IN THE HIC UTH AFRICA
FREE STA EMFONTEIN

eportable:	YES/NO
f Interest to other Judges:	YES/NO
irculate to Magistrates:	YES/NO

Case No.: **3605/2021**

In the matter between:

MPOLOKENG ROSINA SERAME First Applicant

MOLEFI SOLOMON SERAME Second Applicant

and

MOTSHABI MAKWABA First Respondent

MANGAUNG METROPOLITAN MUNICIPALITY Second Respondent

CORAM: VAN RHYN, J

HEARD ON: 21 JULY 2022

DELIVERED ON: 5 SEPTEMBER 2022

---

[1] These proceedings commenced as an application for the eviction of the first respondent and any other persons, holding under her, from Erf 10963, Bloemanda, Bloemfontein, Free State Province ("the property"), held under Title Deed T029486/2001. The applicants issued the application on 6 August 2021. The main grounds for the proposed eviction of the first respondent is on the basis of the applicants' ownership of the property and that the first respondent and or any person holding under her are in unlawful occupation of the property.

[2] The first applicant is Mpolokeng Rosina Serame, a major female resident of Bloemfontein. The first applicant was married to the second applicant, who passed away subsequent to the issuing of the application, filing of the replying affidavit and shortly prior to the hearing of this matter. The first and second applicants are the registered owners of the property.

[3] The first respondent is Makwaba Motshabi, a major female residing at the relevant property. The Mangaung Metropolitan Municipality ("the Municipality") is cited as the second respondent. No relief is being sought against the Municipality and it has been cited only insofar as it may have an interest in the application.

[4] The matter was instituted and prosecuted in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] ("PIE Act"). On 30 September 2021 Loubser J granted an order in terms whereof the first respondent is informed that the date on which the main application for an order that the first respondent and all persons holding under her be ejected from the property, shall be heard shall be the 28th of October 2021. A just and equitable date on which the first respondent and all persons holding under her to vacate, to be determined on 28 October 2021. Furthermore, in the event of the first respondent not vacating the property in terms of the order, that the Sheriff may evict the first respondent and all persons holding under her. The first respondent had to be informed by the Sheriff of the relevant provisions of the Section 4(4) and Section 4(5) of the PIE Act and her right to oppose such application.

[5] The opposed application came before this court on 21 July 2022, subsequent to the filing of an opposing affidavit and counter application. The first and second applicants filed their replying affidavit and opposing affidavit to the counter application on 9 November 2021.

---

[1] Act 19 of 1998

[6] The applicants contend that they purchased the property during August 2001 for the amount of R145 000.00. The property was subsequently registered in their names. During 2008 the first respondent approached the first applicant and enquired whether she may occupy the house on the property. At the time the property was in a derelict state. The house had no doors or windows. At the time the applicants planned on renovating the property. The first respondent was in a dire situation as she was in the midst of a divorce and urgently needed accommodation for her and her minor children.

[7] According to the applicants, an oral agreement was concluded during 2008 between the applicants and the first respondent that she could take occupation of the property on the following terms and conditions:

7.1 The first respondent will not be liable for monthly rent in respect of the property, however in lieu of the rent she will install doors and windows in the house on the property;

7.2 The first respondent will be liable for payment of the monthly municipal account in respect of the property;

7.3 The first respondent may occupy the property pending the finalization of her divorce.

[8] During 2008 the first respondent, after obtaining the first applicant's bank details, made a payment of R70 000 into the first applicant's bank account. According to the first applicant the payment was made out of gratitude for providing the first respondent with housing during her time of need. The second applicant was employed in Lesotho and only returned to Bloemfontein during 2017. During 2018 the applicants ascertained that the first respondent had failed to keep with the payments to the Municipality in respect of the municipal accounts and decided to terminate the oral agreement. The first respondent was requested to vacate the property. She however refused to vacate the property on the basis that she purchased the property from the first applicant in 2008 for the amount of R70 000.00.

[9] On 21 January 2021 the applicants caused a letter to be addressed by their attorney of record to the attorney who represented the first respondent at the time. The first respondent was requested in writing to vacate the property by no later than 21 February 2021. On 29 September 2020, the municipal account was in arrears in the amount of R25 200.79. The current arrears are unknown to the first applicants The first applicant intends selling the property but the first respondent has denied any access to the property and is frustrating any attempts by prospective buyers to view the property. The first respondent refused to vacate the property which lead to the institution of these eviction proceedings.

[10] The first respondent, in her counter application, is seeking an order in the following terms:

> "a. declaring that there is an agreement of sale between the parties with which First Respondent complied with; and
>
> b. that Applicants sign all necessary documentation necessary to give effect to the transfer in favour of the first respondent, in the event that they refuse, the Registrar to be empowered to sign the said documentation including the deed of sale.
>
> Alternatively,
>
> c. Applicants reimburse First Respondent R70 000.00 (SEVENTY THOUSAND RAND), interest thereupon at the legislated interest rate per annum from 12 July 2007 until date of payment;
>
> d. R270 000.00 (TWO HUNDRED AND SEVENTY THOUSAND RAND), interest from February 2021 to date of payment being the amount with which the Applicants are enriched.
>
> e. cost of suit."

[11] The first respondent alleges that she, during 2006, while her divorce was pending, saw an advertisement in a newspaper of a dilapidated house, which turned out to be the relevant property, which was for sale in the amount of R100 000.00. She then succeeded in contacting the first applicant to inform

her of her wish to purchase the property. Subsequent to obtaining an order of divorce in 2006, she again contacted the first applicant in 2007 regarding the sale and purchase price of the property. The first respondent offered to purchase same in the amount of R70 000.00. The first applicant reverted and confirmed that she had contacted the second applicant, who was in Lesotho, and they accepted the first respondent's offer. On 11 July 2007 the first respondent paid the purchase price in the amount of R70 000.00 into the account of the first applicant and took possession of the property.

[12] The first respondent contends that when she took occupation of the property, not only did it lack doors and windows, the property also did not have a roof. In 2007 the first respondent started to effect improvements to the property. She alleges to have spent in excess of R180 000.00 to renovate and repair the property. The first respondent opened a separate municipal account for water and electricity under her name as these services had been suspended. According to the first respondent the accounts in respect of the property are up to date. Unfortunately, the Municipality failed to respond to this application and therefore no explanation for the separate accounts in respect of the property is available.

[13] In her answering affidavit the first respondent alleged that the first applicant sold the property to her in 2007 and she regards the property as her own. She renovated the property and her efforts resulted in the property increasing in value. Due to a lack of funds to obtain a private valuation of the property, she relies on the Valuation Certificate issued by the Municipality on 18 February 2021, appended to the founding affidavit, pertaining to the municipal valuation of the property in the amount of R 450 000.00.

[14] Due to the second applicant's demands for further payments in respect of the purchase price of the property, the first respondent enlisted the services of an attorney to stop the second applicant from contacting her personally and with the view of effecting transfer of the property. The first respondent fails to reveal when these further demands occurred but avers that she made certain payments to her erstwhile attorney at the time. From the receipts appended to

the answering affidavit it appears as if these events occurred during 2010. The first respondent's former attorney demanded transfer of the property where after the second applicant allegedly undertook to comply with the first respondent's demands. These allegations are denied by the applicants.

[15] During 2018 the applicants commenced with renewed efforts and demands for eviction from the property. During 2020 the first respondent learned that her former attorney had been struck from the roll as a practising attorney and the file could not be traced. Only when the first respondent consulted with her current attorney of record did she learn that the law dictates that an agreement of sale of immovable property must be reduced to writing. According to the first respondent, there existed a "meeting of minds" between the applicants and her at the time of the sale in 2007. It was only after receiving legal advice from their attorney of record regarding the non-compliance with the legal requirements that the applicants reneged the sale agreement.

[16] Mr Booysen, the attorney acting on behalf of the applicant argued that the main issues to be determined by the court are the following:

16.1 Whether a valid sale agreement was concluded during July 2007 in respect of the property;

16.2 Whether the first respondent is entitled to claim transfer of the property and whether such claim has prescribed;

16.3 Whether the first respondent and any persons holding under her is in unlawful occupation of the property and whether the applicants are entitled to the relief claimed in terms of the main application;

16.4 Whether the first respondent is entitled to claim a repayment of the amount of R70 000.00 together with interest from 12 July 2007 until date of payment and whether such claim has prescribed;

16.5 Whether respondent has made out a cause of action for the claim of enrichment and the applicants has been enriched in the amount of R270 000.00. And further if the first respondent's claim of enrichment has also prescribed.

[17] Section 26(3) of the Constitution of the Republic of South Africa provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to "all the relevant circumstances". The PIE Act amplifies this by providing that a court may not grant an eviction order unless the eviction sought would be "just and equitable" in the circumstances.

[18] Section 2(1) of the Alienation of Land Act[2] (the "Act") provides as follows:

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[19] In Wilken v Kohler[3] Innes J described the general object of the Act as follows:

> "Recognising that contracts for the sale of fixed property were, as a rule, transactions of considerable value and importance, and that the conditions attached were often intricate, the Legislature, in order to prevent litigation and to remove a temptation to perjury and fraud, insisted upon their being reduced to writing."[4]

[20] The section is directed against uncertainty, disputes and possible malpractices. The legislature, having expressly stated that contracts that do not comply with this section shall be of no force or effect, leaves no room for the argument that the section can be waived by either party.[5] Alienation in relation to land, is defined as meaning sale, exchange or donation, irrespective of whether such sale is subject to a suspensive or

---

[2] Act 68 of 1981.
[3] 1913 AD 135
[4] Wilken v Kohler (supra) at 142.
[5] Wilken v Kohler (supra) at 142.

resolutive condition. A 'deed of alienation' is defined as meaning a document or documents under which land is alienated.[6]

[21] In principle, two requirements must be satisfied for the transfer of ownership of the immovable property. In the first place the parties must intend to transfer ownership and comply with other aspects of the real agreement (animus or mental element) and secondly they must simultaneously effect conveyance by registration. Transfer of ownership and other real rights in land is effected by registration. It is common cause that the applicants are the registered owners of the property.

[22] The following provisions of section 28 of the Act are relevant to the adjudication of this matter:

> "(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-
>
> (a) The alienee may in addition to recover from the alienator-
>
> (i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;
>
> (ii) a reasonable compensation for-
>
> (aa) necessary expenditure he has incurred, with all without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or
>
> (bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and
>
> (b) the alienator may in addition recover from the for alienee-

[6] Section (1) of the Act.

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be reliable.

(2) Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee."

[23] Since the Constitution came into effect, the law governing the owner's power to eject occupiers from his or her immovable property has changed considerably. In principle, an owner is entitled to evict those who unlawfully occupy his or her property. Section 4(8) of the PIE Act provides as follows:

"If the court is satisfied that all the requirements of this section have been complied with that no valid defence has been raised by the unlawful occupier to, it must grant an order for the eviction of the unlawful occupier."

[24] This is an application primarily for an order for the ejectment of the first respondent from the property. The applicants bear the onus to establish that the first respondent is in unlawful occupation of the property. The applicants are further required, in terms of the PIE Act, to satisfy the court that the eviction would be just and equitable. The first respondent bears the evidentiary burden to demonstrate that the eviction would likely render her and other occupiers homeless. The state is obliged to take reasonable measures to provide alternative accommodation to the occupiers where the eviction would likely render them homeless.

[25] On the other hand, the first respondent avers that an oral sale agreement was concluded during July 2007 in terms whereof she paid the purchase price of R70 000.00 and since then occupied the property. She denies that she is in unlawful occupation of the property. She further asserts that the property has not been transferred into her name because of the failure of her erstwhile attorney to see to the transfer of the property. Additionally and in terms of the

counter application, she claims that she made some improvements to the property. The first respondent bears the onus to prove that a valid sale agreement in respect of the property was concluded between her and the applicants, and in the alternative, that she has indeed spent R180 000.00 in renovation costs in respect of the property and that the applicants were enriched in the amount of R270 000.00.

[26] The application of the PIE Act involves a (3) stage enquiry, which encompasses the following, namely:

26.1 that it must be determined whether the occupier of the property in question has any extant right to be in occupation of the property. In the event that the occupier has such a right, then the application falls to be refused;

26.2 that in the event that the occupier of a property has no lawful right to be in occupation thereof, then in that event, it is to be determined whether it is just and equitable for the occupier to be evicted;

26.3 that in the event that it is indeed just and equitable for the occupier to be evicted, then in that event, the terms and conditions of such eviction fall to be determined by the court.

[27] The first respondent did not contend that the improvements which she has made to the property has given rise to a lien in her favour. Failing any right in law being established by the first respondent to occupy the property, the applicants would be entitled to the granting of an eviction order. There is no evidence of a written agreement of sale in respect of the property. That being the case, section 2(1) of the Act, then applies. The first respondent failed to discharge the onus that a valid sale agreement was concluded between her and the applicants in respect of the property. In the absence of a valid written agreement of sale, the first respondent has no claim for transfer of the property. I therefore find that the first respondent has no extant right to be in occupation of the property.

[28] In respect of the payment made to the first applicant on 11 July 2007 in the amount of R70 000.00, which according to the first applicant was merely a

payment in gratitude, it is evident that a dispute of fact is present in respect of the reason for the payment and not as to the fact that the payment was indeed made. A further aspect raised by the applicants is the issue of prescription, which either started to commence on 11 July 2007, or in the alternative, on 3 March 2010 when the first respondent consulted with her erstwhile attorney to obtain transfer of the property. The applicants therefore contend that the claim for repayment prescribed either on 11 July 2010, alternatively on 3 March 2013.

[29] Regarding the claim of enrichment in the amount of R270 000.00, the first respondent referred to a number of illegible, many undated and unspecified, invoices appended to the answering affidavit. However, the nature of the improvements, when these improvements were brought about and the value of these improvements remain unclear. But in any event, the actual cost of expenses is not the test. What one must look at is the increase in market value of the asset because of the expenses incurred by the first respondent. All that is before this court is the first respondent's bald assertion that these expenses amount to R180 000.00 and that the applicants have been enriched in the amount of R270 000.00. The first respondent failed to prove the value of the alleged improvements to the property. On this basis, the counter application to recover the costs of such improvements should fail.

[30] During argument, Me Ngubeni, who appeared on behalf the first respondent, conceded that these claims by the first respondent will be best addressed at a trial. The first applicant's reply to the allegations in respect of the improvements made at the property is that these improvements has to be valued with due regard to the time of occupation of the property since 2007 and the efforts by the applicants to obtain the eviction of the first respondent since 2010 and the failure to pay the municipal accounts in respect of the property.

[31] In my view the first respondent occupied the property without paying any rent. She furthermore had known since 2010 that the applicants were not prepared to transfer the property to her and denied the existence of an oral agreement

of sale which ultimately lead to the current application for eviction. The first respondent is undoubtedly in unlawful occupation of the property.

[32] Section 4(7) of the PIE Act, grants to a court the power to decide whether an unlawful occupier should be evicted, the test being whether it is just and equitable to do so. The first respondent failed to provide any information pertaining to her personal circumstances, her income or her current financial circumstances. It appears as if she has a daughter who is available to care for her if need be and that the first respondent will therefore not be rendered homeless should she be evicted.

[33] In **City of Johannesburg v Changing Tides 74 (Pty) Ltd and others**[7] the court held as follows:

> "The position is otherwise when the party seeking the eviction is a private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers."[8]

[34] In all of these circumstances, I can find no reason why the eviction of the first respondent should not be ordered. Considering the circumstances of the first respondent, coupled with the manner and duration of her occupation and the fact that, even thought she had the benefit of legal representation during 2010 already, the first respondent has until today failed to issue summons for the transfer of the property or, in the alternative, to claim repayment of the amounts paid in respect of the alleged purchase price and renovations at the property. If the applicants did not commence with the eviction application, she might not have submitted any claim against the applicants. Justice and equity undoubtedly demand that the applicants' rights of ownership should not be

---

[7] 2012 (6) SA 294 (SCA)
[8] at paragraph [18].

derogated for an extended period, in favour of the first respondents' unlawful residential occupation of the property.

[35] It is not disputed that the applicants have duly complied with all the procedural requirements for an order of eviction. All that then remains is for the court to determine the timing of the eviction order.

[36] As to the costs of this application, there is no reason why costs should not follow the result.

[37] **ORDER**

In the result the following order is granted:

1. Motshabi Makwaba and all those occupying under or through her are to vacate Erf 10963, Bloemanda, Bloemfontein, Free State Province held under Title Deed T029486/2001 by no later than the 1st day of March 2023

2. In the event of the persons referred to in 1 above do not vacate Erf 10963, Bloemanda, Bloemfontein, Free State Province by the 1st day of March 2023, the Sheriff of the High Court is hereby authorised to immediately evict the first respondent and all persons who occupy the property through or under her, from the property.

3. The counter application is dismissed with costs.

4. The first respondent is hereby ordered to pay the costs of the main application.

_____

VAN RHYN, J

On behalf of the Applicant:	**MR. H J BOOYSEN**
Instructed by:	BOOYSEN ATTORNEYS BLOEMFONTEIN
On behalf of the 1st and 2nd Respondent:	**ADV. T NGUBENI**
Instructed by:	MHLOKONYA ATTORNEYS BLOEMFONTEIN