

SOUTH AFRICA / JUDGMENT

Zulu N.O v Mbazo and Another (D11353//21) [2024] ZAKZDHC 32 (24 May 2024) [2024] ZAKZDHC 32

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Hlatshwayo AJ

CASE / FILE NUMBER

D11353//21

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D11353//21

In

the matter between:

LINDANI

ZULU N.

O

APPLICANT

(In

her capacity as the representative of the Estate

Of

the late Desmond Zulu who died at Ngwelezane

On

the 5th of September 2003 by virtue of a certificate

of

appointment dated 11th May 2004, under

reference

number 7/1/2-307/2004DBN)
and
MUBI
MBAZO
FIRST
RESPONDENT
ETHEKWINI
MUNICIPALITY
SECOND RESPONDENT
ORDER
The

following order is issued:

1.
The application for the eviction of the first respondent and all those occupying through him the property situated at B[...], N[...] Road Ntuzuma Township is granted.
2.
The first respondent is ordered to vacate the abovementioned property on or before
28 June 2024
3.
Should the first respondent fail to vacate the property on the said date the
sheriff of court is authorised to evict the first respondent on 5 July 2024
4.
The first respondent is ordered to pay the applicant's costs.

JUDGMENT

Hlatshwayo AJ

Introduction

- [1] Before this court is an application for the eviction of the first respondent and all persons occupying through him the property situated at B[...] N[...] road, Ntuzuma township. The applicant instituted these proceedings in her capacity as the representative of the estate late Desmond Zulu and in her capacity as the owner of the property.
- [2] The applicant and the deceased were married to each other in community of property. The deceased initially entered into a lease agreement regarding the property in question with the then KwaZulu Government in 1991. As a result, he was issued with a certificate of occupation of the property.
- [3] Subsequently in 1993 the deceased entered into an agreement with KwaZulu government to purchase the said property. A purchase price of R11250 was agreed upon and was duly paid by the deceased in instalments. The property was however not transferred into the deceased

names due to the changes brought about by the dawn of our Constitutional democracy and the new municipal dispensation that took over from KwaZulu Government. He however continued to occupy the property together with the applicant and had been issued a certificate of occupation by the said KwaZulu government.

- [4] When the deceased passed on in 2003, the applicant resided in the property for a while and thereafter decided to move to Jozini, KwaZulu Natal. In 2007 the applicant decided to sell the property to one Khumbuzile Gule, who is the first respondents' sister. Khumbuzile began to occupy the property pending payment of the full purchase price of R90 000. However, she could only manage to pay a sum of R84 700 and she also vacated the property in 2013 leaving the first respondent.
- [5] I digress to mention that at some stage the applicant and the first respondent began negotiations aimed at selling the property to the latter. This culminated into a purchase price in the sum of 260 000 being agreed upon. This transaction however did not materialise as the first respondent alleged that the applicant had failed to furnish a title deed or any proof of ownership entitling her to pass transfer of the property.

Background

- [6] This matter has a long history of litigation, particularly in the magistrates' Court. The applicant commenced eviction litigation against the first respondent in the Ntuzuma magistrates' court under case number 1665/2013. It appears this case was eventually finalised in 2014. According to the applicant this application was dismissed when the magistrates Court upheld some of the points in limine that were raised by the first respondent.
- [7] The applicant launched a second eviction application under case number 274/2020. Again, the first respondent raised a number of technical points. One of those was the failure of the applicant to disclose in her papers that the same matter was decided in 2014. The first respondent also disputed the applicant's locus standi to institute eviction proceedings in respect of the property in question. Another dispute was whether the property was sold to the first respondent's sister. Faced with these challenges the applicant withdrew the 2020 application in 2021.
- [8] On 2 December 2021 the applicant instituted new eviction proceedings in the high court. On 4 April 2022 an order directing service of Section 4(2) notice in terms of the PIE Act[1] was issued by this court. The first respondent opposes the application for his eviction and has raised a number of points in limine.

- [9] It is worth mentioning that the first respondent has been in occupation of the property for over 10 years. It appears from the applicant's affidavit that she has been in occupation since 2013 when his sister, Khumbuzile Gule, vacated the premises[2]. The composition of the first respondent's family is however unclear and both parties did not place that information before me.

Summary of legal submissions.

- [10] Notwithstanding few other general disputes raised in the first respondent's papers, the main dispute is centred around two points in limine. Firstly, the first respondent raised a plea of *res judicata*. The first respondent's contention is that an application for his eviction was dealt with by the Ntuzuma magistrates Court in the 2013 case and was dismissed. Further the applicant brought the same application for eviction in the 2020 case and was also dismissed.
- [11] The first respondent contends that this application consists of the same parties and the same cause of action that was determined by a competent court. It was submitted that the applicant has criticised the magistrates Court decision that the applicant lacked *locus standi* as being incorrect. It follows that the appropriate remedy for the applicant lies with the appeal or review procedure. It was argued that this application for eviction is therefore *res judicata*.
- [12] The second issue raised by the first respondent is that the applicant lacks *locus standi* to institute these proceedings. It was submitted that the applicant is not the owner of the property in question nor is she a person in charge. In support of this contention the first respondent referred me to the certificate of ownership produced by the applicant and submitted that the applicant's name does not appear therein but the name of Janet Lindeni Zulu who is referred to as the wife of the late Desmond Zulu is reflected. The court's attention was also drawn to a property profile issued by eThekweni Municipality[3] which records the owner of the property as KwaZulu government. The first respondent contends that the applicant has no right to evict him.
- [13] Regardless of the above, the first respondent submitted that his sister had paid in full the purchase price agreed to between her and the applicant. He submitted that some of the payments were made by his sister in cash to the applicant before she passed away.
- [14] The applicant however argued that there was no material dispute of facts in this matter. The facts averred by the applicant were not disputed by the respondent nor did he allege any credible version of events or relevant factors to prevent the court from granting the relief sought.

[15] It was submitted that the applicant is the executor of the deceased estate and possesses the necessary locus standi to institute eviction proceedings on behalf of the estate. It was also submitted that the magistrates Court dealt with the eviction application and dismissed the it for lack of compliance with the PIE Act. It had made no finding on any rights of parties. The first respondent continues to occupy the said property and this constitutes a new cause of action. There is thus no merit to the defence of res judicata.

Discussion.

[16] The First respondent's averments of his sister paying the full purchase price has not been submitted in a plausible manner. There are no details or facts supporting that there were payments made by the first respondent's sister to the applicant in the manner described by the first respondent. No details shared of when, how and how much those hand payments were made. The first respondent simply makes bold and unexplained averments of hand payments by his sister. Viewed in light of the documentary proof that the deceased had a right to occupy the said property, the allegations by the first respondent do not rise to the standard of bona fide, genuine and credible facts preventing the relief being granted[4].

Res judicata

[17] The plea of res judicata is well settled in our law. It is premised on the preclusion of suits that are relitigated on the same facts and law decided upon by an earlier court. In *Bafokeng tribe v impala platinum*

[5] the following was stated:

'...the essentials of the exceptio res judicata were threefold, namely that the previous judgment had been given in action or application by a competent court (1) between the same parties, (2) based on the same cause of action, (3) with respect to the same subject matter or thing.

Requirements (2) and

(3) are not immutable requirements of res judicata. The subject matter claimed in the two relevant actions did not necessarily and in all circumstances have to be the same. Where there was a likelihood of the litigant being denied access to the court in the second action, to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely in order to ensure overall fairness, 2 or 3 above might be relaxed.[6]

As was observed in *Smith v Porrit*[7] unless the defence of res judicata is carefully circumscribed it is capable of producing hardship and positive injustice to the individuals. Thus, relevant considerations

will include questions of equity and fairness not only to the parties themselves but to others.

[18] It is apposite to mention that the primary purpose of the doctrine of res judicata is to prevent unnecessary repetition of litigation between the parties, harassment of defendant with multiple suit and to bar the same dispute being adjudicated upon by our courts with the adverse results of conflicting and contradictory decisions.

[19] In this matter the first respondent bears the onus to establish the essential requirements of res judicata. The first respondent relied on the magistrates Court order dated 20 January 2021 and submitted that the applicant's eviction application

was dismissed and further alleged that the 2020 application was likewise dismissed. The evidence presented to me shows that the 2020 application was not dismissed but was withdrawn[8] and the respondent's answering affidavit admits this[9]. The respondent's averments in this regard are without substance and are contradictory.

[20] Additionally, the 2014 magistrates Court order is silent on the reasons for the dismissal of the eviction proceedings. While the order states that proceedings were mechanically record, that record was however not placed before me. Therefore, I am unable to conclude that the Magistrate Court had made a definitive finding on the applicant's rights in the eviction of the first respondent. Regardless of the reasons for the dismissal of the 2014 eviction application by the Magistrate's Court, it is common cause that to date the first respondent continued with occupation of the said property. Each continued occupation amounts to a separate cause of action upon which the applicant may institute eviction proceedings and accordingly, there is not merit to defence of res judicata.

Locus standi

[21] Locus standi denotes the capacity to sue and being sued. It is trite that a party must have 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. Standing is thus not just a procedural question, it is also a question of substance concerning as it does the sufficiency of a litigant's interest in the proceedings[10].

[22] The first respondent's challenge to the applicant's locus is premised on the allegations that she is not the owner of the property and is not entitled to institute eviction proceedings in terms of the PIE Act. S 4(1) authorises an owner or a person in charge of the property to institute eviction proceedings. The first respondent contends that the property in question still belongs to the KwaZulu government. What is axiomatic is that the deceased was issued with a certificate of occupation of the said property as far back as 21 October 1991. Since this date the deceased had been in charge of the property until his demise in 2003. There is no hesitation that the deceased exercised control over the property and fits squarely within the meaning of the person in charge as envisaged the PIE Act.

[23] That right to control and be in charge of the property passed over to the applicant, not only by virtue of her marriage to the deceased and the continued occupation of the property thereafter but also as the executor of the deceased estate. As the representative of the

deceased estate, the applicant exercises her powers derived from the letters of executorship or in this case as the representative of the estate appointed in terms of the then Black Administration Act 38 of 1927 and the regulation promulgated thereunder[11]. The applicant effectively steps into the shoes of the deceased to whom the right of occupation was awarded. The first respondent's

reference to a person referred to as Ms Zulu who is also recorded as the wife of the deceased is irrelevant in the context of the

applicant exercising her powers derived from her position as the representative of the deceased estate. Accordingly, I find that the applicant has the necessary locus standi to institute eviction proceedings in terms of the PIE Act.

PIE consideration

- [24] S 4 of the PIE Act regulates the eviction of unlawful occupiers of land at the instance of the owner or the person in charge of that property. The Act provides that the court must serve a written and effective notice of proceedings to both the unlawful occupier and the municipality at least 14 days before the hearing of the application. In this matter this pre-requisite has been complied with and no valid defence exists against eviction of the first respondent. His continued occupation of the property is without any basis and is therefore unlawful.
- [25] It remains to be determined by this court whether the eviction of the first respondent and all those occupying the premises through him is just and equitable. In the *Occupiers of Erven 87 and 88 Berea v De wet* and another[12] the Constitutional Court was instructive on the application of PIE Act. It held that the Act is not discretionary. Courts must not adopt a passive approach but instead must probe and investigate the relevant surrounding circumstance especially where the occupiers are vulnerable. In this matter, the first respondent has been in occupation for a long period of time and has indeed formed strong ties with the property in question. Prior to that it appears his sister also occupied the property. It is apparent that this eviction of the will have some adverse effect on the first respondent and must not be considered lightly.
- [26] What is rather perplexing is that the first respondent filed an opposing affidavit taking issue with the applicant's entitlement to evict him but chose not to place any relevant facts this court must consider to determine whether it was just and equitable evict him or anyone occupying through him. In *Occupiers of Erven 87 and 88 Berea*[13] the court stressed the need for parties especially where they are legally represented to place relevant information to enable the court to determine if the eviction will affect the rights and needs of the elderly, children and disabled persons and whether there is available alternative accommodation and the financial means of the first respondent to afford alternative housing. In the absence of any presentation of the abovementioned in this matter, this court must grant the eviction of the first respondent and all those occupying the property through him.

- [27] In determining the just and equitable date of eviction and the necessary conditions, I have considered the length of time the first respondent has been in occupation of the property, at the same time I am aware that an unoccupied property may be necessary to finalise the deceased estate. I determine that a period of one month is appropriate for the first respondent to vacate the property.
- [28] Turning to the issue of costs, I find no reason why costs should not follow the course. The first respondent was fully aware that he has no right to continue to occupy the property yet he persisted with his opposition. This has caused the applicant to incur unnecessary costs of asserting the rights of the deceased estate. Due to the history of litigation between the parties, it goes without saying that the applicant has incurred extra ordinary costs.

Order

[20] In the circumstances I make the following order:

3. Should the first respondent fail to vacate the property on the said date the sheriff of court is authorised to evict the first respondent on or after 5 July 2024
4. The first respondent is ordered to pay the applicant's

Case information

Heard on: 27 / 03 / 2024 Delivered on: 24 / 05 / 2024 Counsel for the appellant : Mr. W. Grunder
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- [1] Prevention of illegal eviction from unlawful occupation of land Act 19 of 1998 (the PIE Act)
- [2] Applicant's founding affidavit para 58
- [3] Annexure MM2 P90
- [4] Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.
- [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.
- [5] Bafokeng Tribe v Impala Platinum Ltd & others 1999 (3) SA 517 (BH).
- [6] Ibid para B-E
- [7] Smith v Porritt and others [2007] ZASCA 19 SCA; [2007] SCA 19 RSA, 2008 (6) SA 303 SCA
- [8] The notice of withdrawal at P38
- [9] P80 para 12
- [10] Firm-O-Seal CC v Prinsloo and Van Eeden Inc and another [2023] ZASCA 107

[11] Black Administration Act 38 of 1927 and regulation R200 of 6 February 1987 were declared inconsistent with the Constitution of

the Republic of South Africa 1996 and invalid by the Constitutional Court in *Bhe and Others v Khayelitsha Magistrate and others* 2004 ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) para 136 where the order reads as follows: 'In terms of section 172 (1) (b) of the Constitution it is declared that any estate that is currently being administered in terms of section 23 of the Black Administration Act 38 of 1927 and its regulations shall continue to be so administered despite the provisions of paragraphs 2 and 3 of the order but subject to paragraphs 4,5and 6 of this order until it is finally wound up.'

[12] *Occupiers of Erven 87 and 88 Berea v De wet NO and another* (2017) ZACC18, 2017 (8) BCLR 1015 (CC), 2017 (5) SA 346 (CC)

[13] *Ibid* para 47, *City of Johannesburg v Changing Tides 74 {PTY} LTD and others* (SCA) [2012] ZASCA 116, 2012 (6) SA 294 (SCA), 2012(11) BCLR 1206 (SCA), [2013] 1 All SA 8 SCA

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