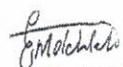


IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 91933/16

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>31 October 2018</u>	
DATE	SIGNATURE

In the matter between

SAMAUEL BOSA LUMU

Applicant

and

CALVINIA M MOKGOETSI

First Respondent

THE UNLAWFUL OCCUPIERS OF THE PROPERTY

KNOWN AS ERF 136, MALANSHOF, GAUTENG

(NR 77 JAN K MARAIS STR)

Second Respondent

CITY OF JOHANNESBURG METROPOLITAN

METROPOLITAN MUNICIPALITY**Third Respondent**

JUDGMENT

Molahlehi J

Introduction

- [1] Following the order made in terms of section 4 (2) of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act (PIE),¹ the applicant now seeks an order declaring the first and second respondents to be in unlawful occupation of property described as ERF 136 Malanshof, Gauteng (the property) and also that they be evicted from the property.
- [2] The respondent, who was assisted by her attorney of record and represented in court by Counsel opposed the application.
- [3] This matter was served before this court the first time on 8 October 2018. On that day the court stood the matter down for the respondents' attorneys to file an affidavit showing cause why an order should not be made exempting the respondents from paying their fees. The order was made following the concern about the manner in which the case of the respondents was presented.
- [4] The respondents' attorneys of record have provided a satisfactory explanation as to the cause of the problem concerning the manner in which the case was presented. Accordingly I do not believe it would be fair and just to deny them their right to the payment of the fees by the respondents.

¹ Act number 19 of 1998.

The case of the applicant

[5] The applicant states in the founding affidavit that the property in question is registered jointly in his name and that of his ex-wife. The marriage of the applicant to his ex-wife whom he married in Kenya was dissolved in terms of a settlement agreement which was made an order of the court. Paragraph 4.1 of the settlement agreement reads as follows:

"4.1 The parties are the joint owners of a certain immovable property situated at 77 Jan K Marais St Malanshof Randburg otherwise described as ERF 136 Malanshof, Randburg..

4.1.1 It is recorded that the Plaintiff hereby agrees to transfer half share in the property to the Defendant (applicant in the present matter) for which there shall be no price or other consideration. All costs pertaining to such transfers shall be payable by the Defendant.

4.1.2 The Plaintiff undertakes to sign all necessary documentation in this regard on demand.

4.1.3 The existing bond registered in both parties' names shall be considered on registration of the plaintiff's half share to the defendant and the defendant shall pay of all amounts owing on the said bond.

4.1.4 The defendant is to give effect to the above within a period of four months from the date of Divorce."

[6] After obtaining the divorce decree and during early 2011 the applicant placed the property through an estate agent on the market for sale. The estate agent recommended that the property be renovated before the sale in order to obtain the highest possible value. It would appear that he agreed to the proposal of the estate agent and gave him the mandate to proceed with the renovation of the property.

[7] The applicant testifies in his answering affidavit that the estate agent later informed him that on arrival at the property he noticed that the house was occupied by

various people amongst others the respondent in this application. He then requested the estate agent to sort out the matter and have the respondents vacate the property.

- [8] The estate agent went back to the occupiers of the property and informed respondents to vacate the property. The first respondent agreed to leave the property and confirmed the undertaking in an affidavit signed on 19 August 2011 wherein in she admitted that she had occupied the said house, and acknowledged that the applicant was the owner of the house. She also indicated that all other people would vacate the house on 3 September 2011 and that she would hand the key over to the estate agent. She also requested that the estate agent allow her to keep furniture she had in a small room on the premises.
- [9] It is common cause that the respondent never complied with the undertaking to vacate the house. On 9 January 2017, the applicant's attorney of the record sent a notice to the respondents to vacate the property. In response to the letter the respondent phoned the attorneys and informed them that she was not willing to vacate the property as she was permitted to be there by Mrs Lumu. She has not filed any supporting affidavit in this regard.
- [10] According to the applicant, although Mrs Lumu was not prepared to be involved in this litigation, she deposed to an affidavit in which she denied ever entering into an arrangement with the respondent to occupy the premises. It is for the above reason that the applicant contends that the respondents are occupying his property and have stayed there for the past six years, without his consent and also without paying for the municipality bills.

[11] This matter served before this court on 14 March 2018, and on that day stood down to 16 March 2018 to afford the respondent an opportunity to address the following:

- a. The plight of the four minor children allegedly staying on the property.
- b. The possibility of the applicant providing alternative accommodation to the respondents.
- c. The role of the municipality in the plight of the respondents.

[12] The applicant contends that the respondents had ample opportunity to deal with the issue of the four minor children, who are allegedly occupying the property but has failed to do so.

The respondent's case

[13] The respondent concedes that she has been in occupation of the property in question since 2010. According to her, she occupied the property from a lease agreement she had concluded with a certain Mr Patrick Tamukundde, a estate agent. She further states that she occupied the property for that period without any disturbance and paid the estate agent the amount of R5000 as rental. She says that the estate agent advised that she should pay directly to him because the applicant did not want his wife to know about the leasing of the property.

[14] In paragraph 2.2.11, the respondent states as follows:

"As I have stated above that I do not dispute to vacate the property, but proper procedures and law must be adhered to, and further, I have advised the applicant and Tom that I should (be) compensated for the improvement to the property for which they agreed to."

[15] At the beginning of his submission, Counsel for the respondent indicated that his

preparation focused only on one aspect relating to the principle that "the hand with blood does not inherit." This point, somehow, from his explanation seems to be related to the contention that the application should be dismissed because "it is too late to call for joinder." It seems to me the essence of the submission was that the applicant failed to join his ex-wife in the proceedings, and therefore the application stands to be dismissed.

- [16] About the merits counsel submitted that the respondent was entitled to occupy the property because she had a valid oral lease agreement with the applicant. The issue of the lien based on the alleged improvement effected on the property by the respondent was not pursued during submission by Counsel for the respondent.

Legal principles

- [17] It is trite that disputes concerning evictions are governed by the provisions of s 4 (6) and (7) of PIE. These two subsections provide that:
- (6) If an unlawful occupier has occupied the land in question for less than 6 months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and household headed by woman.
 - (7) If an unlawful occupier has occupied the land in question for more than 6 months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of

execution pursuant to a mortgage, whether land has been made available or can reasonably be made possible by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and household headed by woman.”

[18] The enquiry to conduct in determining a dispute concerning an eviction entails a two-stage enquiry in which the court seeks to balance the interests of the parties to ensure that the outcome is just and equitable.² The first enquiry involves the court having to evaluate whether it is just and equitable to grant the eviction order.³ The evaluation involves consideration of all the relevant factors which includes amongst others whether there is alternative land or accommodation for those affected.

[19] If the court finds that there is no defence to the claim of eviction, then it is obliged to order eviction. However, before granting the order, the court is enjoined to conduct the second part of the enquiry which involves having to determine, based on the interest of justice and equity, the conditions to attach to the order and the date of the implementation of the order. This inquiry involves also having to determine whether the people who are affected by the eviction may be rendered homeless and thereby requiring emergency assistance to relocate somewhere.

Evaluation and analysis

[20] In the heads of argument, the respondents raised non-joinder of the ex-wife of the

² Occupiers, Berea v De Wet and Others 2917 (5) SA 346 paragraph [46].

³ Johannesburg City Council v Changing Tides 2012 (6) SA 294 (SCA).

applicant as a preliminary point. The facts set out above indicate clearly that the wife, following the outcome of the divorce proceedings, has no material interest in these proceedings. It follows that the issue about non-joinder is unsustainable.

[21] The other point raised by the respondent, which was also not pursued during submission by Counsel, concerns the alleged improvement on the property for which she demands payment thereof before she can be evicted. There is, however, no substantiation of when and what kind of improvements were made on the building. There is thus insufficient evidence upon which a conclusion can be made that the respondent has made any improvement to the house. This point also stands to be dismissed.

[22] In her answering affidavit, the respondent does not raise the risk of homelessness in the event the court was to grant the relief sought by the applicant. She, in fact, states that she is willing to vacate the property except that she insisted that the applicant should follow the proper procedure before that can happen. The most reasonable inference from this is that the respondent will not be homeless if she is evicted. In fact, on her version, she can afford the payment of a rental in the amount of R5 000,00.

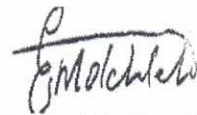
[23] The respondent has also not placed before this court information indicating that her circumstances are such that some limitations need to impose on the property rights of the applicant. As indicated earlier she was on a number of occasions given the opportunity to state her personal circumstances but failed to do so. The respondent has also not provided any information indicating that she cannot afford alternative accommodation in the event of her eviction.

- [24] In light of the above it is clear that there is no defence to the eviction application, thus it is just and equitable that the eviction order should be made.
- [25] Turning to the issue of the equitable date for the eviction of the respondent, account need to be taken of the prolonged period that she has stayed on the property. It has already been indicated that the respondent has not provided any information that would warrant refusing to grant the eviction order. The respondent has been aware of the demand that she should vacate the premises since 2011. She undertook to vacate the property with those she is occupying it with but failed to keep to that undertaking. She was informed of the intention to evict her during 2014 and further during 2017 with the service of notice of eviction. The institution of the eviction proceedings also reinforced the intention of the applicant to evict her in July 2017.
- [26] The above indicates that the respondent had enough time and opportunity to arrange to vacate the premises and to look for another accommodation. In the circumstances, I find that the applicant has made a case for the eviction of the respondents and the reasonable period to afford her to vacate the premises is a period of not more than 14 (fourteen) days.

Order

- [27] In the premises the following order is made:
1. The First and Second Respondents are in unlawful occupation of the property described as Erf 136 Malanshof, Gauteng.
 2. The First Respondent together with those occupying the above property are evicted from the property within 14 (fourteen) days of service of this order.

3. In the event that the First Respondent and those occupying the property with her fail and or refuse to vacate the property, the Sheriff is hereby authorised to take such steps necessary to give effect to this order.
4. The Respondents are to pay the applicant's cost for both this application and section 4(2) of the PIE application.



E Molahlehi

Judge of the High Court;
Johannesburg.

Representation

For the Applicant: Adv J Wilemse

Instructed by: Mahumani Inc

For the Respondent: Adv Maphwanya

Instructed by: Moila Fhatu Attorneys

Heard: 10 October 2018

Delivered: 31 October 2018