

SOUTH AFRICA / JUDGMENT

Perumal v Songca and Others (D3715/2021) [2023] ZAKZDHC 42 (17 July 2023) [2023] ZAKZDHC 42

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D3715/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D3715/2021

In

the matter between:

SIVALINGAM
PERUMAL
APPLICANT
and
MANDLA
SONGCA
FIRST RESPONDENT
FIKILE
ZONDI
SECOND RESPONDENT
ETHEKWINI
MUNICIPALITY
THIRD RESPONDENT

Coram: Mossop J
Heard: 17 July 2023
Delivered: 17 July 2023
ORDER
The

following order is granted:

1.
The first and second respondent, and all other persons unlawfully occupying through them, are directed to vacate the immovable property situated at 1[...] S[...] Road, New Germany, Pinetown by no later than close of business of 31 August 2023.
2.
In the event of the first and second respondents failing or refusing to comply with the order in paragraph 1 hereof, the Sheriff of this court be and is hereby authorised and empowered to eject from the said property the first and second respondent and all other persons unlawfully occupying the property through them.
3.
The second respondent is directed to pay the costs of this application.

JUDGMENT

Mossop J:

- [1] This is an ex tempore judgment.
- [2] Number 1[...] S[...] Road (the property) is the address of a private dwelling situated in New Germany, Pinetown. It is presently registered in the name of the applicant. It is, however, presently occupied by the second respondent. The applicant consequently seeks an order evicting her in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, known informally in the legal profession as ‘the PIE Act’. I shall also refer to it by that name.
- [3] When the matter was called this morning, Mr Patel appeared for the applicant. There was no appearance for the second respondent, who is the only respondent that has opposed the matter. The first respondent has not opposed the application and has not participated in it in any way. Neither has the third respondent. Mr Patel is thanked for his assistance.
- [4] The previous owner of the property was, apparently, the first respondent. It was, however, put up for sale on a public auction on 31 March 2021 by Firststrand Bank Limited, the bond holder. It was purchased by the applicant at that sale in execution for a sum of R735 000.

Having acquired the property, the applicant visited the property a few days later and found the second respondent ensconced there. Upon him advising her that he now owned the property, the second respondent advised him that she had a signed agreement of sale in terms of which the first respondent sold the property to her. The applicant knew nothing of this. At the suggestion of the second respondent that he sell her the property, he said he would sell the property to her for R1 million. Nothing came of this banter.

- [5] The second respondent refuses to vacate the property on the strength of the sale agreement that she concluded with the first respondent. At the time that the applicant brought this application, he believed that the first respondent still resided at the property. It appears that the first respondent no longer occupies the property, having vacated it, according to the second respondent, on 31 December 2021. I am not certain that he has vacated, so I shall include him in the relief to be granted. The second respondent appears to adhere to the view that her rights arising out of the sale agreement that she concluded with the first respondent gives her a better right to the property than the fact that the property is now registered in the name of the applicant.

- [6] Section 4(7) of the PIE Act provides that:

‘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 . . . 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.’

- [7] 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*,^[1] 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.'

[8] In *Ndlovu v Ngcobo; Bekker and another v Jika*,^[2] 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.'

[9] In *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*,^[3] the court held that the best evidence of ownership of immovable property is the title deed. In *Chetty v Naidoo*,^[4] the court, in dealing with the topic of ownership held that:

'... one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).'

[10] The facts reveal that the applicant purchased the property at a sale in execution. He had no prior connection to the property before doing so. He claims not then to have been aware of the existence of the sale agreement concluded between the first and second respondents.

There is no particular reason why he should have been aware of this, and no suggestion is made by the second respondent that he ought to have been aware. It appears that he did not even know that the second respondent was in occupation of the property at all and consequently could not have known of her private arrangement with the first respondent.

[11] Section 70 of the Magistrate's Court Act 32 of 1944 provides that:

'A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.'

[12] Factually, transfer of the property has occurred. No facts have been disclosed that suggest that the applicant was other than a purchaser in good faith without notice of any defect.

[13] The second respondent takes the view that her agreement with the first respondent trumps the applicant's rights. She states that consequent upon concluding the sale agreement in July 2020, she applied for bond approval in or about August 2020 and obtained such approval. She was required to complete paperwork and submit further documentation:

‘... in order to obtain final approval for the purchase price to be paid to the First Respondent.’

[14] At that point, the coherence in the second respondent's version comes to an end. She does not explain whether final approval for her bank loan was forthcoming, or whether the process of transferring the property into her name had commenced. If she received final approval from the finance house, she has not put up any proof of such approval. The sale agreement that she has put up indicates that she was required to obtain such approval within 14 days of acceptance of her offer to purchase. The offer to purchase was signed by her on 10 July 2020 and was accepted by the first respondent on 28 July 2020. Her rather vague submission that she approached a bank ‘in or about August 2020’ does not assist in clarifying what happened next.

[15] The second respondent also does not explain what happened between August 2020 and 31 March 2021 when the property was put up for sale at the public auction attended by the applicant. It seems improbable that the sale between the first and second respondents progressed or that any money was paid to the first respondent. Such sale could only have occurred with the approval of the bondholder. The bondholder is the party that put the property up for sale at the sale in execution. Further evidence that the private arrangement between the first and second respondents did not come to fruition may be found in the fact that the second respondent, on her own version, later offered to purchase the property from the applicant: she is unlikely to have volunteered to pay twice for the same property. Thus, all that the second respondent had was a signed offer to purchase and nothing more.

[16] That agreement with the first respondent, at best, endows her with a personal right against him. She has no right enforceable against the applicant. The registration of the property in the name of the applicant, on the other hand, affords him a real right in the property, defensible against the world.

[17] The second respondent seems to believe that her interaction with the applicant when he first visited the property in which she offered to purchase the property from him has established some form of contractual right in her favour. The circumstances behind this aspect of the matter are that the second respondent apparently requested the applicant to sell her the property when she discovered that he had acquired it. The applicant said he would sell it to her for R1 million. I previously described this interaction in this judgment as ‘banter’. It seems to me that is all that it was. The second respondent was only prepared to pay the amount of R825 000, which amount was not acceptable to the applicant. Nothing further was said or done in this regard. No written agreement was concluded that assists the second respondent. She tacitly acknowledges that no agreement was concluded when she states that:

‘The only issue is the purchase price of the property.’

It may be the only issue, but it is a significant issue on which the parties could not agree. Without agreement on the price, there can be no agreement. In any event, all this occurred orally and not in writing, as required by the Alienation of Land Act 68 of 1981.

[18] I must thus find that the applicant is the true owner of the property. The application of the PIE Act has the effect of delaying or suspending the applicant’s full proprietary rights until a determination has been made on whether it is just and equitable to evict the unlawful occupier and under what conditions.[5] In my view, the applicant is entitled to, and it is just and equitable that, an order be made directing the first and second respondents and all those occupying through them to quit the property.

[19] I must now consider by when the second respondent should vacate the property. She is not an indigent person and has gainful employment. She describes herself in her answering affidavit as being a Centre Manager at the Department of Education. She must therefore earn a salary, although she has not disclosed how much she earns. She is thus able to secure alternative rented accommodation. She states that her two adult children reside with her at the property as does her 51-year-old cousin, who is apparently disabled. No information is provided concerning this disability.

[20] I must, however, acknowledge that the second respondent has been in occupation of the property at least since the applicant purchased it on 31 March 2021. During that time, she has thwarted the applicant’s plans for the property, and she has not paid him a sou for that occupation.

[21] I have a discretion in determining the date upon which the first and second respondents must quit the property. In exercising this discretion, I must always act in accordance with what I perceive to be just and equitable. I accept that finding new accommodation may potentially be stressful. That being said, the second respondent has had a substantial period of time to consider her position and to source alternative accommodation. I shall, nonetheless, give her until the end of August to vacate the property, it being recorded that the date of this judgment is 17 July 2023.

[22] In the circumstances, I grant the following order:

1. The first and second respondents, and all other persons unlawfully occupying through them, are directed to vacate the immovable property situated at 1[...] S[...] Road, New Germany, Pinetown by no later than close of business of 31 August 2023.
2. In the event of the first and second respondents failing or refusing to comply with the order in paragraph 1 hereof, the Sheriff of this court be and is hereby authorised and empowered to eject from the said property the first and second respondents and all other persons unlawfully occupying the property through them.

MOSSOP J

APPEARANCES

Counsel for the applicant: Mr N Patel Instructed by: A R Kazi and Company Ground Floor 169 Felix Dlamini (Brickfield) Road Overport Durban Counsel for the second respondent: No appearance Instructed by: Vishal Singh and Associates Office 1, Office Park (Forest) 15 Summit Drive Sherwood Durban Date of argument: 17 July 2023 Date of Judgment: 17 July 2023

- [1] City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012
- (6) SA 294 (SCA) para 25.
- [2] Ndlovu v Ngcobo; Bekker and another v Jika 2003
- (1) SA 113 (SCA) para 19.
- [3] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd [1992] ZASCA 208; 1993
- (1) SA 77 (A) page 82; see also Bowley Steels (Pty) Ltd v 10 Sterling Road (Pty) Ltd and Another [2017] ZAGPJHC 196.
- [4] Chetty v Naidoo 1974
- (3) SA 13 (A).
- [5] Ndlovu v Ngcobo; Bekker and Another v Jika 2003
- (1) SA 113 (SCA).

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