IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 20413/2019

In the matter between:

M & Z DEVELOPMENT AND
INVESTMENT (PTY) LTD Applicant

and

SB MABUSELA First
Respondent

MARONA SEBITHOMA Second Respondent

ALL OCCPANTS OF ERF 2045
BLOCK H, SOSHANGUVE, PRETORIA Third Respondent

THE CITY OF TSHWANE METROPLITAN
MUNICIPALITY Fourth Respondent

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

....
DATE SIGNATURE

JUDGMENT

NQUMSE AJ

[1] This is an application in terms of section 4(1) of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act, 1998 ("the PIE Act").

[2] The grounds for the eviction are set out in the Notice of Motion and are summarised as follows:

2.1 The applicant is the registered owner of the property;

2.2 The first and second respondent and all those who reside on the property through and under them, including the third respondent, are in the illegal occupation of the property due to the cancellation of the respondent's right of occupancy of the property, and the subsequent failure of the occupants to vacate the property;

2.3 The first to third respondents and all those who occupy the property through and under them are, pursuant to the above, in unlawful occupation of the property; and

2.4 Despite being in unlawful occupation of the property, the first to third respondents and all those who reside through and under them have failed, neglected and/or refused to vacate the property, and are still in occupation thereof.

The Parties

[3] The applicant is M and Z Property Development and Investment (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with registered address situated at 1464 Block G, Soshanguve, Pretoria.

[4] The first respondent is Solomon Bethuel Mabusela, an adult male Businessman, and the purported brother of the late Nkodi Godfrey Mabusela (seller), from whom the applicant purchased the subsequently deposed to property.

[5] The second respondent derives her right of occupation of the subsequently deposed to property through and under the first respondent, from whom she purportedly sub-let the property.

[6] The third respondent is all occupants of Erf 2045, Block H, Soshanguve, Pretoria, currently residing at Erf 2045, Block H, Soshanguve, Pretoria, and whose full and further particulars are unknown to the applicant.

[7] The fourth respondent is the City of Tshwane Metropolitan Municipality, a municipality as contemplated in section 2 of the Local Government Municipal Systems Act 32 of 2000, care of the Municipal Manager at Isivuno Building, Cnr Lillian Ngoyi and Madiba Streets, Pretoria.

Factual Matrix

[8] The deponent, Bongani Mabena (Mabena) on behalf of the applicant avers that on or about 26 August 2014 made a formal offer to purchase from the late Nkodi Godfrey Mabusele with, identity number 380406 5462 089, the property in question. A copy of the written offer signed by both purchaser and seller is attached to the founding affidavit as annexure “C” (hereinafter referred to as the “agreement”). The material terms of the written offer to purchase were *inter alia* the following:

8.1 The applicant shall purchase the property from the seller upon acceptance of the written offer to purchase agreement (sale agreement), which offer to purchase was open for acceptance by the Seller on or before 30 August 2014.

8.2 The purchase price payable by the applicant is an amount of R100 000.00 payable in cash on or before 30 March 2017, to be payable to the conveyancing attorneys to be held in Trust in an interest bearing account until registration of transfer;

8.3 The applicant shall be liable to pay all transfer costs incurred in connection with the registration of transfer of the property, including Transfer Duty and VAT, whichever is applicable, immediately upon request by the conveyancing attorneys;

8.4 Transfer and registration of the property shall be effected upon the applicant having complied with the above;

8.5 The seller shall be entitled to reside at the property after registration of transfer of the property into the name of the applicant, until such time as he meets his untimely death;

8.6 The purchaser shall not be obliged to effect payment of occupational rental to the applicant either prior to or subsequent to the transfer and registration of the property into the name of the applicant in respect of the seller's life-long continued occupation of the property.

[9] The applicant in his affidavit pointed out several discrepancies that are apparent from the sale agreement. Those discrepancies relate to the purchase price, the manner of payment and the suspensive clause therein. With regard to the purchase price the applicant points to the fact that according to the sale agreement the purchase price is payable by way of a 100% cash payment in the amount of R100 000.00 and it is to be secured by a 100% approved bank guarantee, payable

to the seller or registration of transfer of the property, to be obtained on or before 30 March 2017.

[10] That the sale agreement is subject to the suspensive condition that a loan of R100 000.00 is secured by a mortgage to be registered over the property within 14 (fourteen) days from the last date of signature of the agreement, or such extended period as the parties may have agreed to in writing, then and in such event the sale agreement shall lapse and shall have no force, and effect. So the applicant contends, that it has always been the true intention of the seller and himself that the purchase price is to be paid by way of a 100% cash payment, and not by way of a mortgage loan. As a result, the applicant took out a personal loan to pay the full purchase price in cash. The applicant further contends that clause 2.1 and 2.2 of the sale agreement are mutually exclusive and is a support of his contention that the purchase price was payable by way of a cash payment. He further contends that the suspensive condition should have been deleted and the failure to do so was a *bona fide* oversight between the parties.

[11] However, the applicant contends that the discrepancy in the manner of payment pointed out here above has no bearing to the sale agreement since the agreement was perfected when the applicant paid the full purchase price to the seller as per the seller's instructions on 14 June 2016. A proof of payment in the amount of R100 000.00 is attached as Annexure "D".

[12] The applicant pointed out to the discrepancy in the agreement that the offer to purchase was accepted by the seller on 27 August 2014, but the purchase date as per the Windeed property search is 31 March 2016. The explanation advanced by the applicant is that owing to the fact that after the seller had accepted the offer to purchase, it came to the applicant's attention that the seller was married in community of property to his late wife, Momotho Christina Mabusela (deceased) who at the time of the acceptance of the offer by the seller she had been deceased and her estate was in the process of being wound up, prevented the sale of the property until such time as the estate had been wound up. According to the applicant the parties agreed to keep the sale and transfer of registration in abeyance until the finalisation of the deceased's estate.

[13] Upon the finalisation of the deceased's estate in 20016, the parties agreed to extend the date of payment of the purchase price from 30 March 2015 to 30 March 2017 by way of a written amendment duly initialled by both the seller and himself on behalf of the applicant. As a result, the instruction to transfer the property was given to the conveyancing attorneys only during March 2016. The applicant further explains that despite the provision in the agreement which allowed the applicant to take vacant possession of the property by 31 March 2017 a date by which the seller and any person occupying the property through and under shall vacate the property, vacant possession and occupation of the property could not have been granted to the applicant prior to the seller's death which is a special condition of the agreement. Furthermore, the applicant acknowledged that the property is let to tenants and that as an alternative to the tenants vacating the property, the property shall be given to the applicant subject to the rights of the tenants. The fact that the vacant occupation of the property was not granted to the applicant on 31 March 2017, so it was contended, is not material to the validity of the agreement.

[14] The transfer and registration of the property was effected on the name of the applicant on or about 31 October 2016. However, it is contended that the seller continued to occupy the property, as caretaker of the property until such time he died during June/July 2018.

[15] Subsequently, on or about 21 November 2018 the applicant addressed a letter to all tenants occupying the property though and under Bethuel Mabusela which according to the applicant included the second respondent addressing of the following:

15.1 that the applicant is the owner of the property through an agreement with the erstwhile owner, the seller;

15.2 it had come to applicant's attention that the seller has since died and as a result of his passing the applicant has appointed a new site manager, Tiisetso Fakude, to manage the property on behalf of the applicant and to collect rent from the tenants on its behalf;

15.3 all agreements which were previously concluded with the seller would be cancelled effective from 31 December 2018, where after new rental contracts would be concluded with themselves;

15.4 all the tenants are to contact the site manager before 30 November 2018 to make necessary arrangements for the conclusion of new rental contracts, and to pay the rental due to the applicant on or before 5 December 2018, failing which they may be evicted. A copy of the letter is attached to the affidavit as Annexure "E". Despite the invitation to enter into new rental, contracts, the occupiers failed to do so and to effect payment of the rental due and owing to the applicant.

[16] On or about 15 January 2019, the applicant caused a notice to vacate letter to be hand delivered to the property. A copy thereof is annexure "F". According to the said letter, the second respondent and all other occupants were given 1 (one) calendar months' notice to vacate the property. On or about 20 February 2019 the applicant's attorneys caused another notice to vacate to be hand delivered to the property in which the second respondent and all other occupiers were reminded to vacate the property. A copy of the said letter is annexed as "G".

[17] In response to the said letters of notice to vacate, the applicant received correspondence from attorneys acting on behalf of first to third respondent in which they advised that they are in the process of investigating the procedure that was followed in the transfer of the property to the applicant as well as the authenticity of the sale. The said attorneys also advised that they carry instructions to lodge an application to declare the applicant's title over the property null and void. Consequently, despite the cancellation of the first to third respondent's right of occupation of the property they have failed and or refused to vacate the property.

[18] The only answering affidavit is that of the second respondent who first raised the following *points in limine*:

First *Point In Limine*

18.1 The applicant has failed to join the executors of the estate of the late Nkodi Mabusela who would be able to explain the manner in which the property was sold to her and she is a *bona fide* purchaser of the said property. Further, the applicant has confirmed that it purchased the property from Nkodi Mabusela who was married in community of property to the pre-deceased Mrs Mabusela. This is another reason that makes the application defective.

Second *Point In Limine*

18.2 The applicant's application is silent on the categories of persons as envisaged in section 4(6) of the PIE Act, which the court should pay specific attention to in determining a date on which it would be just and equitable to grant the eviction against those category of persons.

18.3 The applicant has failed to attach the whole agreement, thereby prejudicing the response of the respondent to the averments especially pertaining to the interpretation thereof.

[19] He further stated that on or about 20 June 2018, he and Mabusela, the executor of the estate of the late Nkodi Mabusela signed a contract of sale of immovable property for a purchase price of R250 000.00. A copy of the said contract (hereinafter referred to as the contract) is annexed to the answering affidavit as annexure "A". He further stated that she would be approaching the court for the cancellation of the illegal, unlawful and fraudulent transfer of the property to the applicant.

[20] According to her, they used to live with the deceased and she never saw the applicant until two years after the death of the deceased when he came to their home looking for the first respondent. She contends that if the applicant had bought the property, he would have surfaced whilst the deceased was still alive, alternatively, he would have announced his claim of purchasing the property the first

time he came after the death of the deceased or he would have sought to meet with the family or the executrix/executor of the seller's estate. Furthermore, the purported witness's signature of Miss Lindiwe Tryphosa Mkhumazi with identity number 870222 0904 088 denies ever signing the agreement as a witness.

[21] She further attacks the authority of the authority of the deponent to the affidavit on behalf of the applicant since he failed to attach a resolution of the company. He therefore contends that the deponent had no such authority to depose to the founding affidavit and he is barred from supplementing its papers without bringing new evidence in its reply. She also denies that the address which is indicated in the founding papers as her business address, since it is actually her primary residence. This she contended, is an attempt by the applicant to mislead the court since she is aware that it is more cumbersome to evict a person from her primary residence than it is from business premises. She further contends that the property was registered under Mabusela Momutho Christine, Mabuselo Nkodi Godrey and Mabusela Chrestine. The property so it is contended vested on the three aforementioned persons. She also takes issue with the fact that the agreement does not mention anything about the payment of R100 000.00 into the account of a conveyancing practitioner, neither is such conveyancer's name indicated. Furthermore, nowhere in the agreement does it state that payment was supposed to be a cash payment if regard is had to clause 12 of the agreement.

[22] He further contends that according to clause 12 the applicant would have had 14 days from the date of signature, being 27 August 2014 to secure the purchase price which would lapse on 10 September 2014. The extension of the period from 10 September 2014 would only have been as a result of a signed extension which was not done. She questions how a payment would have been effected 2 years after the agreement had *ipso facto* lapsed. According to her, this reeks of fabrication by the applicant who is suing with the full knowledge that Nkodi is deceased and cannot clear the muddied waters. She also questions how the Deeds office would have changed the purchase date of the property *mero motu* and she alleges that the Deeds office may have been misled by the applicant regarding the date of the sale. A letter annexed to the answering affidavit as annexure "C" is a complaint to the

SAPS to investigate the matter. However, according to her, the said letter yielded no results.

[23] She further contends that the property is his primary residence and the allegation that it is her business premises is to hoodwink the court pertaining to the gravity of the relief sought. According to the second respondent, there is a dispute on the persons who are occupying the property as well as the facts surrounding the purchase of the property warrant the matter to be referred for oral evidence, as it is not capable of being resolved by way of motion proceedings.

[24] Solomon Bethuel Mabusela, the first respondent deposed to a confirmatory affidavit in which he confirms that he is the brother of Nkodi (the seller) and he resided at 11678 Magagula Street, Mamelodi East. On 20 November 2018 he was called by his tenant, the second respondent who informed him about the applicant's claim for having bought the property from his late brother, Nkodi. He further confirms that the second respondent is using the property house no 2045 "H" Soshaguve as his Spaza shop. He further stated that when his brother, Nkodi died he had no children with his wife who pre-deceased him. For the reason that he was staying with Nkodi before his death, he has a claim over his property.

[25] In its replying affidavit the applicant applied for the condonation of its late filing which according to the applicant was due to collecting all documentation that pertains to the sale of the property. In this regard the applicant explained that the conveying attorneys had since closed their offices and had stored the contents of the file relating to the property. They were stored in an off-site storage facility to which they did not readily have access until recently.

[26] The applicant further stated that its delay is not intentional nor a show of disrespect to the rules of the court but it was necessary to obtain the relevant documentation in order to be able to respond to the second respondent's answering affidavit. It further contended that the delay did not cause any prejudice to the second respondent more so that the respondent's attorneys had agreed to stay the *dies* in which the applicant is required to deliver its replying affidavit. This instead worked in favour of the respondent as the delay favours their prolonged unlawful occupation of the property.

[27] The delay to file the replying affidavit is late by not more than 16 days which is not an excessively long delay from when the replying affidavit ought to have been delivered. The explanation for the delay is plausible and it appears adequate in my view. Further no prejudice will be suffered by the respondent. Therefore, it's in the interest of justice that condonation be granted.

[28] In reply the applicant contends that the second respondent has opposed the application merely for its delay once she has not put up any lawful *bona fide* defence to the application. The applicant maintains that the second respondent's does not reside at the property to which the application for eviction relates but at Erf 482 Refentse, Stinkwater, Pretoria, Gauteng. It further contends that it is disingenuous of the second respondent to aver that the executor of deceased estate of the seller is not cited to these proceedings whilst admitting in his answering affidavit that the first respondent is the executor of his late brother's estate.

[29] Furthermore, the first respondent who is the executor of the estate of the seller, has gone as far as to depose to a confirmatory affidavit to the answering affidavit and yet remains silent on how he could have allegedly sold the property to the second respondent in 2018, 2 years after the property had been transferred and registered in the name of the applicant. Applicant also contends that since the property was purchased from the seller whilst he was still alive, it was not necessary to cite the executor of Momotho Christina Mabusela as the seller was the executor of her estate. A copy of the letters of Executorship is respect of the deceased estate of the late Momutho Christina Mabusela was attached as annexure "BM1" as confirmation of the seller's appointment on 27 October 2014 by the Master of the High Court.

[30] Applicant stated that a further delay in the registration of the property was caused due to the requirement that before the applicant could take transfer of the property, the Master of the High Court is required to issue a certificate that there is no objection to such transfer. The endorsement of the power of attorney which had to be submitted by the seller pursuant to section 42 of the Administration of Estates Act, Act 66 of 1965, which was submitted to the Registrar of Deeds on 18 July 2016

was attached as annexure "BM3". In addition, the applicant attached the following documents:

30.1 A copy of the Deed of Transfer under Deed of Title T80023/2002 as annexure "BM4";

30.2 Declaration given by the late Nkodi Godfrey Mabusela as annexure "BM5";

30.3 Conveyencer's Certificate confirming that the property does not form party of a joint estate as annexure "BM6".

[31] The applicant stated that, contrary to the allegation made by the second respondent for having failed to mention the category of vulnerable persons, it has done so and refers to paragraphs 8 to 11 of the founding affidavit. It further contended that it is the second respondent who has failed to volunteer any information to the court which relates to the personal circumstances of the occupiers of the property. The applicant in response to the second *poin*t *in limine* stated that it was not the responsibility of the applicant to ensure that the second respondent served on her attorneys the complete application, which had been served upon her.

[32] Furthermore, her attorneys were at liberty to contact applicant's attorneys to request the pages that were allegedly missing. That they did not do, nonetheless a copy of the agreement was furnished to the second attached as annexure "BM8".

[33] The applicant further contends that the purported sale agreement between the first and second respondent lacks the necessary *essentialia* in order for it to constitute a binding purchase and sale agreement. The applicant pointed out the following false allegations, which were made in the affidavit of the second respondent.

33.1 That the agreement the second respondent alleges to have entered into with the first respondent was actually entered into with a one other Lerabela Aifheli Simon;

33.2 The second respondent's allegations that she bought the property with a purchase price of R250 000.00 is not mentioned anywhere in the agreement;

33.3 In the agreement, a deposit of R50 000.00 is payable into the Trust Account of Madiwa Attorneys as deposit for transfer costs and other legal costs. What the applicant finds difficulty in understanding is how such a deposit can be transferred to the first respondent if it is supposedly to be reserved for transfer costs.

[34] Even if the agreement between the respondents constituted a valid and binding offer to purchase, the applicant contends that the first respondent could not have validly transferred property, which never vested in the deceased estate of the late Nkodi. Furthermore, neither of the first and second respondent had launched an application to set aside the sale of the property to the applicant.

[35] Applicant avers that he met with the seller twice a year in order to find out if there were any challenges he may have been experiencing with the tenants in the property and also to ensure that he was paying the Municipal services for the property. This explains why the second respondent never saw him but only after his death. The applicant also denies that he surfaced after 2 years since the death of the seller which would have been in June of 2020, whereas he launched this application for eviction in 2019. He attended to the property in October 2018 after he was advised that the seller had passed away in June of the same year. He further stated that the second respondent indicated that she was looking for him in order to advise him about the passing of the seller but had unfortunately misplaced his contact details. She also advised him that the first respondent was collecting rentals since the death of the seller, to which he informed her that he was the registered owner of the property and that the rental payments ought to be effected on him. Subsequent, to him being advised by the second respondent, he received a hostile and an aggressive call from the first respondent in which he confirmed to the first respondent that he was the owner of the property and reserved his rights to law criminal charges of fraud against the first respondent for collecting rentals from tenants when he had no right to do so.

[36] According to the applicant, Lindiwe Mkhwamazi was the neighbour of the seller and fondly loved by him. He reiterates that Lindiwe is the one who signed as the witness to the agreement and this is evident from the similarities in the signature on the agreement and her confirmatory affidavit. He contends that the second respondent is attempting to mobilise the community against the applicant for her own financial gain. He attached further proof as annexure "BM9" in which the seller confirmed that he had received the full purchase price from the applicant and would like the initial agreement that was signed to proceed in order for the property to be transferred to the applicant. The seller further stated in BM9 that he was not coerced into signing the agreement.

[37] The applicant further avers that as the sole director of the applicant he is authorised to depose to the founding affidavit and the replying affidavit. He attached the resolution of the applicant as annexure "BM10". He further stated that the applicant has undergone a name change from M & Z Development and Investment to Mazih Properties (Pty) Ltd. A copy of the certificate of the new name is attached as annexure "BM11".

[38] In further demonstration that the second respondent has given false evidence under oath. The applicant refers to para 1.1 of the answering affidavit of the second respondent wherein he stated with emphasis that she resides at Erf 482 Refentse, Stinkwater, Pretoria, Gauteng, whereas in an affidavit marked annexure "BM12" which was made to the police when he and first respondent laid a complaint of fraud against the applicant, they mentioned in the said affidavit that the second respondent was operating a Tuck/Spaza shop from the property in question. It is further denied that the property is registered in the names of three different persons. It is averred by the applicant that reference to Momotho Chrestina Mabusela with identity number 400406 was an error in the Title Deed. A copy of the affidavit in terms of section 4(1)(b) of the Deeds Registration Act, No. 47 of 1937 as deposed to by the seller is annexed as "BM13". Second Respondent further explained that the identity number and name of the late wife to the deceased was incorrectly captured in the Title Deed and should correctly read as Momothu Christina Mabusela with Identity number 411205 0153 088 and the married identity number of the deceased should not read

400503 5318 083 but should read 380406 5462 089. The amendment effected by the Registrar of Deeds is annexed as “BM14”.

[39] It was further contended that it was always the true intentions of the parties that the sale to be a cash deal despite reference to the securing of the purchase price by way of a bank issued guarantee. By way of an addendum, they agreed to a purchase price of R100 000.00 and the seller had received such payment. A copy of the written agreement is annexed as “BM15”. He further stated that following an interview with the police to whom he handed over all documentation he never heard anything thereafter.

[40] The applicant further contends that the sole reason for the opposition by the second respondent is to delay the proceedings. He further submitted that at the time of his application, evictions were subject to the Disaster Management Act, No. 57 of 2002 and the Regulations therefrom. As a result, he deferred to the court to determine the execution of the order after the state of national disaster. However, upon a balancing of the rights of the applicant not to be deprived of its property the applicant submits that the second respondent will not be severely prejudiced by the application for the following reasons:

40.1 That the first and second respondents do not reside at the property but only utilise it for commercial gain;

40.2 It is assumed by the applicant that the three occupants are students;

40.3 The respondents are causing the applicant irreparable financial harm as a result of the illegal electricity that is connected to the property;

40.4 At present the debt owed to the Municipality exceeds R60 000.00, proof thereof is annexed as “BM16” and the applicant finds itself in great risk of a legal action from the Municipality.

Issues

[41] The issues to be determined in this matter can be crystallized as follows:

41.1 Whether the first and second respondents and all those deriving right of occupation of the property through and under them, occupy the property unlawfully;

41.2 Whether it shall be just and equitable for the court to grant an order for eviction of the occupiers from the property and if so,

41.3 What time-frame should be given to the occupiers to vacate the property

Discussion

[42] I find it necessary to first deal with the *points in limine* which have been raised by the second respondent. It has to be borne in mind that when the sale transaction was entered into and concluded in an agreement between the applicant and the seller, the seller was still alive and an executor of his late wife's property. The undisputed evidence shows that the agreement was concluded before the death of the seller. It should therefore follow the subsequent appointment of executorship of the first respondent in the estate of the seller has no bearing on the agreement and is of no consequence in the eviction application. For that reason, the first *point in limine* should fail.

[43] In the notice in terms of section 4(2) of PIE, the applicant invited the respondents to file an affidavit which should provide *inter alia* any personal circumstances relating to the impact which the eviction order will have on the rights and needs, particularly if there are any elderly, children, and disabled persons who

occupy the property and if the household is headed by a woman. And whether they will be rendered homeless if an order for eviction is granted. No such evidence was proffered by the respondents. I therefore find no merit in the second *point in limine* and is accordingly dismissed.

[44] The second respondent sought to suggest that she was prejudiced in not receiving a complete copy of the agreement from the applicant and on that basis applies for the dismissal of the eviction application. What the second respondent does not address is her failure upon realising that the agreement has missing pages to bring same to the attention of the applicant or seek a complete version of the agreement. Instead she elected to answer to the founding affidavit of the applicant and mount a dispute on the authenticity of the agreement without any complaint of missing pages or clauses. This I find curious and inconceivable. I am instead inclined to accept the applicant's version that the papers that were served on the respondents included the complete version of the agreement. Thus, the third *point in limine* is also dismissed.

[45] Section 1 of PIE defines an 'unlawful occupier' to mean "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 the Act would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 31 of 1996." The requirements in sub-sections 4(6), (7), (8) and (9) are spelt out as follows:

> "6. If an unlawful occupier has occupied land in question for less 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, the rights and needs of the elderly, children, disabled persons and households headed by woman;
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> 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 sold in a sale of execution pursuant to a mortgage, where the land has

been made available or can reasonably be made available by a municipality or other Organ of State or other landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women;

8. If the court is satisfied that all the requirements of this section had been complied with and that the unlawful occupier has raised no valid defence, it must grant an order for the eviction of the unlawful occupier and determine

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a);

9. In determining a just and equitable date contemplated in sub-section (8), the court must have regard to all relevant-factors, including the period the unlawful occupier and his or her family have resided on the land in question."

[46] I find it curios in this matter that the first respondent does not oppose the application but availed himself to depose to a confirmatory affidavit on behalf of the second respondent when it is apparent that he is a central figure in the stance and opposition to the application by the second respondent. Equally, it is quite interesting that, instead of the second respondent urging the first respondent to oppose the application, she raises on behalf of the first respondent a defence of the first respondent being an executor of his late brother's estate, the seller.

[47] Furthermore, there is no appointment letter of executorship for the first respondent that has been produced in the papers filed by the second respondent. In any event, as alluded here above that even if the first respondent had been appointed as executor the estate of the seller, the purchase and sale transaction between the applicant and the seller took place before the first respondent's appointment as an executor. Neither has the agreement of the applicant and the seller been challenged in court in order to set aside the registration and transfer of the property into the name of the applicant. On the objective facts and the material

placed before me, the applicant has established sufficiently his right and ownership in the property.

[48] This brings me to a point whether there is a dispute of fact that will require the matter to be referred for oral evidence. It is now trite that the approach to be adopted by the court when in motion proceedings it is faced with a dispute of facts, is to apply the principle laid down in *Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[1] where the court stated as follows:

> "It is correct that, where in proceedings on notice of motion disputes of fact has arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real genuine or *bona fide* dispute of fact…"

[49] However, in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[2] Heher JA dealt with how courts should decide on the adequacy of the respondent's denial in motion proceedings in order to determine whether a real, genuine or *bona fide* dispute of fact had been raised and stated as follows:

> "[13] A real genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and ambiguously addressed the fact said to be disputed…"

[50] *In casu* the second respondent's contention that there is a dispute of fact on the ownership of the property is not borne out by the facts adduced before me. Whatever concerns and disputes that were raised by the second respondent have been sufficiently addressed by the applicant's affidavits and the documentary material that was attached to those affidavits. Besides, the issue of ownership has been proven with certainty by the applicant. I need to briefly deal with the allegation

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[1] 1984 (3) SA 623 A

[2] 2008 (3) 371 (SCA) para 11 -13

that the applicant lacks the authority to depose to the affidavits on behalf of the applicant.

[51] The founding affidavit is deposed to by Bongani Sithembiso Mabena, the sole director of the applicant. I am constrained to agree with the submission made by the applicant that it is superfluous to produce a Resolution on behalf of the applicant under those circumstances. In *Garnes and Another v Telekom Namibia Ltd*[3] addressing the issue of authority to institute proceedings, Streicher JA stated as follows:

> "The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the founding affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised[4]. In *Garnes*[5], Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent[6]."

[52] *In casu* the founding affidavit clearly indicates and it is averred by Mabena that he is the sole director of M and Z property and duly authorised to depose to the founding affidavit in his capacity as a sole director. In any case the issue was further put to bed by the applicant attaching the resolution on the replying affidavit. I am therefore of the view nothing further turns on this point.

[53] In light of the factual matrix before me, I am satisfied that the applicant has proved the two minimum requirements envisaged in ss 4(6) and 4(7) of PIE. It is further my view that the respondent has not raised or provided a valid defence against the application. Thus, the applicant is entitled to the eviction of the occupiers from the property.

[54] This brings me to the question of who occupies the property of the applicant. What is perfectly clear and beyond any dispute is that both first and second respondent do not reside on the property. This is borne out in their affidavits. More

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[3] 2004 (3) SA 614 (SCA) *al*
[4] At 624 para G -H
[5] *Ibid*
[6] *Op Cit* para H - I

particularly the confirmatory affidavit of the first respondent wherein he mentions that the second respondent uses the property as a spaza shop or for business purposes. That averment is supported by the affidavit deposed to by the second respondent to the police in which she stated that she stays at 482 Refentse Section in Stinkwater an address that is completely different from that of the property in question. As was stated in *Ndlovu v Ngcobo, Bekker and Another v Jika*[7] that ownership and the lack of any lawful reason to be in occupation are important factors in the exercise of the court's discretion. The applicant has placed before court information that sub-tenants who are three students occupy the property. There is no evidence placed before me that there are any vulnerable persons who occupy the property[8].

[55] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*[9] the Supreme Court of Appeal held as follows: 'the first enquiry is that under s 4(7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances, the availability of alternative land and the right and needs of people falling in specific vulnerable groups are singled out for consideration. Under s 4(8) it is obliged to order an eviction 'if the requirements of the section have been complied with' and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under s 4(7) that an eviction order would be just and equitable. In considering whether eviction is just and equitable, the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that the eviction would be just and equitable, the court enters upon the second enquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties.'

[56] Courts must therefore, be informed of all the relevant information and circumstances in each case in order to be satisfied that it is just and equitable to evict and, if so, when and under what conditions[10]. As alluded above the respondent opted not to assist the court with any information as to the circumstances of their

[7] 2003 (1) SA 113 (SCA)
[8] See *FHP Management (Pty) Ltd v Theron*
[9] [2012] ZASCA 116 para 2
[10] Occupiers, Berea v De Wet and Others 2019 (2) SA 522 (WCC) para 58

occupation, save the evidence that the first respondent is not an occupant in the property and second respondent is using it as her business premises. There is no other information that is available regarding any other occupant, except that the other occupants are students who are sub-tenants. It can therefore be reasonably assumed that they are not minors and nothing would prevent them from seeking student accommodation or alternative accommodation.

[57] In light of the aforegoing I find that it would be just and equitable to order the eviction of the first and second respondents from the property and any other person who occupy the property through and under them.

[58] Accordingly, the following order is made:

Order

1. The first and second respondents and any other persons who occupy the property through and under them are ordered to vacate the property, Erf 2045, Block H, Soshanguve, Pretoria on or before 10 July 2022.
2. In the event that the first and second respondents and any other persons who occupy the property through and under them fail to vacate the property aforesaid, the Sheriff of this Court or her/his deputy is authorized to cause the first, the second respondent and any other person who occupy the property through and under them to be evicted from the property on 20 July 2022.

3. The second respondent is hereby ordered to pay the costs of the application.

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VM NQUMSE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellants	: Ms Claire Mi9chelle Laurent
Instructed by	: SSLR Incorporate
For the Respondent	: Mr Maduwa
Instructed by	: Messrs Maduwa Attorneys
Heard on	: 14 February 2022
Judgement handed down on	: 13 June 2022