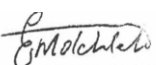




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 272/2017 & 1077/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
21 October 2018 DATE	 SIGNATURE

In the matter between

MADULAMMOHO HOUSING ASSOCIATION (PTY) LTD Applicant

and

MIRRIAM POPPY THABANE & NONHLANHLA PRETTY

MKIZE

First Respondents

CITY OF JOHANNESBURG

Second Respondent

JUDGMENT

Molahlehi, J

Introduction

- [1] The applicant, Madulammoholo Housing Association, has instituted two separate eviction applications against the respondents being, Ms Thabane and Ms Mkhize (the respondents) under the above case numbers. The respondents in both cases are lessees at Portion 3 of Erf 2605 Jabulani Views, Matjhabeng, Soweto (the property). The two applications were by agreement heard together and their determination is made jointly in this judgment.
- [2] The applicant, Madulammoho, is an association incorporated in terms of section 21 of the Companies Act.¹ It avers in paragraph 8 (eight) of its founding affidavit in both matters that it is the owner of Portion 3 of Erf 2605 Jabulani, Soweto (the premises).
- [3] On 19 December 2012 the applicant and Ms Mkhize concluded a lease agreement for the occupation of Unit C005 at the premises. The monthly rental in terms of the agreement was R750.00 payable in advance on the first day of each calendar month.
- [4] The lease agreement with Ms Thabane was concluded on 19 December 2012 and that was for the occupation of unit D 201 with monthly rental payment in the sum of R901 000, 00.
- [5] The applicant avers in the founding affidavit that after concluding the lease

¹ Act number 61 Of 1973.

agreements it handed possession of each of the two units to each of the respondents.

[6] The initial period of the lease agreement was for a period of six months after which the lease became a monthly lease which could be cancelled by either party on a month's notice.

[7] The respondents were issued with separate notices of cancellation of the lease agreements on 18 October 2013 by the applicant. They both have refused to vacate the respective units they occupy despite the demand set out in the notice. It is for this reason that the applicant contends that they are in unlawful occupation of the property.

[8] The respondents have both opposed the eviction applications. They were legally represented throughout the proceedings.

[9] On 17 September 2018 both matters were postponed to 25 September 2018 with a directive that the City of Johannesburg should appear before the court and provide a report regarding this matter.

[10] At the hearing of the matter on 25 September 2018 the City of Johannesburg was legally represented. It in accordance with the directive of the court presented its report in the form of an affidavit dated 17 September 2018. The essence of the report is that there is no temporary emergency accommodation facilities (TEA)

available to accommodate the respondents. .

- [11] The report also indicates that because the respondents are legally represented, they ought to have placed before the court information as to why they would be rendered homeless if the relief sought against them was granted. In opposing the application the respondents raised the issue of ownership of the property.
- [12] The property in question is a housing scheme intended to address the plight of those persons who do not qualify for the Reconstruction and Development Program (the RDP) housing scheme and also at the same time do not qualify for securing mortgage bonds to buy houses in the housing market. These are families whose combined income in terms of the policy of the City of Johannesburg is in excess of R3 000.00 but less than R10 000.00.
- [13] The respondents further contended that the property was developed through a grant from the Gauteng government and those who took occupation were granted subsidies and required to pay nominal rent. The understanding according to them was that after paying rental for 5 (five) years the property would be transferred and registered into their names.
- [14] Ms Thabane testified in her affidavit that at the time she was served with the eviction notice she was left with 9 (nine) months to qualify to have the unit transferred into her name.
- [15] And in the case of Ms Mkhize, she testified in her answering affidavit that she is left with 2 (two) years to have the house transferred into her name. She also contended that the lease can only be cancelled in the event of breach of the lease agreement. This point was not pursued in argument, correctly so, because

the cancellation was based on the provision of the lease agreement and not breach of contract.

[16] The other point raised by the respondents was that they were not served with the notice in terms of s 4 (2) of Prevention of Illegal Eviction of Occupiers Act (PIE). This point was also, correctly not pursued in argument by Counsel for the respondents.

[17] In addition to setting out the procedure for registering for temporary emergency accommodation (TEA) by a person faced with potential homelessness, the report indicates that the respondents in the present matter have never approached the City of Johannesburg to register. The report further indicates that the City of Johannesburg has no TEA readily available for the respondents in the present matter.

Case for the respondents

[18] As stated above the respondents have opposed the application. They have in this respect placed in dispute the issue of ownership of the property by the applicant. They also indicate in this regard that they have instituted proceedings to challenge the ownership of the property by the applicant. They contended that the ownership of the property by the applicant was fraudulently obtained.

Evaluation and analysis

[19] The first issue to deal with in this matter concerns the ownership of the property and whether absent that the applicant is non-suited to institute this application.

The respondents contend that the applicant has no right of ownership to the property. They further contend that the ownership which the applicant relies on was fraudulently acquired.

[20] The respondents have instituted proceedings which have been pending for quite some time challenging the ownership of the property by the applicant. It should be pointed out that the alleged fraud has not been substantiated. It however seems the challenge is based on the contention that the applicant could not in law have purchased the property because it is a product of a social housing scheme which has been subsidized by the government.

[21] The delay in finalizing those proceedings raises questions about why they instituted. Be that as it may, the issue of evicting applicants does not depend only on ownership of a property. A landlord, who may not necessarily be the owner of a property, also has a right to cancel a lease agreement and vindicate his or her right to possession. In this regard the applicant avers in paragraph 13 (thirteen) of both its founding affidavits that it gave the possession of the leased units to the respondents who took possession respectively on 1 November 2014 and 1 May 2013.

[22] Ms Thabane has despite notice and demand refused to vacate the unit. She ought to have vacated the unit by 30 November 2016. She thus has been in unlawful occupation of the premises since 1 December 2016. The same applies to Ms Mkhize who was issued with the notice on 29 September 2016 and thus has been in unlawful occupation of the unit since 1 November 2016.

[23] In both the first and second hearing of this matter both Counsel referred me to

Mashile, J's unreported judgment, in Hlamolani Ellen Mawendela v City of Johannesburg, Case number 0273/2017. That case involved two other occupiers of the same property.

[24] It is apparent from that judgment that the court dealt with the eviction application on the basis of possession of the property and not ownership thereof. In this regard it is important to emphasize that Counsel on the two occasions that this matter served before this court indicated that they were in all respect in agreement with the approach adopted by Mashile J except for the manner in which the order was formulated. It was in this respect pointed out to Counsel that this court did not have jurisdiction over their complaint concerning that order. It does however seem to me that the approach adopted in formulating the order was based on the fact that the court did not have any input from the City of Johannesburg upon which it could determine the risk of homelessness. In addressing that concern the court ordered the City of Johannesburg to find alternative accommodation for the tenants within three months from the date of that order.

[25] I find, based on the above discussion that Mkhize and Thabane are in unlawful occupation of the units leased to them not on the basis that the applicant is the owner of the units but on the basis that it has the right to possess them.

[26] I now turn to deal with the issue of whether it would be just and equitable to order eviction of both Mkhize and Thabane. It is now trite that before granting an eviction order the court has to conduct a two prong enquiry to determine whether, having regard to all the relevant factors, it is just and equitable to order eviction.

[27] In terms of s 4 (7) of PIE one of the factors to take into account involves the consideration of homelessness consequent an eviction and availability of alternative accommodation or land. This arises in a case where it has been shown that the personal circumstances of the affected person/s are such that eviction will result in homelessness and that they do not have alternative accommodation. .

[28] The second part of the inquiry involves consideration of "what justice and equity demand in relation to the date of the implementation of the order and what conditions to be attached to the order of eviction.².

[29] The other principle applicable in an eviction application is that where the respondent has failed to disclose a defence the court is enjoined to grant the order for eviction as prayed for by the applicant. In this respect Mashile J in Hlamolani Ellen Mawandela, said:

"[14] It has been stated in a number of decisions that a party resisting eviction ought to divulge all circumstances pertinent to the `eviction order. The upshot of such failure will be an order granting the eviction. "

[30] Mashile J then quoted with approval what was said by the Supreme Court of Appeal (the SCA) in *Ndlovu v Ngcobo, Bekker and Another*,³ which is also apposite in the present matter. In that case the SCA said that:

"Unless the occupier opposes and disclose circumstances relevant to the eviction order, the owner, in principle will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the

² See *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers the Newtown Urban Village* 2013 (1) SA 583 (GSJ)

³ 2003 (1) SA 113 at para 19

occupier and it cannot be expected of an owner to negative in advance facts not known to him and not an issue between the parties."

[31] In the present matter the applicant in both notices of motion brought to the attention of the respondents the provisions of s 26 (3) of the Constitution which reads as follows:

"Housing: No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[32] The approach to be adopted by the court in dealing with the issue of eviction under PIE was dealt with in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*.⁴ Mojaelo AJ as he then was, found that in dealing with eviction the court need to be informed of all the relevant "circumstances in each case in order to satisfy itself that it is just and equitable to evict and, if so, when and under what conditions." The court further held that:

"[48] The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful."

⁴ (CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017

[33] In the present matter the applicant brought to the attention of the respondents that should they feel that their rights as provided for under that section 26 of the Constitution will be infringed then they should place before the court information supporting such a claim. The respondents were again advised of what they were required to do if they were of the view that their rights would be infringed if an eviction order was granted.

[34] In addition to the above it needs to be emphasized that the respondents were represented by both attorneys and Counsel in these proceedings, thus the question of whether they could not appreciate what was required of them to protect their rights does not necessarily arise.

[35] Mkhize states in her answering affidavit that she is a female person with five minor school going children and that her household is headed by her as a single woman. She further states in paragraph 18 (eighteen) of her answering affidavit that:

“18.1 As I have already alleged above that I am a woman heading a family in lawful occupation of this property with my salary income less than R10 000. 00 a month and that this property was acquired through Government Capital and Subsidy grants therefore peremptory provisions, as I have been advised and such advise been accepted by me to be correct, that section 4 (7) of the “PIE” Act applies herein.”

[36] The above information tells this court very little about the personal circumstances of Mkhize. The amount “less than R10 000,00” could mean that she is earning R9 999.00 through which she can afford rental in another property. She also does not provide any details about her children, their age what grade are they at school,

how much she pays for their school fees from the “less than R10 000.00” salary she earns. She also does not state if she believes that an order evicting her would result in homelessness, and why she has to date not approached the City council and asked for assistance.

- [37] Thabane also tells the court that she is a woman heading a family and earning a salary “less than R10 000,00.” The observation made above concerning Mkhize also applies to her.

Evaluation

- [38] It seems to me, common cause or at least it has not been disputed that the premises in question is a social housing scheme intended to address the issue of housing by government. The scheme is intended to address those who has some income but do not qualify for the free RDP housing and at the same time do not qualify for mortgage bond from the banks. This suggest that there is a risk of homelessness if the two respondents were to be evicted immediately.
- [39] The City Johannesburg's report does not assist the court in relation to what the effect of the eviction will be on the two respondents. What the report does is simply to tell the court that the City of Johannesburg does not have temporary emergency accommodation available for them. There is no indication that there has been any engagement between the parties in relation to the information regarding the impact of the eviction will have and how it can be ameliorated. There is no evidence from the report as to whether there are other social housing schemes in the area which has the capacity to accommodate the applicants as part of alternative accommodation. There is also no evidence that

there other affordable housing in the area for the respondents.

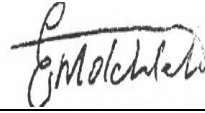
[40] As appear from above I am of the view that applicants should be evicted. However, that can only happen once the court is provided with all the relevant information relating to the effect of the eviction on the respondents.

[41] In light of the above I seek to make an order that addresses the interest of the applicant and the respondents.

Order

[42] In the circumstances the following order is made:

1. Ms Mkhize and Ms Thabane, the respondents and all those who occupy the units through and under them are evicted from the Jubulani Matjhbeng Soweto.
2. The order is held in abeyance pending all relevant information being placed before the court.
3. The parties are direct at undertaking constructive engagement regarding the issue of homelessness and including dealing the personal details and circumstances of the Ms Mkhize and Ms Thabane.
4. The City of Johannesburg shall provide the court with a report dealing with the information referred to in paragraph 3 above within 60 (sixty) days of date of this order.
5. The matter is postponed to a date to be arranged by the Registrar after the expiry of the 60 (sixty) days period referred to above.
6. Costs are reserved.



E MOLAHLEHI

Judge of the High Court

Gauteng Local Division,

Johannesburg

RESPONDENTS:

FOR THE APPLICANT: Adv V Fine

INSTRUCTED BY: Mervyn Joel Smith Attorneys

FOR THE RESPONDENTS: Adv BT Ngqwangele & Adv N K Ramsingh

INSTRUCTED BY: Mtabela Attorneys & Mchunu Attorneys

HEARD ON: 25 September 2018

DELIVERED ON: 21 November 2018