

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:13623/22

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

Date:27 November 2023 E van der Schyff

In the matter between:

MARTIN LAWRENCE KINGSTON

APPLICANT

and

FABIAN ZIMPANDE MSIMANG

1ST RESPONDENT

UNLAWFUL OCCUPIERS OF ERF 321
DERRICK AVENUE, WATERKLOOF RIDGE,
PRETORIA

2ND RESPONDENT

FABIAN ZIMPANCE MSIMANG N.O.

3RD RESPONDENT

(In his capacity as executor of the Estate Late Meinrad
Mendi Themba Boyi Msimang)

4TH RESPONDENT

CITY OF TSHWANE MUNICIPALITY

5TH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant is the owner of an undivided 55% share in the immovable property situated at 321 Derrick Avenue, Waterkloof Ridge, Pretoria (the property). In this application, the applicant seeks the eviction of the first respondent, Mr. Msimang, and persons who occupy through him, from the property. Mr. Msimang is also cited as the third respondent in his representative capacity as the executor of the Estate Late Meinrad Mendi Themba Boyi Msimang (the deceased estate). Further relief is sought against Mr. Msimang *qua* executor in terms of a Joint Venture Agreement concluded between the applicant and the late Mr. Meinrad Msimang (the deceased). In this regard, the applicant seeks an order directing Mr. Msimang, and, failing him, authorising the Sheriff to:

- i. Take any steps and sign any documents to sell the property by public auction by Aucor Auctioneers without a reserve price on terms and conditions applicable to a sale of residential properties by public auction;
- ii. Sign any sale agreement that may be concluded by a third-party buyer of the property pursuant to any sale agreement.
- iii. That the proceeds of the sale, less the auctioneer's commission be paid as to 55% to the applicant and 45% to the deceased estate.

Eviction

[2] Mr. Msimang claims that he is in lawful occupation of the property. He claims to own a 45% undivided share in the property because he is the executor of the deceased estate. Mr. Msimang contends that the applicant's 55% share in the

property is to be seen as security, which does not include the rights to occupy or sell the property without due consultation between the parties. Mr. Msimang further avers that the applicant lacks the necessary *locus standi* to seek the eviction order, that the application should have been mediated in terms of the Joint Venture Agreement (JVA), that the property is to be sold by private treaty in terms of the JVA and that there are disputes of fact that precludes the relief sought on application. In a supplementary answering affidavit he raises issues he typifies as constitutional issues, amongst others, that the property is of cultural importance since it came to be regarded as the Msimang family home and that the JVA is *contra public policy*.

[3] The owners of the property in undivided shares are the applicant and the deceased estate. As the executor of the deceased estate, Mr. Msimang only has the powers and duties prescribed in the relevant provisions of the Administration of Estates Act 66 of 1965. An executor is legally vested with the administration of the estate, and his position is a fiduciary one as he occupies a position of trust.¹ Mr. Msimang erroneously holds the view that as executor of the deceased estate, he holds the 45% undivided share in the property that confers on him the right of ownership and, consequently, the power to use the property and enjoy its fruits. Since Mr. Msimang is not a co-owner, he has no entitlement to occupy the property, and as a result, he is unlawfully occupying the property. Mr. Msimang can also not be said to be 'in charge' of the property as the executor of the deceased estate because the deceased estate only holds a minority interest in the property.

[4] The applicant, as a co-owner, has the *locus standi* to seek the eviction of any person who unlawfully occupies the common property without first having to obtain the consent or cooperation of the other co-owner.²

[5] The applicant's attempts to resolve the matter with Mr. Msimang did not bear fruit. Mr. Msimang claims in a supplementary answering affidavit that the applicant's

¹ *Prince NO v Allied-JBS Building Society* [1979] All SA 761 (E), *Mujuru NO and Others v Mujuru NO and Another* [2006] JOL 17603 (ZH).

² LAWSA Vol 27, second edition, para 267.

'commercial interests' can be catered for if he sells his interest in the property to him. Nothing prevents Mr. Msimang, even at this late stage, from making an acceptable market-related offer to the applicant or to purchase the property at the auction.

- [6] Mr. Msimang is a party to the proceedings. He had an opportunity to place the necessary information before the court that it would not be just and equitable to order his eviction. Mr. Msimang's answering affidavit informs the court that he owns a property with a higher financial value than the property in question. Mr. Msimang would thus not be left homeless if he must vacate the property. Mr. Msimang did not provide this court with information precluding a finding that an eviction is just and equitable. Alternative accommodation is available, and Mr. Msimang's wish to remain on the property is not one of the factors that are taken into account in determining what is just and equitable.³ The averments in the supplementary answering affidavit that the burden that will follow on the granting of an eviction order 'is untold because the family would be displaced' does not pass muster in light of the fact that Mr. Msimang informed the court of his other dwelling. By providing a reasonable time for the occupants to vacate the dwelling, the court will guard against a violation of any of the occupant's dignity.

Joint Venture Agreement

- [7] The applicant and the late Mr. Msimang (the deceased) concluded a JVA. The JVA regulated, amongst others, the terms upon which the deceased would occupy the property, the sale of the property while they both were alive, and the sale of the property in the event either party to the JVA predecease the other.
- [8] Since one party to the JVA did, in fact, predecease the other, Mr. Msimang, as the executor of the estate, cannot rely on the terms of the JVA that regulated the position between the parties to the JVA while they were both alive. This is the

³ *Grobler v Phillips and Others* 2023 (1) SA 321 (CC) at para [23].

reason why clause 9 of the JVA is not applicable. It would have applied had a dispute arose between the applicant and the late Mr. Msimang whilst the latter was still alive. Since the parties to the JVA set out the position that had to be followed when the first party passed away, the executor of the estate is bound to comply with the terms of the JVA. *In casu*, the provisions of clause 5 of the JVA are applicable.

- [9] In terms of clause 5 of the JVA, the property has to be sold by private treaty on terms agreed upon by the applicant and the executor of the deceased estate within three months of the appointment of the executor, failing which the property is to be offered for sale by public auction in terms of clause 4.2 of the JVA. No agreement was reached between the first executor of the deceased estate, who was appointed on 18 December 2018. Mr. Msimang was appointed as executor on 5 November 2020. No agreement was reached within three months of his appointment either, and the property was not sold by private treaty. In terms of the provisions of the JVA the property now stands to be offered for sale by public auction.
- [10] The enforcement of the JVA does not offend public policy. The Msimang family can retain their family home if they procure the applicant's 55% interest therein. If the property is sold at public auction for a ridiculously low price, as Mr. Msimang seems to fear, that would only be to his benefit because he would also be able to bid on the property.

Factual disputes

- [11] On a careful reading of the papers, I am unable to identify a 'real, genuine and *bona fide* dispute if fact'⁴ that goes to the core of the relief sought. The respondent's incorrect application of legal principles does not give rise to factual disputes.

⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [13].

Costs

[12] There is no reason not to apply the general rule that costs follow success.

ORDER

In the result, the following order is granted:

1. The first and second respondents are, subject to 2 below, hereby evicted from the immovable property, being Erf 1017, Waterkloof Ridge Township, Registration Division JR, Gauteng, situated at 321 Derrick Avenue, Waterkloof Ridge, Pretoria (the Property);
2. The first and second respondents are to vacate the Property by 29 February 2024, unless the parties come to an alternative arrangement, captured in writing, regarding the date to vacate;
3. In the event that the first and second respondent fail to vacate the Property by 29 February 2024, and the parties did not come to an alternative agreement captured in writing, the Sheriff of the High Court, assisted by the South African Police Services if necessary, is authorised to evict the first and second respondents from the property;
4. The third respondent is directed to take all steps necessary and sign all documents required, for the sale of the Property without a reserve price by public auction by Aucor Auctioneers, on terms and conditions applicable to the sale of residential properties by public auction;
5. The proceeds of the sale, less the auctioneer's commission are to be paid as follows: 55% to the applicant and 45% to the deceased estate;
6. Should the third respondent fail and/or refuse to sign all documents required, as set out above, the Sheriff is authorised and directed to sign all documents required, for the sale of the Property without a reserve price by public auction by Aucor Auctioneers, on terms and conditions applicable to the sale of residential properties by public auction;
7. The first respondent is to pay the costs of this application.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. L. Hollander
With:	Adv. V. Qithi
Instructed by	Schindler's Attorneys
For the first and second respondents:	Adv. M. Sikhakhane
Instructed by:	Mabuza Attorneys
Date of the hearing:	7 November 2023
Date of judgment:	27 November 2023