

REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES

CASE NO: 5446/2017
12/4/2018

In the matter between:

KENEILOE ELSIE MABOA	First Applicant
JONAS MABOA	Second Applicant

and

LEBOGANG GRACE MUKHARI	1 st Respondent
UNLAWFUL OCCUPIERS	2 nd Respondent
THE CITY OF TSHWANE	
METROPOLITAN MUNICIPALITY	3 rd Respondent
THE SHERIFF OF PRETORIA SOUTH WEST	4 th Respondent

JUDGMENT

SHANGISA AJ:

Introduction

- 1 The first and second applicants ("the applicants") seek an order evicting the first respondent from the property situated at [...] ("the property").

Factual Background

- 2 On 16 August 2016, the applicants entered into an agreement for the sale of the property with one William Mabitsela ("the deceased") and his wife Selelo Jeanette Mabitsela (Mrs Mabitsela). The deceased and Mrs. Mabitsela were initially married in terms of customary law in 2008. However, on 15 July 2015 they entered into a civil union and married in community of property.
- 3 The applicants purchased the property for the amount of R490 000.00. They accordingly paid the initial cash deposit of R200 000.00 towards the property. The applicants subsequently acquired a joint bond from Standard Bank for an amount of R290 000.00.
- 4 The aforementioned amount was paid to the deceased and Mrs. Mabitsela. The property was thereafter transferred to the applicants and was also registered in their names. On 26 October 2016 the applicant's conveyancers and attorneys wrote to the first respondent informing her that the property in which she resides has been sold, and that she should vacate same.
- 5 Despite the aforementioned letter from the applicants' attorneys, the first respondent refused to vacate the property. Accordingly, she wrote a letter through her attorneys informing the applicants that she had no intention of vacating the property.
- 6 Consequently, the applicants instituted legal proceedings with a view to evicting the first respondent from the property.

First Respondent's Points in Limine

- 7 For her part, the first respondent raised a number of points in limine on the basis of which she contended she was entitled to occupy the property. I proceed to deal with the first respondent's points in limine.
- 8 At the outset, the first respondent contends that the applicants have failed to comply with the provisions of Prevention of Illegal Eviction and Unlawful Occupation of Land Act ("the PIE Act"). However, on 27 February 2017 the applicants approached the high court on an *ex parte* basis and sought leave to serve the section 4(2) notice on the first respondent. The court duly granted the order in terms of section 4(2) of the PIE Act.
- 9 Pertinently, on 24 March 2017 the applicants served on the first respondent a section 4(2) notice in terms of the PIE Act. In my view, on the facts that I have just enumerated, it is clear that the applicants complied with the requirement that requires them to serve the notice on the first respondent. Accordingly, there is no merit in the first respondent's first point in limine.
- 10 The second point in limine raised by the first respondent contends that the applicants should have proceeded by way of action because, so the argument goes, the provisions of the PIE Act do not apply to the current proceeding. The applicants rely on two grounds for its contention. First it contends that the applicants are not owners of the property as contemplated by the PIE Act. Secondly, the first respondent contends that the applicants do not qualify as persons in charge in terms of the PIE Act.
- 11 In my view, there is no merit in the aforementioned point in limine. It is instructive that the first respondent does not allege any material dispute of fact. One needs only pay regard to the definition of a "person in charge" and an "owner" as set out in section 1 of the PIE Act. The latter defines a person in charge simply as:

"a person who has or at the relevant time had authority to give permission to a person to enter or reside upon the land in

12 Similarly, the owner is defined in the PIE Act simply as:

"the registered owner of land, including an organ of state.

13 If one has regard to the aforementioned definition, it is clear that the applicants fall within the purview of the definition as owners since the property is registered in their name.

14 In my view, the first respondent has also failed to set out the basis for asserting that there is any material dispute of fact. In any event, the first respondent woefully fails in her papers to set out the basis for her assertion that the applicants failed to comply with the aforementioned provisions of the PIE Act.

15 The first respondent also makes an unsubstantiated submission that she is the lawful owner of the property. However, this was not pleaded. In any event, other than making the bald, unsubstantiated claim of ownership, the first respondent failed to annex any supporting material which proves her ownership of the property. There is therefore no merit in the first respondent's claim that she is also the lawful owner of the property.

16 It was submitted on behalf of the first respondent that there are pending proceedings in Venda in which she is challenging the validity of the first applicant's marriage to the deceased. In that regard, the first respondent alleges that the first applicant's marriage to the deceased and the transfer of the property into her name were occasioned by fraud.

17 However, the first respondent's answering affidavit fails to plead or set out the material facts upon which she relies for her averments. Other than a mere say so, the first respondent failed to annex proof of any pending proceedings. Nor was any such averment was pleaded by the first

respondent. Significantly, the applicant's ownership of the property remains unrefuted, at least in these proceedings.

The Legal Position

- 18 It therefore follows that the applicants have complied with their obligation in terms of the PIE Act. They properly attached proof which indicates that they are the registered owners of the property. What is more, the applicants also obtained a court order which set out the manner of service of the section 4(2) PIE notice on the first respondent. I therefore do not find any merit in the first respondent's aforementioned points in limine.
- 19 It is common cause in this matter that the first respondent has been in unlawful occupation of the immovable property for a period of more than six months. That being so, the provisions of section 4(7) of the PIE Act are applicable in the present matter.
- 20 In *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC) (8 June 2017), Mojapelo AJ enunciated the applicable test on eviction as follows:

'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.' (My emphasis).

- 21 In the course of argument by the parties' respective counsel, I invited them to address the court on the import of the Berea case (supra). In particular, it appeared to me that there was insufficient information on the personal circumstances of the first respondent. I accordingly adjourned the

proceedings to enable counsel to place before court sufficient information and personal circumstances of the first respondent. I also asked both counsel to read the *Berea case* overnight.

22 The important consideration turns on whether the granting of the order of eviction would be just and equitable. In that regard, the court pays attention to a variety of factors such as the presence of alternative accommodation, the rights and needs of children, disabled persons and households headed by women. The test is an objective one.

23 In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) 294 at para 25, the court held that under section 4(7) the factors to be taken into account include availability of 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 s 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.

24 The *Changing Tide* matter (supra) further enunciated the principle that 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 grant that order. However, the important issue concerns what justice and equity demand in relation to the date of implementation of that order.

25 In the present matter, the first respondent is gainfully employed as a security control officer at OR Tambo International Airport. It was submitted on her behalf that she has a minor child. However, the minor child attends school in Thohoyandou where she lives with the first respondent's parents.

26 The first respondent claims that she was also married to the deceased in terms of the customary law. In that regard, she produced a letter which she alleged constituted proof that lobolo negotiations had taken place and that consequently she and the deceased had a customary marriage. It is on the strength of the alleged customary marriage that the first respondent resists the eviction proceedings.

27 In my view, it is easy to dispose of the first respondent's contentions. In

the first instance, the applicants have furnished proof that they bought the property from the deceased and his wife Mrs. Mabiletsa. The latter further annexed a marriage certificate which indicated that she and the deceased were married in community of property.

28 In my view, the first respondent failed to show that her customary marriage was celebrated and that it took effect in terms of section 3 of the Recognition of Customary Marriages Act, 120 of 1998. Other than a mere assertion that there were lobolo negotiations, the first respondent failed to substantiate and allege that there was a valid customary marriage between herself and the deceased.

29 As matters stand, the applicants are the registered lawful owners of the property. They are currently paying monthly instalment towards a bond of the property.

30 I bear in mind that, as was said in the *Berea matter* (supra), the enquiry has nothing to do with unlawfulness of the occupation. However, one has to do a balancing act and determine whether granting the order of eviction would be just and equitable, in light of the circumstances of the matter.

31 The important consideration in this matter is that the first respondent is gainfully employed. There are no minor children or the elderly living in the property. It seems to me that the first respondent may obtain an alternative accommodation. The applicants are prejudiced in that they have been servicing the bond on a monthly basis and have to make regular payments to the Bank. However, the applicants have never been allowed to take occupation because of the first respondent's refusal to vacate the property.

32 In my view, on a proper conspectus of all the information placed at my disposal, it seems to me that the considerations of justice require that the first respondent be evicted from the property. The circumstances of the first respondent are such that she will be able to secure an alternative rental accommodation.

33 Although the first respondent failed to submit proof of her income, despite requests I made to her counsel, and for which purposes I had also stood the matter down until the following morning to enable her produce her

personal information, I am satisfied^{ed} that the order of eviction will not render her homeless given her position as a gainfully employed person at the airport. As a gainfully employed person, it seems to me that there is no likelihood that the order of eviction will result in the first respondent's homelessness.

- 34 Consequently, on the facts of this case, it seems to me that it would be just and equitable to issue an order of eviction.

Order

- 35 In the result I make the following order:

1. The first and second respondents (and all other persons and/ or individuals who occupy and /or claim the property through or under them) are ordered to vacate the property known as [....] ("the property") within 45-days from date of this order;
2. Should the first and second respondents (and all other persons and/or individuals who occupy and/or claim the property through or under them) fail to comply with the order in (1) above, the Sheriff of this court, Pretoria South-West, is hereby authorised and/or mandated to take all steps necessary to execute this order to evict the first and second respondents (and all other persons and/or individuals who occupy and/or claim the property through or under them) from the property, and if necessary, to obtain the assistance of the South African Police Service to assist him/her in this regard;
3. The first and second respondents are directed to jointly and severally pay the costs of the first and second applicants' application, the one paying the other to be absolved.

SHANGISA AJ

Acting Judge of the High Court,

Gauteng Division, Pretoria

DATE OF JUDGMENT:

APPEARANCES:

COUNSEL FOR THE APPLICANTS: Adv. D. THUMBATHI

INSTRUCTED BY: MAKAMA ATTORNEYS INC

COUNSEL FOR THE FIRST RESPONDENT: Adv. T.P MATODZI

INSTRUCTED BY: FUNYUFUNYU ATTORNEYS