



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20519/14

In the matter between

Reportable

ANNIE HENDRICKS

APPELLANT

and

MARGARET HENDRICKS

FIRST RESPONDENT

GRAHAM HENDRICKS

SECOND RESPONDENT

**AND ALL OTHER FAMILY AND PERSONS
RESIDING UNDER THE FIRST AND
SECOND RESPONDENTS**

THIRD RESPONDENT

CITY OF CAPE TOWN

FOURTH RESPONDENT

Neutral citation: *A Hendricks v M Hendricks & others* (20519/14) [2015]
ZASCA 165 (25 November 2015)

Coram: Mhlantla, Leach, Tshiqi, Majiedt and Saldulker JJA

Heard: 16 November 2015

Delivered: 25 November 2015

Summary: Eviction – an owner who occupies property without the consent of the holder of a right of habitation in respect of that property is an ‘unlawful occupier’ as contemplated in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Zondi and Samela JJ sitting as court of appeal):

1. The appeal is upheld, with the first respondent to pay the costs.
2. The order of the a quo is set aside and substituted with the following:
 - (a) The appeal is upheld, with the first respondent to pay the costs.
 - (b) The matter is remitted to the Somerset West Magistrates' Court for the finalisation of the eviction application brought by the appellant, (the applicant in the magistrates' court), in particular for a consideration of the factors set out in section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998'.

JUDGMENT

Majiedt JA (Mhlantla, Leach, Tshiqi and Saldulker JJA concurring):

[1] A long-running family quarrel culminated in the appellant, Ms Annie Hendricks, seeking the eviction of her erstwhile daughter-in-law, the first respondent, Ms Margaret Hendricks, and her son, the second respondent, Mr Graham Hendricks, in the Somerset West Magistrates' Court. The third respondent, collectively the other persons occupying the property in question through the first and second respondents, and the fourth respondent, the City of Cape Town, did not participate in the matter. I will therefore refer to the first and second respondents simply as 'the respondents'.

[2] The eviction was sought in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, (the PIE Act), but was unsuccessful. The magistrates' court held that the respondents were not unlawful occupiers as contemplated in the PIE Act and could therefore not be evicted. The Western Cape Division of the High Court, Cape Town (Zondi and Samela JJ, sitting as court of appeal) endorsed this view and dismissed the appellant's appeal. This court granted the appellant special leave in terms of s 16(1)(b) of the Superior Courts Act, 10 of 2013.

[3] The eviction application was unopposed. The unanswered factual allegations made by the appellant are these. The appellant was 72 years old when she launched the eviction application. On 5 November 1990 she had sold her residential property, Erf 2128, Macassar, situated at 9 Fish Street, Macassar (the property), to her son, the second respondent. A lifelong right of habitation was registered in favour of the appellant on the property's title deed. A concomitant cession of right of habitation, signed by the second respondent in favour of the appellant in respect of the property, was recorded in a notarial deed, number K871/90. The appellant lived in the property when her son took occupation thereof after registration of the transfer. The second respondent married the first respondent in community of property on 24 November 1990. Relations soured between the appellant and the first respondent and deteriorated steadily over the years. By 2009 the appellant experienced the living conditions in the property as intolerable which prompted her to leave the property temporarily. She was granted refuge first by her daughter and later by her other son. The appellant obtained a family violence interdict against the first respondent and instructed her attorneys to write to the respondents to request them that the appellant be permitted to move back into the property without being verbally abused by them. These letters, as well as ongoing negotiations, including a round-table discussion convened by the appellant's attorneys, bore no fruit.

[4] The respondents were divorced on 2 February 2010 and, in terms of the decree of divorce, their joint estate in community of property had to be divided equally between them. It appears from the papers that at some stage

the second respondent (who, as stated, is the appellant's son) left the property, possibly as a consequence of having been refused access to the property by the first respondent. He has played no part in any of the previous proceedings and in this court. Ultimately, the first respondent remained in occupation of the property, together with her daughter from a previous relationship, her granddaughter and the three children born of the marriage between her and the second respondent. On 6 February 2012 the appellant's attorneys wrote to the first respondent, again asserting the appellant's right of habitation and calling upon the first respondent to vacate the property by 22 February 2012, failing which an eviction order would be obtained. In the end, an eviction order was sought, without success.

[5] The central issue before the magistrates' court was whether the respondents were unlawful occupiers as envisaged in the PIE Act. Section 4 provides for the eviction of unlawful occupiers. Since the respondents had been in occupation of the property for more than six months at the time of the eviction application, s 4(7) applies. It reads:

'(7) If an unlawful occupier has occupied the land in question for more than six 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 available 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 households headed by women.'

In s 1 'unlawful occupier' is defined 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 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 the Informal Land Rights Act, 1996 (Act 31 of 1996).’

'Person in charge' is defined in that section as 'a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question'. The appellant's case is that she was at the time of the eviction application the person in charge of the property, and that her legal authority, as contemplated in the definition, emanated from her right of habitation. In the magistrates' court the appellant's legal standing to bring the application and the fact that she had temporarily given up residing in the property without abandoning her right of habitation, was not in issue. It was also not in issue that she had not consented to the respondents' occupation of the property and that any previous tacit or implied consent had been unequivocally withdrawn. I must add that, although no opposing papers had been filed on behalf of the respondents, they were represented by an attorney in the magistrates' court. But in the court a quo and in this court, the first respondent appeared in person, apparently due to impecuniosity. Before us the first respondent merely denied that she had caused the appellant to leave the property and indicated that the appellant was welcome to return at any time.

[6] The right to habitation as a servitude is a limited real right which confers on the holder the right to dwell in the house of another, without detriment to the substance of the property¹. The right can historically be traced back to Roman law when the original objective was to provide accommodation to indigent foreigners. In that context it was regarded as a factual, rather than a juridical, institution. But Justinian accepted it as a sui generis legal concept and he classified it as a personal servitude². This was generally accepted by Roman-Dutch authorities³. Our courts have long recognized *habitatio* as a personal servitude which is a limited real right. Thus it has been held to be a *jus in re* which founds an action *rei vindicatio*⁴. The novel question before us is whether, as far as the PIE Act is concerned, a holder of this limited real right is a 'person in charge' of the property in respect

¹See: P J Badenhorst et al, Silberberg and Schoeman's *The Law of Property*, 5 ed at 341.

²1 2.5.5; and see Van Leeuwen *Censura Forensis* 1.2.15.12.

³Grotius, Introduction 2.44.8; van der Linden, *Institutes* 1.11.6.

⁴*Galant v Mahonga* 1922 EDL 69 at 79. See also *Kidson & another v Jimspeed Enterprises CC & others* 2009 (5) SA 246 (GNP) paras 7 and 8, where Van Rooyen AJ gives a useful exposition of the history and ambit of the right.

of which the *habitatio* operates and whether that holder can obtain an eviction order against an owner who occupies the property without the holder's consent. For the reasons that follow both these questions must in my view be answered in the affirmative.

[7] It is well established that ownership is the most comprehensive real right and that all other real rights are derived from it⁵. But limited real rights are absolute in the sense that they are enforceable against any and all. A limited real right detracts from the owner's dominium. Thus, in the present instance, the owner of the property, the first respondent, cannot exercise full dominium over it, inasmuch as she cannot occupy the property, unless the appellant as the holder of the right to habitation has consented thereto. Absent such consent, her occupation of the property is unlawful. She is therefore, on the facts of this case, an 'unlawful occupier' within the meaning contemplated in s 1 of the PIE Act.

[8] The court a quo sought to distinguish *Galant* and *Kidson* (referred to in footnote 4 above) on the facts and on the law. It rejected the contention advanced by the appellant's counsel that 'the right to habitation trumps ownership'. Finally, it found that the owner of the right to habitation cannot evict the owner of the servient tenement. While it did not set out any further reasons for this conclusion it seems to me, with respect, that the court a quo has misconceived the nature of the right of habitation vis-à-vis the owner of the property in respect of which the *habitatio* prevails. And the court a quo failed to consider at all whether the holder of such a right can be a 'person in charge' for purposes of the PIE Act, more particularly as far as s 4(7) is concerned. In *Kidson* the owner of a farm had destroyed the farmstead and outbuilding to which the applicants had a right of habitation, granted to them by the previous owner. The court held that the applicants were entitled to exercise their rights of habitation by either rebuilding the farmstead and outbuildings or by building alternative structures. Van Rooyen AJ correctly

⁵Grotius: Inleidinge 2.3.10: 'Ownership is complete if someone may do with the thing whatever he pleases, provided that it is permitted in terms of law' (translation as set out in Silberberg and Schoeman's *The Law of Property* 5 ed, at 91 fn 7, own emphasis). See also *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106-107.

held (at para 11) that ‘the *ius in re aliena* limits [an owner’s] ownership until the death of the person entitled to the *habitatio*.’ In *Galant* the court enforced a right of habitation enjoyed by an heir against a co-heir who had inherited the farm. Sampson J held that the plaintiff, as holder of the right of habitation, can sue for the recovery of that right against any owner of the land subject to the right. These cases demonstrate that an owner’s rights in his or her property are limited in relation to the right of habitation and, for that matter, by the holder of the right of use [*usus*] and a usufruct. In this regard therefore the court a quo erred in its findings.

[9] I have not been able to find a reported judgment where the holder of a right of habitation had been held to be a ‘person in charge’ within the meaning of the PIE Act. But appellant’s counsel referred us to the unreported judgment of Rogers AJ in *October NO & another v Hendricks & another*⁶. There the court had to decide whether the owners of property could be ‘unlawful occupiers’ in the context of an eviction application having been brought by the holder of a life usufruct in respect of the property. The applicant’s late husband had bequeathed the relevant property to their two daughters with the proviso that they should vacate the property once they get married. The will also stipulated a life usufruct in favour of the applicant. As is the case here, strained relations between the applicant and one of her daughters resulted in an eviction application in the high court against the said daughter and her husband. The court framed the question thus: whether the respondents in that case were persons who occupy the property ‘without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such [property]’. Rogers AJ held that ‘(w)here someone other than the registered owner is the “person in charge” (ie the person with the right to determine who stays on the property), it is the consent of such person rather than the registered owner which is . . . relevant. *It follows that the holder of bare dominium could be an unlawful occupier if he or she occupied property without the consent of the usufructuary*’ (own emphasis).

⁶*October NO & another v Hendricks and another* (23189/2011) [2013] ZAWCHC 12 (31 January 2013).

[10] The conclusion and reasoning of Rogers AJ is clearly correct. Applied to the present instance, the first respondent's bare dominium as owner of the property must in law yield to the appellant's right of habitation. For, like usus and usufruct, *habitatio* is a limited real right, enforceable to the extent of the right itself, against the entire world (hence its registrability against a title deed). Absent any consent from the appellant, either express, tacit or implied, the first respondent is an unlawful occupier of the property.

[11] When one has regard to the definition of an 'unlawful occupier' in s 1, as set out above, the appellant is indubitably a 'person in charge' of the property. This is so, not only on the basis expounded by Rogers AJ in *October*, quoted above, but also by virtue of the fact that the appellant plainly derives her 'legal authority' as contemplated in the definition of 'person in charge' in s 1 and as set out above, from her right of *habitatio*. She alone could legally grant permission to a person (even the registered owner) to reside in the property.

[12] In the premises, the court a quo has erred in its findings. But that is not the end of the matter. Section 4(7) provides that a court may grant an eviction order only if it is satisfied that it is just and equitable to do so. In order to make that determination, it must consider the factors enumerated in the subsection. In *Port Elizabeth Municipality v Various Occupiers*⁷ the court stressed that the phrase 'just and equitable' entails a more elaborate enquiry than 'purely of the technical kind that flow[s] ordinarily from the provisions of land law'⁸. And it emphasized that in conducting such an enquiry, '. . . the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result'⁹.

[13] Some of the factors to be considered in terms of s 4(7) are the rights and needs of the elderly, children, disabled persons and households headed

⁷*Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC).

⁸*Id.*, para 35.

⁹*Id.*, para 36.

by women. As a result of the outcome of the case the magistrates' court did not have to consider s 4(7) at all. Due to the lack of opposing papers, there is a dearth of information on these and other potentially relevant aspects. It appears from the papers that, at the time of the respondents' divorce (in 2010), there was one minor child (they had three children). There is no indication on the papers of whether this child and possibly one or both of the others, may still be dependent on their parents. There is also no indication whether anyone of the occupiers of the property is disabled. In all probability that household is headed by a woman, the first respondent, in view of her divorce from the second respondent. In the circumstances, the matter must be remitted to the Somerset West Magistrates' Court for a full enquiry as contemplated in s 4(7) into whether it would be just and equitable to order the eviction of the respondents (in effect only the first respondent) and all those occupying the property through them or her (the first respondent).

[14] It is necessary to add one last observation. This unseemly family feud is highly regrettable. It is plain on the papers that hard, inflexible positions have been adopted on both sides. Ultimately, no one wins in a matter such as this. The more desirable outcome, beneficial to all concerned, is to bury the hatchet and to co-exist in harmony on the property. One can only hope that good common sense will prevail.

[15] The following order is issued:

1. The appeal is upheld, with the first respondent to pay the costs.
2. The order of the court a quo is set aside and substituted with the following:
 - '(a) The appeal is upheld, with the first respondent to pay the costs.

(b) The matter is remitted to the Somerset West Magistrates' Court for the finalisation of the eviction application brought by the appellant, (the applicant in the magistrates' court), in particular for a consideration of the factors set out in section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.'

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant: R J Steyn
Instructed by: Morkel & De Villiers Attorneys, Somerset West
Matsepes Inc, Bloemfontein

For Respondents: In Person