IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 32842/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

THOMAS NETSHONGOLWE **First Applicant**

NELEDZANI JANE NETSHONGOLWE **Second Applicant**

and

NTSHENGEDZENI NETSHONGOLWE **First Respondent**

ALUFHELI NETSHONGOLWE **Second Respondent**

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **Third Respondent**

Heard: **24 January 2022 (*Via* Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and by being uploaded to *CaseLines*. The date for hand-down of the judgment is deemed to be on 4 February 2022.**

JUDGMENT

TLHOTLHALEMAJE, AJ

[1] This application is before the Court in terms of section 4 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act[1], ("the PIE Act"). The first and second applicants (applicants) seek an order evicting the first and second respondents (respondents) from a property in Chiawelo Extension 2, Soweto. The respondents have opposed the application.

[2] The background to this application is fairly undisputed and may be summarised as follows;

2.1 Mrs Eliza Netshongolwe (the Deceased) passed away on 30 June 2005. She was the registered owner of the property which is the subject of the dispute between the parties. She had five children, being the first applicant, the respondents, and two other individuals who are not party to these proceedings. The second applicant is married to the first applicant in community of property.

2.2 In the founding affidavit, the first applicant avers that he moved into the deceased's house and the property in question, sometimes in 1975. He further avers that the Deceased also had another registered property in Venda, Limpopo Province where the respondents used to reside. The respondents had with the intention of securing employment in Johannesburg, then moved from Venda and decided to join him and the deceased in the disputed property with effect from 2002/2003.

2.3 On 9 November 2001, the Deceased had executed and signed a will in which she had nominated and appointed the first applicant as the sole heir and beneficiary of her estate. The first applicant was also the appointed executor of the will, and administrator of the estate.

2.4 On 18 September 2003, the Deceased executed and signed a *second* will, which effectively revoked the first one. In the second will, she bequeathed her entire estate to all her five children, who were also appointed and nominated as executors of the will.

[1] Act No. 19 of 1998

2.5 It is not necessary to burden this judgment with what appeared to be a family squabble between the parties between 2006 and 2014 over the ownership of the property. Further disputes surrounding the contributions to be made by the parties in the household towards the provision and payment of basic necessities need not burden this judgment. Of relevance however is that based on the first will, the Registrar of Deeds had on 21 August 2014, issued a Title Deed in respect of the property in favour of the applicants.

2.6 The respondents allege that the transfer and issuance of the title deed were obtained by the applicants through dubious and fraudulent means, which allegation was denied. In the light of the principal issue before the Court and the order to be made, I will refrain from attaching any significance to these allegations.

2.7 It is not clear at what stage the respondents had complained to the Master of the South Gauteng High Court about the first applicant's executorship. Resulting from the complaints, the Master had on 9 September 2015, revoked the first will on the strength of the second will. The second will was then lodged with the Master, registered and accepted.

2.8 There was a period of relative calm amongst the siblings upon the registration of the second will, until on 30 May 2019, when the applicants through their attorneys of record, served the respondents with a letter demanding that they should vacate 'their' property. When that demand did not elicit any response, the applicants had then instituted these proceedings on 25 September 2019.

[3] From the pleadings, it is apparent that currently, despite the first will and the first applicant's executorship having been revoked, or the second will having been lodged, registered and accepted, the Title Deed as issued on 21 August 2014 remains extant. The applicants have not taken any steps to challenge the decision of the Master to revoke the first will, and equally so, despite the second will, the respondents have also not taken any steps to have the Title Deed issued in favour of the applicants set aside. In the light of this conundrum, the question that arises is whether the applicant can lay any greater lawful claim to the property for the purposes of obtaining an eviction order.

[4] The starting point is obviously that the best evidence of ownership of immovable property is the Title Deed to it[2], which implies that in terms section 4(1) of the PIE Act, the applicants are *prima facie*, entitled to apply for the eviction of the respondents, if they are indeed 'unlawful occupiers' as defined. The matter however is not as simple as that, as mere lawfulness of occupation does not put an end to the enquiry.

[5] Flowing from the provisions of section 4(6) and (7) and section 6(1) of the PIE Act, it is acknowledged that in determining an application for the eviction of an alleged unlawful occupier of property, the court must consider what is just and equitable given the circumstances of each case. Furthermore, the court is enjoined to consider whether an occupier of property sought to be evicted, has proffered some valid defence as to the reason why an eviction ought not to take place[3]. I intend to dispose of this application on the basis of the latter enquiry.

[6] The facts of this case are evidently not unusual but for the conundrum explained elsewhere in this judgment. Thus, it is not in dispute that by virtue of the second will, all five siblings are entitled to ownership of the property in question, and that the only difference as already stated, is that the applicants are by virtue of the extant transfer and title deed, currently in possession of ownership of the property.

---

[2] See *R v. Nhlanhla* 1960 (3) SA 568 (T) at 570 D – H;

[3] See *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O* (CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC), where Mojapelo AJ held as follows;

> "[44] The nature of the enquiry under section 4 of PIE was examined in the case of *Changing Tides.* In summary, it was held that there are two separate enquires that must be undertaken by a court:
>
> > "First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order."
>
> And
>
> [47] It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information…" (Citations omitted)

[7] The question whether the respondents can be regarded as unlawful occupiers ought to be examined within the definition of that term in section 1(xi) of the PIE Act, which reads as follows;

> *"'unlawful occupier'' means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in 15 law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)"*

[8] Emphasis in this case should be placed on *'…a person who occupies 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*.' Flowing from this definition, it is my view that but for the fact that the applicants are in possession of the title deed based on the revoked will, it cannot be said that the respondents are unlawful occupiers as defined. There is no doubt that the effect of the second will was to confer on them, rights as beneficiaries, which rights have been registered and accepted by the Master, and thus entitling them to occupy the property. Based on these facts therefore, despite being in possession of the title deed, there can be no basis for the applicants to claim a greater lawful ownership of the property than that of the respondents, let alone their rights to claim ownership.

[9] In the light of the above, other than the fact that the respondents are not *'unlawful occupiers'* as defined, they have in any event, demonstrated that there is a legal and valid right to remain in occupation of the property. Once a legitimate defence has been demonstrated, the question of whether an eviction order should be considered does not even arise, and it would thus not be necessary to address other legs of the enquiry envisaged under section 4 of the PIE Act.

[10] In the light of the above conclusions, it follows that the applicants' application ought to fail, and costs should follow the results.

[11] Accordingly, the following order is made;

Order:

1. The Applicants' application is dismissed with costs.

_____

Edwin Tlhotlhalemaje

Acting Judge of the High Court

Gauteng Local Division

Appearances:

For the 1st & 2nd Applicants:	Adv. L Makungo, instructed by Madikane and Mnandi Attorneys
For the 1st & 2nd Respondents:	Adv. Adv Icho Kealotswe-Matlou, instructed by Letlhage Attorneys