8] The PIE Act provides, inter alia, the procedures for the eviction of unlawful occupiers. The PIE Act's definitions are of importance for present purposes. Section 1 of the PIE Act defines an "unlawful occupier" as:

"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, 1996 (Act 31 of 1996)."[1]

- [9] Section 4(1) of the PIE Act applies to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

- [10] It can be distilled from these provisions that a party relying on the PIE Act must bring its case for eviction within the ambit of its provisions. This renders the present application a straightforward one. The Applicants bear the onus to establish –

as an essential jurisdictional requirement – that the person sought to be evicted is an "unlawful occupier".

- [11] The First Respondent averred that he was "constructively evicted" from the property during December 2020 when a protection order against him was obtained. He averred that this transpired after he was locked out of the property and broke a lock. He admitted that his personal belongings and those of his siblings are still at the property.

- [12] The legal question for decision therefore, is whether this would mean that the First Respondent and all those whose belongings are still at the property, by and through him, are unlawful occupiers?

- [13] The definition of "unlawful occupier" in section 1 of the PIE Act refers to a "person" who occupies land. The word "evict" is also defined in the PIE Act to mean to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will and "eviction" has a corresponding meaning". [2]

- [14] Factually, the only nexus the First Respondent still had with the property was that some of his belongings were still in a room. It is common cause that he resided at a different property and no longer had access to the property of the applicants. He have decided however, for whatever reason, not the remove his belongings.

- [15] Insufficient facts were pleaded by the Applicants to indicate that the First Respondent had sufficient control over the backroom on the premises to conclude the he was still occupying the room. There was no evidence presented to court that he still had the

key to the room which prevented Applicants to take occupation of the backroom.

- [16] Further in my view, the First Respondent was no longer in occupation of the property or part of the property once he left, albeit, as a result of a protection order. The definition provided in section 1 of the PIE Act of unlawful occupier is clearly couched in the present tense. Consequently, at the time of the launch of the application to evict, the First Respondent – according to the ordinary meaning of the provision – was not an “unlawful occupier” because he as a person left the property.
- [17] In *Bekker and another v Jika*[3], the court found that the ordinary meaning of the phrase “unlawful occupier” should prevail, Somyalo JP, aptly noted the significance of the definition being couched in the present tense, and suggests that “the time for determining the unlawfulness or otherwise of the occupancy is at the time of eviction or at the time legal proceedings are instituted and certainly not at the time the person “entered” or “moved” onto the land.”
- [18] The question of eviction therefore cannot arise in relation to someone who, at the time of launching the application, was no longer in occupation of the property in relation to which an eviction is sought, albeit that he had before that been in unlawful occupation thereof. In other words, the mere fact that some of the First Respondents belongings were left on the property does not mean that he as person remained in occupation of the room. The applicant would be entitled to deal with these goods in terms of the law which may necessitate an application to court for and order for the removal thereof. There is no need for this court to come to a conclusive finding in this regard.
- [19] It should be noted that should the court have concluded that First Respondent was still occupying the back room then his occupation would have been unlawful. The defences, besides the question about not being in occupation, have no merit. His belated unhappiness how the executor dealt with the main estate created no right to occupation. Moreover, he signed the redistribution agreement and received proceeds out of the estate. This is common cause. His only current gripe is that the Applicants paid insufficiently for the property. This comes down to one thing and that is that First Respondent wants more money as his case is not that he has a right to occupy the property. Fact is however, that the First Respondent is no longer in occupation.
- [20] Having found that the First Respondent, nor any other person for that matter, are unlawfully occupying the property of the Applicant, it follows that the Applicants application must fail.

Costs

[21] During December 2020 the First Respondent was in unlawful occupation as he still wanted to gain access to the property. This behaviour necessitated the drafting of the application. After December 2020 the First Respondent was no longer in occupation and the need to serve and further pursue this application fell away. The Applicant persisted with the application. Accordingly the Applicant should be ordered to pay the costs of the application.

Order

[22] The Application is dismissed with costs.

REAN STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

Counsel for the Applicants: Mr. G. Mncube Instructed by: Mncube Attorneys Inc. Counsel for the 1st Respondent: Mr. S. Seka Instructed by: Legal-Aid SA

Date of hearing: 24 April 2023

Date of Judgment: 28 April 2023

[1] Section 1(xi) of Act 19 of 1998.

[2] Section 1(iv) of Act 19 of 1998.

[3] See *Bekker and another v Jika* [2002] 1 All SA 156 (E) at para 10.

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