

SOUTH AFRICA / JUDGMENT

T.R.T V C.N.N and Another (903/2022)

[2023] ZALMPTHC 12 (28 November 2023)

[2023] ZALMPTHC 12**COURT**

Limpopo High Court, Thohoyandou

BEFORE

IM Khosa

CASE / FILE NUMBER

903/2022

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Policy**HIGH****COURT OF SOUTH AFRICA****LIMPOPO LOCAL****DIVISION, THOHOYANDOU****CASE****NO: 903/2022****REPORTABLE:**

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

28/11/2023

In

the matter between

T[...]

R[...] T[...]

APPLICANT

And

N[...]

N[...] C[...]

FIRST

RESPONDENT

THULAMELA

LOCAL MUNICIPALITY

SECOND
RESPONDENT

JUDGMENT

IM KHOSA AJ

Introduction

[1] This is an application for the eviction of the First Respondent from stand no 1[...] Block [...] Ha-Magidi, Thohoyandou, Limpopo Province “the property”. The application was brought in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”). The application is opposed by the First Respondent. The Second Respondent did not participate in these proceedings.

Factual background

- [2] Around the year 2010 the Applicant and the First Respondent (“the parties”) had a romantic relationship. At that time, both parties were each married to their respective spouses.
- [3] In July 2010, a sale agreement was concluded between the Applicant and Musie Tshimangadzo Stanley “Musie” for the purchase of the property. In terms of the sale agreement, the Applicant purchased the property from Musie for the sum of R 20 000.00[1]. The property is registered in the name of the Applicant[2].
- [4] After some years, the relationship between the parties soured. Around the years 2015 and 2016, the parties were granted protection orders against each other[3]. On the 05 May 2018, through Clientele Legal, the Applicant caused a notice in terms of section 4(1) of the PIE Act to be issued against the First Respondent. In the said notice, the First Respondent was informed of her unlawful occupation of the property and required to vacate the property within 30 days. The First Respondent did not vacate the property as requested.
- [5] On the 28 April 2022, the Applicant caused a second notice to vacate to be served on the First Respondent requesting her to vacate the property within 14 days[4]. The First Respondent, through her attorneys of record, responded to the second notice to vacate. In her response, the First Respondent denied that she is an unlawful occupier of the property.
- [6] It is common cause that the First Respondent has a house that she received as part of settlement on finalization of her divorce with her ex-husband and that she is currently occupying the property.
- [7] On the 01 September 2022, this court, per Tshidada J, granted an order authorising service of the eviction application on the Respondents in a manner sanctioned by the rules of court.

The issue

- [8] The issue for determination is whether the First Respondent should be evicted from the property.

The law

- [9] Section 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution) finds application in this matter. Section 26(3) provides that no one may be evicted from their home or have their home demolished without an order of the court.
- [10] The PIE Act provides for the legal procedure for eviction of unlawful occupiers. Section 4(1) of PIE Act provides that “notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier”.
- [11] Section 1 of the PIE Act defines the terms “owner” and “unlawful occupier”. An “owner” is defined in PIE Act as “the registered owner of land”[5]. An “unlawful occupier” is defined as “any person who occupy 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...”[6]
- [12] Section 4(7) of the PIE Act provides that ‘If an unlawful occupier has occupied the land in question for more than six months from 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 relevant circumstances, including, except where the land is sold on execution pursuant to a mortgage, whether the 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 person and households headed by women.’
- [13] Section 4(8) of the PIE Act empowers the court to evict an unlawful occupier once it is satisfied that there is compliance with the provisions of section 4. This requires that the court must be satisfied that it is just and equitable to order an eviction.
- [14] In *Wormald NO and others v Kambule*[7], the court held that “an owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis”.

Evaluation

- [15] In terms of the PIE Act, the Applicant is required to prove that he owns the property, that the First Respondent occupies it unlawfully, that he has complied with the procedural provisions of PIE Act and that on a consideration of all the relevant circumstances, an eviction order is just and equitable.

[16] The onus to prove locus standi to institute these proceedings is on the Applicant.[8] Once the Applicant has established his locus standi, the grant or refusal of an application for eviction in terms of PIE is predicated on a threefold enquiry:

[16.1] First, the court must determine whether the occupier has any extant

right in law to occupy the property, that is, is the First Respondent an unlawful occupier or not. If she has such a right, then the matter is finalised and the application must be refused.

[16.2] Second, the court must determine whether it is just and equitable that the First Respondent be evicted.

[16.3] Third, if the court finds that it is just and equitable that the

First Respondent be evicted, the terms and conditions of such eviction must be determined.

[17] It is trite law that ownership of immovable property is evidenced by registration. Proof of registration of immovable property is the best evidence of ownership[9]. The Applicant provided the deed of grant as evidence of registration of the property in his name[10]. The First Respondent does not dispute that the property is registered in the name of the Applicant[11]. It is effectively common cause between the parties that the Applicant is the registered owner of the property. In the circumstances, the Applicant's locus standi to launch these proceedings is beyond question.

[18] The next question is whether the First Respondent is an unlawful occupier. The PIE Act provides that an unlawful occupier is "any person who occupy 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..."[12]

[19] It is common cause that the First Respondent is occupying the property and has occupied the property for a period in excess of six months. It is the Applicant's case that he allowed the First Respondent to occupy the property during the good days of their relationship as the First Respondent had problems with her ex-husband. When the parties' relationship soured, their arrangement or the Applicant's consent that the First Respondent occupies the property ceased to exist and from that moment, the First Respondent became an unlawful occupier.

[20] The crux of the First Respondent's opposition is based on the underlying cause of the registration of the property in the names of the Applicant.

[21] The First Respondent's case is that she is in fact the owner of the property. The First Respondent avers that the property is registered in the names of the Applicant as a result of the parties' arrangement[13]. She contends that the parties had an agreement that she will purchase the property from Musie using the Applicant's name. Their agreement was made with an objective of ensuring that the property is excluded from the joint estate of the First Respondent and her ex-husband and as a result, it is not liable for division upon the

finalization of the divorce proceedings between the First Respondent and her ex-husband.

- [22] The First Respondent contends that she is not in unlawful occupation of the property and the Applicant has no right to evict her. This is despite the fact that the First Respondent neither disputes the registration of the property in the names of the Applicant nor seeks an order that she be declared the owner of the property and the property be registered in her own name.
- [23] As I indicated above, the registration of immovable property is the best evidence of ownership and it is common cause between the parties that the property is registered in the Applicant's name. Counsel for the First Respondent submits that the version of the First Respondent raises a dispute of fact on the issue of ownership, which ought to have been foreseen by the Applicant and which require referral to oral evidence. I disagree.
- [24] In my view, the First Respondent failed to raise a material dispute of fact by not advancing a real contention for ownership of the property in her opposing papers. The agreement alluded to by the First Respondent relates the underlying causa for the registration of the property in the Applicant's name. Even if the property remains registered in the name of the Applicant in breach of the said agreement, as contended by the First Respondent, the First Respondent must seek recourse from contractual remedies available to her emanating from that breach of contract.
- [25] A breach of contract does not give birth to a right to occupy the property. That contention, alone, does not come to the aid of the First Respondent. In my view, that is the death knell of the First Respondent's defence in this application. As a result, the First Respondent is an unlawful occupier of the property as she occupies the property without the consent of the Applicant and without any other extant right in law to occupy the property.
- [26] The next issue for determination is whether it is just and equitable to evict the First Respondent. This court must consider a wide range of factors as envisaged in section 4(7) of the PIE Act in order to come to the conclusion that the eviction is just and equitable. Section 4(7) of the PIE Act must be considered together with section 4(8) which is the empowering provision as indicated above.
- [27] The term 'just and equitable' is not defined in the PIE Act. What is just and equitable will vary from case to case. Each case is to be decided on its own merits. However, justice and equity are important overriding factors.
- [28] The determination of what is just and equitable requires the court to make a value judgement of all the relevant facts. Once the eviction order is granted, the court is called upon to decide what reasonable conditions must be incorporated in the eviction order.
- [29] The relevant factors in section 4(7) of the PIE Act are peremptory but not exhaustive. The availability of alternative accommodation is an important consideration towards making a finding that an eviction is just and equitable.

- [30] The interplay between the constitutional rights enshrined in Sections 25 and 26 of the Constitution is innate to eviction applications. In *Ndlovu*,^[14] the court held that “the effect of PIE is not to expropriate the landowner and cannot be used to expropriate someone indirectly and the landowner retains the protection of section 25 of the Bill of Rights”.^[15]
- [31] The Court, in *Blue Moonlight*^[16], held that “a private owner has no obligation to provide free housing”^[17] and that “unlawful occupation results in a deprivation of property under section 25(1)” of the Constitution^[18].
- [32] The court, in determining whether or not to grant an eviction order or in determining the date on which the property has to be vacated, has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense^[19].
- [33] In this matter, it is common cause that the First Respondent has an alternative accommodation. It follows that the granting of an eviction order will not render the First Respondent homeless. Further, the Applicant has no obligation to provide the First Respondent with free housing. The First Respondent has occupied the property since the year 2011. That is a very long duration.
- [34] The first notice to vacate the property was served on the First Respondent during the year 2018, a period of over five years before the hearing of this application. The First Respondent failed to take any action to hold the Applicant to the parties’ agreement that the property will be transferred to her name after her divorce is finalized. The First Respondent’s conduct is discordant with what would naturally be expected of a person who desires to protect her ownership.
- [35] Further, the parties’ relationship has deteriorated to the extent that they successfully applied for protection orders against each other. One of the terms of the protection order granted against the Applicant is that he must not enter the First Respondent’s place of residence. Effectively, for as long as the First Respondent remains in occupation of the property, the Applicant cannot set foot on his property, lest he violates the protection order and may face legal consequences for such violation. In the circumstances of this case, I find that it is just and equitable to order the eviction of the First Respondent from the property.
- [36] A just and equitable date on which the First Respondent must vacate the property needs to be determined. As already indicated, the First Respondent has a house and therefore has an available alternative accommodation. She has occupied the property for a duration of over a decade. The Applicant cannot be fairly expected to endure her occupation any longer.
- [37] Having regard to the circumstances of this matter, a speedy resolution of this application would be in the best interest of the parties. There is no basis for delaying the eviction date and doing so would unjustifiably violate the Applicant’s dominium.

[38] The Applicant prays that the First Respondent be ordered to vacate the property within 5 days, failing which the sheriff or his deputy be authorised to take necessary steps to evict the First Respondent. Having regard to the long duration of her occupation, a period of 5 days is a very short time for the First Respondent to vacate the property. In my view, a period of 30 days is a reasonable time for the First Respondent to vacate the property.

Conclusion

[39] The Applicant has complied with the procedural requirements of PIE Act relating to service of the notice to vacate and obtaining the court's permission to serve the eviction application on the Respondents.

[40] This court is satisfied that the Applicant is the owner of the property, the First Respondent is occupying of the property without the consent of the Applicant and without an extant right to occupy the property. Further, it is just and equitable that the First Respondent be ordered to vacate the property within 30 days.

Costs

[41] It is trite that costs are within the court's discretion, which discretion should be exercised judiciously. The general rule is that costs will follow the cause or event. Put differently, the successful party should be awarded costs. In this matter, there is no reason to deviate from this norm.

[42] In his replying submissions, the Applicant's counsel submits that the court should mulct the First Respondent with punitive costs on the basis that the First Respondent seeks the assistance of this court in perpetuating an illegality of hiding the property (if she is the owner) from her ex-husband, which in terms of the law, ought to have been a part of their joint estate.

[43] The application for punitive costs launched for the first time, at that belated stage of the proceedings and without notice to the other party infringes upon the principle of fairness as the First Respondent was not called upon to answer that suit.

[44] Further, the operative principle in determining whether to award punitive costs is, whether a litigant's conduct is frivolous, vexatious or manifestly inappropriate[20]. The First Respondent has a fundamental right to access the court, which right entails that she must be able set out her defence fully. To mulct her with punitive costs will have a chilling effect on that right. I thus find that the First Respondent's conduct does not meet the threshold for the award of costs on a punitive scale against her.

[45] I therefore make the following order:-

[45.1] the First Respondent is ordered to vacate the property within 30 days of this order.

[45.2] in the event that the First Respondent fails to vacate the property as per the order in paragraph 45.1 above, that the Sheriff or the Deputy Sheriff is ordered to take necessary steps to evict the First Respondent from the property.

[45.3] the First Respondent is ordered to pay the costs of the Applicant on a party and party scale.

IM KHOSA

ACTING JUSTICE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES FOR THE APPLICANTS Adv RC Mathevula INSTRUCTED BY Kern, Dekker and Muthevhuli Attorneys Inc FOR THE RESPONDENT Adv TC Munyai INSTRUCTED BY Netsianda Incorporated DATE OF HEARING 03 November 2023

JUDGMENT

28 November 2023

JUDGEMENT

DATE

: Judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date and time for hand down is deemed to be 09h00 on 28 November 2023

- [1] Annexure TRT 1 to the Founding affidavit
- [2] Deed of grant, annexure TRT 2
- [3] Annexures TRT4 and TRT5 to the founding affidavit
- [4] Annexure TRT 8 and 9 to the Founding affidavit
- [5] Section 1(ix) of PIE Act
- [6] Section 1(xi) of PIE Act
- [7] Wormald NO and others v Kambule 2006 (3) SA 563 (SCA) at para 11
- [8] Kommissaris van Binnelandse Inkomste v Van der Heever 1999 (3) SA 1051 (SCA) at para 10
- [9] Goudini chrome (Pty)ltd v MCC Contracts (Pty)Ltd 1992 ZASCA 208; 1993 1 SA 77 (A) at para 82
- [10] Note 2 above
- [11] Respondent's answering affidavit at para 10
- [12] Note 6 above
- [13] Para 11 of the answering affidavit

[14] Ndlovu v Ngcobo, Bekker v Jika

[2002] ZASCA 87; 2003 (1) SA 113 (SCA)

[15] Ibid at para 17

[16] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd

[2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC)

[17] ibid at para 31

[18] Ibid at para 37

[19] Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')

[1992] ZASCA 149; 1992 (4) SA 791 (A) 800, Knox D'Arcy Ltd and Others v Jamieson and Others

[1996] ZASCA 58; 1996 (4) SA 348 (A) 360G-362G)

[20] Helen Suzman Foundation v Judicial Service Commission

[2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 36

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