

SOUTH AFRICA / JUDGMENT

S.G.B v S.L.B (D951/2020) [2020] ZAKZDHC 67 (30 December 2020)

[2020] ZAKZDHC 67**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Chetty

CASE / FILE NUMBER

D951/2020

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Policy
IN THE HIGH COURT OF
SOUTH AFRICA KWAZULU-NATAL LOCAL DIVISION, DURBAN
CASE
NO. D951/2020
In the matter

between:

S[....]
G[....] B[....]
APPLICANT
and
S[....]
L[....] B[....]
RESPONDENT
This
judgment was handed down electronically by circulation to the
parties' representatives by email, and released to SAFLII.
The
date and time for hand down is deemed to be 10h00 on 30 December
2020.
ORDER
(a)
The respondent is directed to vacate the immovable property situated
at
[....] by not later than 31 January 2021;
(b)
The applicant is directed to pay to the respondent rental pendente

lite on any property rented by the respondent subject to a maximum amount of R30 000 per month with effect from 31 January 2021;
(c)
No order as to costs.

JUDGMENT

Chetty J

[1] This matter came before me on the trial roll in respect of a divorce action between the parties instituted under case number 4677/2018D. In the course of those proceedings, an order in terms of Uniform rule 43 was issued on 23 August 2019 ('the Rule 43 order') where the applicant was ordered to pay maintenance pendente lite for the respondent and their minor child in the amount of R30 000 per month. The applicant was also directed to retain the respondent and the minor child as beneficiaries on his medical aid plan as well as to pay for the child's educational expenses and to make a contribution towards the respondent's legal costs in respect of the divorce action.

[2] It is not in dispute that as a result of the breakdown of their marriage, the applicant moved out of the matrimonial home located in the [...], KwaZulu-Natal in April 2018, leaving the respondent

to reside there with their minor son. It is also common cause that their son is a full-time border at a private school in the Natal

Midlands. As such, the matrimonial home is occupied almost exclusively by the respondent alone. It is a large house by all accounts, comprising four bedrooms (all ensuite), a gym, a double garage and is approximately 560 m² in extent. The applicant currently lives in rented accommodation.

[3] The applicant, pending the finalisation of the divorce action, launched an application for the respondent to vacate the matrimonial home she presently occupies on the basis that he intends to sell the

house as he is financially incapable of paying the amount in terms of the Rule 43 order as well as continuing to pay the mortgage bond on the matrimonial home and other related expenses.[1] After having the matrimonial home on the market for a while, the applicant received an offer to purchase in December 2019 for R6

million, which he accepted. On the basis that he is contractually obligated to give the new owners vacant possession of the property on the date of transfer, he has sought the eviction of the respondent.[2] I recognise that this case presents a challenge to the conventional grounds where an eviction is sought, either on a possessory claim or on the rei vindication, where reliance is placed on the applicant's ownership and the respondent's possession of the property. In the present context, the applicant (at the time of hearing) was neither an owner, possessor nor lessee

and did not seek the eviction in order to occupy the matrimonial home himself. It is not disputed that at the time when the applicant launched the application, he was still the owner of the property.

[4] According to the applicant, the respondent has vacillated in her stance on the sale of the house. She initially supported the sale, only to later change her mind and frustrate potential buyers viewing

the property. This is disputed by the respondent. Mr Stokes SC for the applicant submitted that the applicant recognises that, pending the finalisation of the divorce action, he is obliged to provide suitable accommodation for the respondent and to this extent has sought suitable properties on the same golf estate that could be occupied by the respondent, without having any adverse impact on her amenities. In this regard the applicant tenders to rent for her a three-bedroom house, with three bathrooms and three garages, being 380 m² in extent, with a swimming pool and high-quality finishes, at a cost of approximately R30 000 per month. This, on his calculations, would save him almost R30 000 per month on his existing bond repayments, together with a further R11 875 arising from maintenance to the matrimonial property, levies, utilities and other related expenses associated with ownership. The tender of alternative accommodation to the matrimonial home was repeated by the applicant's attorney and has to date been refused by the respondent.

[5] The applicant, in seeking the eviction of the respondent, relied heavily on the decision in *Cattle Breeders Farm (Pvt) Ltd v Veldman* [1974] 1 All SA 289 (RA) where the court held at 291:

‘The rights of a wife to remain in the matrimonial home, which this dwelling undoubtedly was, are well set out by Lord UPJOHN in the case of *National Provincial Bank, Ltd. v. Ainsworth*,

[1965] UKHL 1; (1965) 2 All E.R. 472 at p. 485:

“A wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains

there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully

there as a wife, the situation is one sui generis.”

[6] In light of the above, it is evident that a spouse has a sui generis right to remain at the matrimonial home while the parties are married. The right arises from the marriage relationship, which means that it ceases to exist upon termination of the marriage. It is common cause that the divorce action, set down before me, could not proceed. Instead, the applicant persisted in the eviction application, with his need to give vacant possession to the new purchasers of the property, gaining a degree of urgency as counsel informed me that transfer of the property had only recently taken

place prior to the date for hearing.

[7] Cattle Breeders recognizes that a spouse occupying the matrimonial home (the wife in this instance) may be ejected from the matrimonial home provided that she is offered 'suitable alternative accommodation' or 'a means of acquiring such suitable accommodation'.^[3] The court held at 292:

'A long line of cases seem to have laid down the proposition that even if the husband may be the defaulting party he may eject the wife from the matrimonial home, provided he offers her suitable alternative accommodation or offers her the means of acquiring such suitable accommodation.'

[8] Cattle Breeders applied the English decision of *National Provincial Bank Ltd v Ainsworth* [1965] UKHL 1; [1965] 2 All ER 472 to the facts before it. In *National Provincial*, Lord Upjohn stated at 485:

'... he may offer alternative accommodation to the wife; he may offer her substantial maintenance to go and live elsewhere. The cases that I have already cited show that, provided the wife's marital rights are adequately safe-guarded in some such way, the court would not normally refuse to evict a wife if the husband wants to deal with his property.'

[9] Both Mr Alberts, who appeared for the respondent, and Mr Stokes, accepted, and correctly in my view, that notwithstanding the authority as set out in *Cattle Breeders* I still retain a discretion, having regard to all the facts and circumstances, whether to grant an order for eviction. This is

evident from *Buck v Buck* 1974 (1) SA 609 (R) at 612H-613A, where the court held:

'What seems to me to emerge clearly from these cases is that the remedy is a discretionary one, but of course the Judge's discretion must be exercised on proper principles and within reasonable limits.'

[10] Similarly, in *Owen v Owen* 1968 (1) SA 480 (E), the court refused to order that a wife vacates the matrimonial home because the husband had not offered suitable alternative accommodation. The court stated at 484A-B:

'It is sufficient for present purposes to say that I am not satisfied in this case that the applicant has made an adequate tender to the respondent, either of alternative accommodation or of funds sufficient to place her in a position to obtain that accommodation.'

[11] During the course of the hearing, it transpired that the matrimonial home was indeed sold and that transfer thereof had passed to the new owners early in November 2020, shortly before I heard the application. It therefore follows that the applicant, in whose name the immovable property was registered, was no longer the registered owner of the property as at the time of the hearing. Mr Alberts submitted that apart from the other defences raised by the respondent, the crisp issue is whether the matter was properly before

me as the application for eviction is one which had to comply with the provisions of the Prevention of Illegal Eviction from and

Unlawful Occupation of Land Act 19 of 1998 ('PIE'). In that regard, s 26(1) of the Constitution provides that '[n]o

one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant

circumstances.' Section 1 of PIE 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 No. 31 of

1996).' (my emphasis)

The application of PIE to the present facts are considered later.

[12] Mr Stokes submitted that the transfer of the property into the name of the new owners[4] does not affect the right of the applicant to seek the eviction of the respondent in that as at the time of *litis contestatio* his right to seek the eviction was competent in law.[5] The term *litis contestatio* is synonymous with the close of pleadings. It is generally accepted that this would be the stage when the issues are crystallised and joined. *Milne, NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 359A; *Potgieter v Sustein (Edms) Bpk* 1990 (2) SA 15 (T) at 18I. Its effect is to

'freeze the plaintiff's rights as at that moment'. *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608D. If a person loses his title to sue after *litis contestatio*, it is open to his opponent to raise that fact as a defence to the original claim by way of a special plea. *Thos Barlow & Sons (Natal) Ltd v Dorman Long (Africa) Ltd and another* 1976 (3) SA 97 (D).

[13] At first glance, the argument seems logical and sound in law that once transfer passed to the new owners, the applicant lost his right to seek the respondent's eviction. Mr Alberts submitted that the new registered owners would have locus to seek the respondent's eviction as she would fall within the definition of an 'unlawful occupier' in terms of PIE. Accordingly, the respondent submits that the applicant has no locus to seek the eviction following the transfer of ownership. It is also doubtful whether the respondent may invoke her *sui generis* right to occupy the matrimonial home as against the new owners. See *National Provincial* (supra) at 479 where Lord Hodson stated:

'When there is a genuine transfer, there is no reason why the wife's personal rights against her husband, which are derived from her status, should enter the field of real property law so as to clog the title of an owner.'

Lord Upjohn also stated at 485 that:

‘I am of opinion that the rights of husband and wife must be regarded as purely personal inter se and that these rights as a matter of law do not affect third parties.’

[14] Mr Stokes however emphasised that the applicant did not apply for the respondent’s eviction on the basis of his ownership, asserting the *rei vindicatio*. It is not disputed that the founding affidavit makes no mention of the usual averments by an owner seeking the eviction of a tenant or occupant. Counsel submitted that ownership of the matrimonial home in the name of the applicant did not give him any right to seek the respondent’s ejectment. In *Badenhorst v Badenhorst* 1964 (2) SA 676 (T) at 679 the following was held:

‘My view is that a wife has no right to seek to eject her husband from the matrimonial home merely because the property belongs to her. Because he is her husband he has rights flowing from the marriage which in relation to that property put him in a category differing *toto coeli* from that of a stranger. The wife’s right to eject him must therefore flow from considerations which to a great extent must depend on the merits of

the matrimonial dispute.’[6]

[15] The applicant’s contention that the loss of his ownership does not strip him of his ‘right’ to seek the eviction of his spouse from their home is given support in *HM v LM* [2020] ZAWCHC 24 where the court held that the non-owner spouse could evict the owner spouse from the matrimonial property. The difference between *HM v LM* and the present matter however is that the non-owner spouse was residing in the matrimonial home from which she sought the owner spouse’s ejectment, and thus the right she was enforcing was probably what Hahlo refers to as being ‘closely bound up with the duty of support’.[7] I am mindful that the context in which our courts have recognized the right of one spouse to obtain the eviction of the other is where co-habitation is undesirable: ‘our courts have held that eviction orders by one spouse against the other are justified in cases of molestation, where it is in the interest of minor children or where there are other factors that render co-habitation by the spouses undesirable’.[8] Notwithstanding that the applicant does not reside in the matrimonial home and that he is not the owner thereof, I am of the view that having regard to the facts of this matter, the applicant does indeed have locus to seek the respondent’s eviction. I am swayed to this conclusion particularly because the applicant’s actions in seeking his spouse’s eviction will not have the result of stripping her of her home or rendering her vulnerable as someone without any form of adequate accommodation. Those interests are well taken care of by the applicant *pendente lite*. The applicant’s duty to provide suitable accommodation for his wife pending the finalization of the divorce arises from the Rule 43 order. As stated earlier, his proposals do not entail a breach of those obligations. Moreover, the new owners were not joined as parties to the application, and I am unaware of their approach towards the respondent continuing to live on the property as a lessee of theirs, pending the finalization of the divorce or the financial resources of the applicant to continue paying a rental in excess of the R30 000 he has tendered for alternative accommodation.

[16] In light of the authority which I have referred to, it is contended on behalf of the applicant that his ownership of the property is irrelevant, as was his loss of ownership prior to the hearing of the application. I agree with this statement. Consider what the position would have been had the parties resided in a rented apartment which constituted their matrimonial home, where the wife alone occupied the matrimonial home, while her estranged husband lived elsewhere. Would the wife be able to mount a challenge against her husband to demand that she has a right to live in the matrimonial home even where the landlord is threatening to evict her from the premises? I think not.[9] In my view the wife, if threatened with eviction, would only have a right against her estranged husband to provide her with reasonable

accommodation pending the divorce. Her entitlement would be restricted to suitable or reasonable alternative accommodation. This

entitlement does not extend to a demand to be accommodated at a specific house or property.

[17] Returning to the issue of whether PIE applies to the present case, Mr Stokes relied on *PPS v TLS* [2020] ZAWCHC 90 where the court found that a spouse cannot become an ‘unlawful occupier’ in relation to the other spouse in terms of PIE, in the context of a marriage in community of property. The court reasoned that in a marriage of community ‘the right to give and withdraw consent vests in the spouses jointly, so that one spouse cannot become an “unlawful occupier” simply because the other spouse does not want him or her to live there.’¹⁰ The court found it ‘unnecessary to express an opinion on the case where the parties are married out of community of property and the land in question belong[s] solely to one of them.’ This is precisely the factual matrix in the present matter. It bears noting that the court in *PPS* did not suggest that the underlying conclusion regarding the right of one spouse to evict the other could be altered based on the matrimonial regime.

[18] C P Smith in *Eviction and Rental Claims: A Practical Guide* June 2020 - SI 13, suggests that PIE may be applicable to the eviction of one spouse by another, thereby overriding the spouses’ common law remedies. Section 4 of PIE makes the Act applicable ‘[n]otwithstanding anything to the contrary contained in any law or the common law’. Smith opines that PIE should apply to eviction proceedings by one spouse against the other. However, the author also recognizes that there may be several reasons why the application of PIE might be inappropriate. One reason is set out below:

‘A possible view is that the spouse sought to be evicted is not a person “without any other right in law to occupy such land” as defined in PIE because his or her right of occupation is founded on a spouse’s conjugal right to occupy the common home and that his or her occupation can, therefore, never be rendered unlawful as defined in PIE. This could mean

fact that the owner also had locus standi to seek an ejectment order against the trespasser, does not abrogate the right of the lessee to claim the same relief against the trespasser.’ ¹⁰ *PPS v TLS* [2020] ZAWCHC 90 para 20.

that such cases fall to be dealt with as an eviction of a “lawful occupier” sui generis in terms of the common law.’[10]

[19] This view aligns with the applicant’s contention, and would appear to be in tandem with the dicta in *Cattle Breeders*, which confirms the right of one spouse to reside on the property being founded in the status as a spouse. The applicant’s case is supported by the views set out in *H R Hahlo The South African Law of Husband and Wife* 5 ed (1985) at 143-4 where he states that ‘[e]ven where the husband is the owner of the property occupied by the couple, he has no right, while the marriage is in existence, to eject his wife from it without providing her with suitable alternative accommodation’. Acting in accordance with these principles, the applicant seeks the respondent’s eviction from the matrimonial home against a tender of equally comparable living conditions.

[20] I am not convinced by Mr Alberts’s argument as to the application of PIE as it does not appear to me that a spouse who occupies the matrimonial home without the other spouse’s consent, would fall within the definition of ‘unlawful occupier’, given that the right is sui generis and flows from the marriage relationship and not from an incident of possession or ownership. In any event, the enquiry before me is whether the applicant has locus standi to seek the respondent’s eviction from a property of which he is no longer the registered owner, nor in possession of.

[21] Mr Alberts further submitted that even if the applicant was entitled to seek the respondent’s eviction, the applicant chose the incorrect procedure. The correct procedure, it was submitted, was to pursue a variation of the Rule 43 order. I am not persuaded by that submission and I agree with Mr Stokes that even if I were to grant the order for eviction sought, the provisions of the Rule 43 order remain intact. The

Rule 43 order makes no mention of the respondent’s occupation of the matrimonial home, such occupation flowing from her status as a spouse and not through the Rule 43 order.

[22] I do not consider that the applicant, notwithstanding no longer being the owner of the immovable property occupied by his spouse, loses his right to deal with the matrimonial home in the manner he has, or that there is anything iniquitous about the way in which he has sought to give vacant possession to the new owners. The respondent’s

interest and financial well-being are properly protected by the provisions of the Rule 43 order. The interests of the respondent and her minor son are adequately catered for in the applicant’s tender of alternate accommodation. No valid grounds of opposition

have been put up by the respondent as to why the alternative proposed by the applicant should be rejected. I am unable to find any reason why the applicant should not be entitled to the order he seeks. I find the observations in *National Provincial* (supra), apposite to the position in which the applicant finds himself. The court at 472 said:

‘Then many things may happen; he may offer alternative accommodation to the wife; he may offer her substantial maintenance to go and live elsewhere. The cases that I have already cited show that, provided the wife's marital rights are adequately safe-guarded in some such way, the court would not normally refuse to evict a wife if the husband wants to deal with his property.’ (My emphasis.)

[23] In the result, I am satisfied that the applicant has made out a case for the eviction of the respondent from the matrimonial home against a tender by the applicant to pay rental pendente lite on a property to be rented by the respondent, subject to such rental not exceeding an amount of R30 000 per month. I pause to point out that the eviction order I make takes into account the regulations made in terms of the Disaster Management Act and in particular regulation 37(2) which allows a court to suspend or stay an eviction order until the expiration of the national state of disaster. I am satisfied that it is just and equitable to grant the order without imposing any suspension on its execution, particularly as the date for the respondent to vacate the matrimonial home is 31 January 2021, which is beyond the end date of the current Adjusted Level 3 restrictions. Moreover, as pointed out earlier, the effect of this order does not deprive the respondent of shelter or accommodation during the current period of restrictions, which is what regulation 37(2) seeks to proscribe. Instead, the order has the effect of relocating the respondent to rental accommodation, commensurate with her needs and without any diminution in her amenities, paid for by the applicant, pending finalisation of the divorce. [11]

[24] With regard to costs, while the applicant has been substantially successful in this application, I do not believe that this is an instance where costs should follow the result, despite the respondent being somewhat uncooperative in regard to the sale of the house. Ultimately, the respondent was unable to mount any sustainable defence to the application. Once Mr Alberts's reliance on the respondent being an ‘unlawful occupier’ for the purposes of PIE withered away, so too did any remaining ground of opposition to the order sought. I associate myself with the views in *Owen v Owen* (supra) at 484H-485A with regard to costs, where the court said the following:

‘She may well legitimately regard herself as the innocent party but she is at present dealing with an entirely collateral dispute, an interlocutory matter in respect of which the only issue is whether she should vacate the house of the applicant and it seems to me that, although there was no onus on her to seek alternative accommodation herself, her attitude has been unco-operative and obstinate. The view which I take of the matter is that, whether or not there had been an onus upon her, had she indicated any willingness to co-operate with the applicant, the matter might well have been resolved without the necessity of his coming to

Court.’

[25] I accordingly make the following order:

- (a) The respondent is directed to vacate the immovable property situated at 12 Woodchester Way, Cotswold Downs Estate, Hillcrest by not later than 31 January

2021;

M R CHETTY

Applicant: A Stokes SC Instructed by Ness-Harvey, Westville Email info@nhattorneys.co.za

Respondent: S Alberts Instructed by Asmal & Asmal Attorneys Email: asmalex2@telkomsa.net

Date of hearing: 09 November 2020 Date of Judgment: 30 December 2020

This Judgment was delivered electronically to the parties on the 30th December 2020, at 10h00

- [1] The matrimonial home is registered in the name of the applicant, although the respondent contends that it was purchased with funds from a joint property portfolio in the UAE. According to the respondent, the home is the only asset in the applicant's

estate and its sale has a profound impact on her accrual claim in the divorce action. The respondent disputes the allegations of the applicant's financial inability and accuses him of a lavish lifestyle including overseas holidays.

- [2] The applicant's locus standi was not disputed on the papers, although in the heads of argument the issue was raised whether he had the necessary standing to bring an application for the respondent's eviction.

- [3] Cattle Breeders Farm (PVT) Ltd v Veldman [1974] 1 All SA 289 (RA) at 292.

- [4] According to the respondent's supplementary heads, dated 5 November 2020, the property was transferred on 4 November 2020. A WinDeed Search was put up in confirmation.

- [5] It is debatable (although it was not argued before me) whether the applicant has locus in as much as he is a non-occupying spouse, who sold the matrimonial home and resides elsewhere. In Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) para 7 the SCA held: '[7] . . . Generally, the requirements for locus standi are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove locus standi rests on the party instituting the proceedings.'

- [5] It is debatable (although it was not argued before me) whether the applicant has locus in as much as he is a non-occupying spouse, who sold the matrimonial home and resides elsewhere. In Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) para 7 the SCA held:

[7] . . . Generally, the requirements for locus standi are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove locus standi rests on the party instituting the proceedings.'

[6] Emphasis in original. The case was cited with approval in *Du Plessis v Du Plessis* 1976 (1) SA 284 (W) at 287A-B, the court stated: 'Mr Kantor contended that the mere fact of ownership of the conjugal home by one spouse was by itself not a ground for eviction of the other spouse. I agree.'

[6] Emphasis in original. The case was cited with approval in *Du Plessis v Du Plessis* 1976 (1) SA 284

(W) at 287A-B, the court stated: 'Mr Kantor contended that the mere fact of ownership of the conjugal home by one spouse was by itself not a ground for eviction of the other spouse. I agree.'

[7] H R Hahlo *The South African Law of Husband and Wife* 5 ed (1985) at 143-44.

[8] C P Smith *Eviction and Rental Claims: A Practical Guide* (June 2020 - SI 13) para 3.4.3.

[9] It has been held that it is no obstacle for a lessee, for example, to sue for eviction even though the owner of the property also has a right to sue for eviction. See *Teka v Teka* [2010] ZAGPPHC 638: 'the

[10] CP Smith *Eviction and Rental Claims: A Practical Guide* (June 2020 - SI 13) para 3.4.3.

[11] Adjusted Alert Level 3 Regulations as set out in Disaster Management Act, 2002: Amendment of Regulations issued in terms of section 27(2), GN R1423, GG 44044, 29 December 2020.

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