

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BISHO)**

CASE NO: 186/2022

- | | |
|-----|--|
| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES:
YES/NO</u> |
| (3) | <u>REVISED.</u> |

.....
DATE

.....
SIGNATURE

In the matter between:

ANDISWA GOLODA

First Applicant

THE EXECUTORS OF THE ESTATE LATE

PIKILE KONCOSHE

Second Applicant

(Anthenkosi Koncoshe NO and Anelisa Hoho NO)

and

ANDILE NTOZINI

Respondent

BUFFALO CITY METRO MUNICIPALITY

Interested Party

J U D G M E N T

DREYER AJ

- [1] Right to housing is a fundamental right – often times a contested one as the facts in this matter illustrate.
- [2] Pikile Koncoshe (“the deceased”) owned a house at 10401 NU2 Mdantsane, East London (“the house”). He died in 1999.
- [3] In 2002, the respondent, Andile Ntonzini (“Ntozini”) who was without accommodation, found the house abandoned. The house had fallen into disrepair, it was dilapidated and had been vandalised. The doors, windows and roof had all been removed, as was the electrical cabling. Ntozini traced Vuyiseli Piacini Koncoshe (“Vuyiseli”), the deceased’s brother (in Berlin, East London), who was responsible for the house. Vuyiseli gave Ntozini permission to stay at the house in the condition he found it.
- [4] Ntozini moved into the house, effected repairs to the house to make it habitable and settled the outstanding municipal accounts due to the City of East London. Ntozini had the municipal account transferred into his name and continued to pay for the services.
- [5] In 2014, the mother of Anthenkosi Koncoshe (“Koncoshe”), of one of the executors of the deceased, told Ntozini she wanted to sell the house. Ntozini resisted the sale of the house as he believed he had rights to the house having lived there for 10 years. The dispute was

referred to the Master of the High Court in Bhisho. The Master told Ntozini that repairing the house into a habitable condition did not make him the owner. He would have to buy the house from the executors of the deceased to prevent them from selling the house to someone else.

[6] As Ntozini could not raise the finance himself to buy the house, his uncle, Mboneleli Livingstone Siyongwani (“Siyongwani”) agreed to assist him. Siyongwani made an offer to the executors of the estate, Koncoshe and Anelisa Hoho (“Hoho”) to purchase the house for the sum of R160 573.00. The written offer of purchase was subject to Siyongwani securing financial assistance from the Department of Housing for the full purchase consideration. This suspensive clause was not time bound.

[7] Ntozini contends that the offer of purchase was accepted by both joint executors, Koncoshe and Hoho. The written offer of purchase attached to Ntozini’s answering affidavit is only signed by Hoho. Koncoshe did not sign the sale agreement. The offer of purchase does not specifically record that Hoho signed in her capacity as the executor of the estate of the deceased

[8] Ntozini contends that this offer of purchase resolved the dispute between him and the executors. In any event, Ntozini continued to live undisturbed at the house.

[9] The Department of Housing granted Siyongwani the financial assistance to purchase the house on 12 February 2018. This grant of finance was subject to the transfer of the property within a period of three months from the grant of the finance, that is, by May 2018. The house was not transferred into Ntozini 's name or into Siyongwani's name. There is no mention in the papers whether the Department of Housing paid the purchase consideration to the joint executors, Koncoshe and Hoho. Ntozini contends the Hoho and Koncoshe refused to sign the transfer documents with their appointed transferring attorneys, Yazbeks Incorporated. Siyongwani died in 2021.

[10] Goloda contends that she purchased the house from the joint executors, Koncoshe and Hoho, on 26 September 2016 for the sum of R150 000.00 and paid the purchase consideration. The written offer of purchase stated the Goloda was to obtain vacant occupation of the property on registration of transfer or when Ntozini was evicted. The house was not transferred into Goloda's name. There is no explanation on the papers for the failure to transfer the property to Goloda. Ntozini still lives in the house.

[11] Nothing turns on the validity of these potentially conflicting offer of purchase agreements. It is not an issue I need determine. The issue I am to determine is Goloda's right, if any, to evict Ntozini.

- [12] There are two requirements for a successful eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“PIE”),¹ namely, the applicant must be the owner or the person in charge of the land and the occupier must be in unlawful occupation.
- [13] PIE defines the “owner” to mean the registered owner of the land. When this definition is read together with the definition of an owner of immovable property in terms of the Deeds Registry Act,² this includes the executor of a deceased estate of any owner of immovable property.
- [14] The person in charge is the person who, *at the relevant time, had the legal authority to give permission to the person to enter or to reside upon the land.*
- [15] An unlawful occupier is defined one who occupies the land “*without the express or tacit consent of the owner or the person in charge*”.
- [16] The applicant, Goloda, contends that she meets both requirements as and is consequently entitled to the eviction Ntozini. Ntozini disputes this.
- [17] Goloda launched the application contending that she was the owner of the house. In reply, Goloda continued to assert her right as the lawful owner of the property. The house’s title deed is not attached to

¹ Act 19 of 1998

² Act 47 of 1937

the papers. Goloda does not rely on the registration of title to assert her right as an owner. Transfer of ownership of immovable property requires the registration of transfer of the property through the Deeds Office. The registration of the transfer of a real right in immovable property occurs by the execution of a deed of transfer,³ into the name of the new owner. The title deed itself constitutes the proof of ownership. In argument, counsel for Goloda conceded that Goloda is not the owner of the house. The concession is correctly made

[18] Goloda's representative argued that Koncoshe and Hoho, as the joint executors, are in charge of the house and, as the second applicant, they have the *locus standi* to institute these proceedings. Technically this is correct.

[19] While cited as co-applicants, Koncoshe and Hoho have not participated in these proceedings. This is not surprising as in the founding affidavit, Koncoshe and Hoho are merely cited interested parties. In reply, Goloda deposes that she was "duly authorised by the second applicant to depose to the affidavit *for and on their behalf*."

[20] Goloda needed no such authorisation. This is trite. It is the institution of the proceedings which must be authorised.⁴ Goloda's authority to institute these proceedings has not been challenged, it is her *locus standi*.

³ Section 16 of the Deeds Registry Act

⁴ *Ganes v Telecom Namibia* 2004 (3) SA 615 (SCA), at 642G-H

- [21] A party may not make its case in reply but must do so in the founding affidavit.⁵ The new matter Goloda introduces in the replying affidavit does not retrospectively remedy her own *locus standi*.⁶
- [22] There is no magic in Goloda deposing to the words “*for and on behalf of*” the executors of the deceased. These words do not elevate Goloda’s *locus standi*. The confirmatory affidavit of Hoho, annexed to the replying affidavit, does not authorise Goloda to institute these proceedings. Hoho does not elect to become a party in the proceedings. This affidavit merely confirms specific facts set out in specific paragraphs in the founding affidavit. These do not include confirmation of the sale agreement on which Goloda relies nor that Goloda is retrospectively authorised to institute the proceedings for and on behalf of the executors of the deceased estate.
- [23] The establishment of *locus standi* should have been articulated in the founding affidavit. It was not. Goloda does not have the *locus standi* to bring these proceedings in her own name. She is not the owner of the house. The joint executors, Koncoshe and Hoho, though both the owners and in charge of the house, are not parties in these proceedings. While cited, they have not elected to enter into the fray.
- [24] This finding is dispositive of the matter.

⁵ *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1188H; *Giant Concerts CC v The Minister of Local Government, Housing and Traditional Affairs KZN* 2011 (4) SA 164 (KZP) at 170H-I

⁶ *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA), at 945F-H, confirming the view in *Musa and Kassim NNO v The Community Development Board* 1990 (3) SA 175 (A), at 181B

[25] However, as the parties spent a considerable time in argument on the question whether Ntozini was in lawful occupation, I consider it prudent to consider the second leg of the requirement under PIE.

[26] Goloda contends that Ntozini had been granted a precarium by the deceased's family to occupy the property, which was cancelled by written notice on 31 July 2018 ("2018 notice"), alternatively, on 1 June 2019 ("the 2019 notice"). The 2019 notice confirms the 2018 cancellation. The 2018 notice is not included in the papers. It is not clear whether that notice was given by Goloda or the joint executors of the deceased estate.

[27] Ntozini acknowledges that he received the letter in 2019 but denies that he was ever granted a precarium. A precarist in Roman Dutch law is a person who occupies another's land gratuitously but subject to the owner's revocable permission.⁷

[28] Ntozini contends that he had the consent of Vuyiseli, who was in charge of the house in 2002, to live in the house as Ntozini had found it. Ntozini effected repairs to the house. Ntozini settled the municipal arrears. Vuyiseli confirmed this under oath in 2014. Goloda does not dispute this. Ntozini denies he is in unlawful occupation.

[29] Goloda was aware, at the launch of these proceedings in March 2022, that the question of Ntozini 's lawful occupation was a disputed one.

⁷ *Lechoana v Cloete* 1925 AD 536

This notwithstanding elected to institute motion and not action proceedings where the dispute could be adequately ventilated.

[30] If I take the facts in the founding affidavit as admitted in the answering affidavit then by application of the *Plascon-Evans* principle,⁸ Goloda has failed to show that Ntozini is in unlawful occupation. Moreover, such contentions of Ntozini 's unlawful occupation that there are in the founding affidavit are hearsay. Hoho's confirmatory affidavit is only made in reply.⁹

[31] The necessary allegations on which the applicant relies must appear in the founding affidavit, not adduced by supporting facts in the replying affidavit.¹⁰ This Goloda has failed to do.

[32] Goloda has failed to show that Ntozini was in unlawful occupation.

[33] In the result, I make the following order: the application is dismissed with costs.

DREYER AJ
ACTING JUDGE OF THE HIGH COURT

⁸ *Plascon Evans Paints Ltd van Riebeeck Paints (Pty)Ltd* 1984 (3) SA 623 (A)

⁹ In *Eskom Holdings Soc Ltd v Masinda* 2019 (5) SA 386 (SCA) at 387I to 388B, the Supreme Court held that the practice to support hearsay evidence by confirmatory affidavits of witnesses who should have provided the necessary details as a slovenly practice

¹⁰ *Mauerberger v Mauerberger* 1948 (3) SA 731 (C) at 732; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 349A-B

Representation for applicant

Counsel: Adv T Coto
Instructed by: Makhanya Attorneys

Representation for respondent

Counsel: Adv X Nyangiwe
Instructed by: Madikazi Attorneys Inc
Date of Hearing: 1 September 2022
Date of Judgement: 27 September 2022