

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2019/26021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
_____	_____
DATE	SIGNATURE

In the matter between:

RICHARD MOTHIBA

Applicant

and

MAMORENA PRISCILLA MOTHIBA

Respondent

JUDGMENT

DT v R Du Plessis, AJ

- [1] The applicant applies for the eviction of the respondent from the immovable property known as Erf 214 Tladi, Soweto and situated at 214 Babinaphuti Street, Tladi, Soweto (“the property”). The parties were previously married to each other, which marriage was concluded on 21 October 1980 in terms of section 22(6) of the now repealed Black Administration Act 38 of 1927.

- [2] One of the main issues in the matter was whether the marriage was in or out of community of property. The applicant alleged that they were married out of community of property and that he was the sole owner of the property. For these reasons, so he averred, the respondent was in unlawful occupation of the property and he was entitled to an order for her eviction. As will be shown hereon, the issue of the marriage regime between the parties has become moot.
- [3] The marriage between the parties was ended when an order of divorce was granted in the Regional Court of Vereeniging on 10 April 2017. The order made provision for the division of the 'joint estate'. The applicant stated that at the time he was under the impression that they were married in community of property but that he later received legal advice to the effect that the marriage was in fact out of community of property.
- [4] After such advice, the applicant launched an application in the Regional Court for a variation of the divorce order, which application was dismissed on 11 August 2023. The basis for the dismissal was a finding that the parties were in fact married in community of property, with reliance on the judgment by the Constitutional Court in *Sithole and Another v Sithole and Another*.¹ There is apparently an appeal pending against this dismissal.
- [5] My *prima facie* view is that the Regional Court was wrong as it did not take into account that the orders of the Constitutional Court would not affect the legal consequences of any act done in relation to a marriage before the orders were made. As the decree of divorce was granted before the orders in *Sithole*, the orders cannot affect the consequences thereof. In any event, in light of the facts of this matter, it is not necessary for me to make any finding on this issue.

¹ [2021] ZACC 7; 2021 (5) SA 34 (CC); 2021 (6) BCLR 597 (CC).

- [6] At some stage the applicant moved out of the property but the respondent remained in occupation. He subsequently married another woman, who has passed away since the marriage.
- [7] As already stated above, the applicant alleged that he was the sole owner of the property. As proof for this allegation he annexed a copy of the first page of a Certificate of Registered Leasehold to his founding affidavit. This showed that he was registered, under a previous surname, as the holder of the leasehold.
- [8] This document was peculiar as the whole certificate was not attached. There was also the number 1 before the applicant's name in the leasehold, which indicated that there may have been a number 2. As this is a public document registered in the Deeds Office, I invited Mr Van der Westhuizen, who appeared for the applicant before me, to produce the remaining pages. I indicated that I would draw an adverse inference if such pages were not produced.
- [9] Mr Van der Westhuizen informed me that his instructions were that the applicant was the sole owner and that the property was registered in only his name. He conceded that if the respondent's name appeared in the certificate she would be in lawful occupation of the property and it would be the end of the application for the applicant.
- [10] On 30 January 2024, a day after the matter was argued, the applicant filed a supplementary affidavit in terms whereof he stated under oath that he was never in possession of the 'title deed'. He provided no explanation for being in possession of the page of the leasehold certificate that was annexed to his founding affidavit. He then referred to a document issued by the City Council of Soweto on 1 February 1989 entitled "Certificate of Provisional Grant of Leasehold" which indicated that the leasehold was granted to him as further proof that he was the sole owner.
- [11] Unfortunately for the applicant, the respondent's attorneys obtained the

relevant next page of the certificate of leasehold from the Deeds Office. This clearly shows that the leasehold is also registered in the name of the respondent, albeit under the same surname as the applicant.

[12] This is an extraordinary development, as it must mean that the document has been deliberately withheld from the court. There can be no reason why the applicant could not obtain the rest of the document when it was very easily obtainable from the Deeds Office. Whether the withholding of the full certificate of leasehold was done at the applicant's own instance or on the advice of his attorneys is unclear, but this is so serious that I deem it necessary to refer the matter to the Legal Practice Council for investigation.

[13] As the leasehold was also registered in favour of the respondent, it is not necessary to determine the marriage regime between the parties. She is clearly entitled to occupation of the property and her occupation cannot be unlawful. In fact, as has been stated above this aspect was conceded by Mr Van der Westhuizen on behalf of the applicant. The applicant may have other remedies at his disposal to realise his half share of the leasehold. He is definitely not entitled to the eviction of the respondent on the basis that the application was brought.

[14] Even if the applicant can prove that the leasehold was incorrectly registered, there would be a factual dispute on the papers regarding the respondent's rights to the property that cannot be resolved. As the onus is on the applicant to show that he is entitled to the eviction of the respondent on the basis that she is unlawfully in occupation of the property and he has failed to do so, the application must fail on that basis also.

[15] For the above reasons I make the following order:

15.1. The application is dismissed with costs.

15.2. The matter is referred to the Legal Practice Council to investigate the deliberate withholding of the full Certificate of Registered Leasehold from the court and to take the appropriate disciplinary steps, if

applicable.

D T v R DU PLESSIS

Acting Judge of The High Court

Johannesburg

Date of Hearing: 29 January 2024

Date of Judgment: 2 February 2024

Counsel for Applicant: Mr Van der Westhuizen (attorney)

Instructed By: Mike Potgieter Attorneys

Counsel for Respondents: Adv D M Selala

Instructed By: Xiviti Attorneys