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IN THE HIGH COURT OF SOUTH AFRICA.
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A202/2016

In the matter between:

KEGOMODITSWE IRENE MNYANDU

Appellant

and

ZACHARIA OLIPHANT AND/OR
THE OCCUPANTS OF THE PROPERTY KNOWN
AS ERF [...], THABONG, WELKOM

Respondents

HEARD ON: 27 MARCH 2017

JUDGMENT BY: DAFFUE, J *et* LOUBSER, AJ

DELIVERED ON: 20 APRIL 2017

[I] **INTRODUCTION:**

[1] This is an appeal against the Judgment of the Magistrate of Welkom dismissing an application for the eviction of one Mr Zacharia Oliphant and all other occupants from the premises known as ERF [...], Thabong, Welkom, together with some ancillary relief. The application was made by the Appellant in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, number 19 of 1998 ("PIE").

[2] During the course of the proceedings, the Magistrate referred the matter to oral evidence and proceeded to hear the evidence of several witnesses, including the evidence of the Appellant and Mr Oliphant, the principal occupier of the property. The following represents a summary of the facts presented by the parties by means of the affidavits filed of record, the supporting documentation and the oral evidence itself:

(II) **FACTS PRESENTED BY APPELLANT:**

(3) The Appellant is a widow aged 54 years and she resides in Thaba Nchu. She wants to return to Welkom where she and her late husband, Dr. Mnyandu, once lived before his death in 2006. She is the registered owner of the property in question, and in support of this contention, she produced a Deed of Transfer of the property in her name, number T[...], dated 23 May 2013.

[4] She further testified that her late husband had purchased the property from a Mr. Sipho Leeuw and his wife in 1988 for a purchase price of R40 000,00. Before transfer of the property could be effected, her husband passed on. The said Mr. Leeuw also testified at the hearing, and he confirmed his prior ownership, since 1988 of the property by virtue of a Grant of Leasehold number T[...], which formed part of the papers before the Court a quo. He further confirmed his sale of the property to Dr. Mnyandu for the purchase price mentioned. He further testified that he and his wife eventually gave transfer of the property to the Appellant in 2013, since she was the surviving spouse of Dr. Mnyandu, who had passed on earlier.

[5] The Appellant concluded her evidence by stating that the Respondents were occupying her property without her permission or consent, and that they were therefore illegal occupants. They were not paying any rent to her, and possibly, not even any municipal charges. They have ignored a prior demand by her attorneys to vacate the property before 10 September 2013. She prayed that the Court would find it just and equitable in the circumstances to grant an order of eviction against the Respondents.

(III) **FACTS PRESENTED BY MR. ZACHARIA OLIPHANT:**

[6] Mr. Zacharia Oliphant stated that he owned a tavern on the property in question and that he has been living there with his

wife and two children for about nine years at the time of his testimony in the Court a quo. He was surprised when he received the application for eviction, because he was of the opinion that he was actually the rightful owner or occupier of the property.

[7] He confirmed that Mr. Leeuw and his wife were the initial leasehold owners of the property. This leasehold or right to occupy was later transferred to Dr. Mnyandu. According to him, Dr. Mnyandu then sold the property to one Mr. Thomas Siska, and he handed in an Offer to Purchase in this respect, which turned out to be a document not signed at all by the purchaser. I pause here to mention that the Appellant, in her evidence, denied any knowledge of such a transaction between her late husband and the said Mr. Siska. She told the Court a quo that her husband had actually let the property to Mr. Siska, after they, the Mnyandu's, had left the property and moved out of town. After a period of time, however, Siska had stopped paying the rent. These facts were confirmed by Mr. Leeuw when he gave his evidence.

[8] Be it as it may, Mr. Oliphant further stated that transfer of the property could not be effected in the name of Mr. Siska and his wife at the time, since there were outstanding service charges due to the Welkom Municipality. He handed in several documents to show that, eventually, a point was reached where the right of occupation was awarded to the Siskas by the Welkom Municipality in August 1997. He stated in his Opposing Affidavit

that, "*on probabilities*", the right of occupation had passed to Mr. Siska and his wife, Moliehi Alina Siska. When the two of them passed on later, Mrs. Mantso Oliphant inherited the right to occupation from her daughter, the abovementioned Moliehi Alina Siska. Mrs Oliphant then occupied the property until her death, and Mr. Zacharia Oliphant, the son of Mrs. Oliphant, thereafter inherited the property or the right to occupy from her.

- [9] Matsidiso Maphutsi, an administration officer of the Municipality, testified that, according to the records relating to the property, Dr. Mnyandu was the rightful owner of the property. At some point, Mr. Thomas Siska wanted to transfer the property into his name by virtue of a Deed of Sale he had concluded with Dr. Mnyandu, but ultimately the two of them were advised to consult an attorney with a view to such transfer. As far as she knows, the transfer never happened because Mr. Siska, and later his wife, both passed on before it could be effected. Meanwhile, and apparently on the basis of the Deed of Sale, the housing committee of the Municipality resolved to grant the right of occupation of the property to Mr. Siska before his death.

(IV) **FINDINGS OF THE MAGISTRATE:**

- [10] On the facts outlined above, the Magistrate made the following findings, *inter alia*:

- (a) The Deed of Sale between Dr. Mnyandu and Mr. Siska was sufficient proof of an agreement between the two of them.
- (b) One of the relevant factors that cannot be overlooked is the legality and the validity of the Deed of Transfer (as produced by the Appellant) especially where it is challenged. Accepting such a document as legal and valid without further enquiries may lead to untold injustice.
- (c) The mere production of a Deed of Transfer in circumstances such as in this matter, does not justify the finding that the Appellant is the true owner of the property.
- (d) The Respondent has shown another right in law, namely the right to inheritance that made his occupation of the property lawful.
- (e) For these reasons, the application for eviction was dismissed without an order as to costs.

[11] Mr. Louw, appearing for the Appellant before us, contended that the Magistrate ought to have found that the Deed of Transfer, number T5331/20013, evidencing the transfer from Sipho Leeuw and his wife to the Appellant in 2013, was conclusive proof of the ownership of the property in the absence of any valid challenge thereto. On the other hand, he submitted, the Magistrate ought to have found that there was no evidence that Mr. Thomas Siska

had ever obtained a right in respect of the property which could devolve upon his heirs or beneficiaries.

[12] The Respondent occupants did not take part in the appeal proceeding. In a letter placed before us, dated 22 March 2017, the legal representatives of the Respondent in the Court a quo, namely Legal Aid South Africa (Welkom Justice Centre), informed the attorneys of the Appellant that their client was notified about the pending appeal, but that he had given them instructions not to oppose the appeal, and that he would abide by the ruling of this Court.

(V) **THE RELEVANT STATUTORY PROVISIONS:**

[13] Section 16A of the Deeds Registry Act, number 47 of 1937 provides that a right of leasehold in terms of the Black Communities Act of 1984 which has been granted to a person, shall be transferred by means of a Deed of Transfer to another person. This section must be read with Section 2(1) and Schedule 1 of the Upgrading of Land Tenure Rights Act, number 112 of 1991, which provides that a right of leasehold shall be converted into ownership, *"and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the Registrar of Land Rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion"*.

- [14] In terms of Section 6(1) of the Deeds Registry Act, number 47 of 1937, read with Section 102 thereof, only the High Court may cancel a Deed of Transfer, and in such event, the deed under which the land or real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived (Section 6(2)).
- [15] Section 4(1) of PIE provides that applications for the eviction of an unlawful occupier apply to proceedings instituted by an owner or person in charge of land. Section 1 thereof defines an owner as the registered owner of land, and an unlawful occupier as a person who occupies land without the express or tacit consent of the owner or without any other right in law to occupy such land.
- [16] 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 of eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, whether land has been made available or can reasonably be made available by a municipality or other organ of state, or another 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. (Section 4(7)).
- [17] Section 4(8) provides that, if the Court is satisfied that all the requirements of Section 4 have been complied with and that no

valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier and determine a just and equitable date on which the unlawful occupier must vacate the land under the circumstances.

(VI) **APPLICATION OF THE STATUTORY PROVISIONS TO THE EVIDENCE:**

[18] The provisions referred to above are clear in their wording and cannot leave any doubt as to their ordinary meaning and substance.

[19] In terms of those provisions, Mr. and Mrs. Leeuw were the rightful leasehold owners of the property, and they later became the exclusive owners of the property in question when their Grant of Leasehold number T[...] became converted into ownership by virtue of the quoted provisions of the Upgrading of Land Tenure Rights Act, number 112 of 1991. It follows that, after 1988, the Municipality and/or its various departments or committees had no authority over the fate of ERF [...] since it had already become the lawful property of Mr. Leeuw and his wife, and only they could decide the further ownership or occupation thereof. All the decisions and recommendations by the Municipality pertaining to ERF [...] after 1988 are therefore irrelevant and should have been ignored by the Court a quo.

- [20] The evidence is uncontested that, in 2013, Mr. Leeuw and his wife eventually gave transfer of the property directly to the Appellant by means of Deed of Transfer number T[...], since Dr Mnyandu had long passed away by then. In accordance with the abstract theory which applies in this country the validity of a transfer of ownership is not dependent upon the validity of the underlying transaction such as the deed of sale. See **Legator Mckenna Inc and Another v Shea and Others** 2010 (1) SA 35 (SCA) para [20]. The requirements for the passing of ownership are twofold as stated in para [22] of **Legator Mckenna**, namely delivery in the event of movables and registration of transfer in the event of immovable property and secondly a valid real agreement has to be in existence. The real agreement will be valid if there is an intention on the part of the transferor to transfer ownership and an intention on the part of the transferee to become owner of the property. See also **Dreyer and Another NNO v AXZS Industries (Pty) Ltd** 2006 (5) SA 548 (SCA) at par (17]. The Appellant thereby became the registered owner of the property, and therefore she had the necessary *locus standi* to apply for the eviction of unlawful occupants, once the procedural formalities of PIE have been met. See in this respect **Jackpersad NO and Others v Mitha and Others** 2008(4) SA 522 (D and CLO) at 528 H, with reference to **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003(1) SA 113 (SCA).
- [21] In this respect, the Court a quo incorrectly borrowed the words of Moloi J in **Dhlamini v Lopolo and Another** 2010 ZAFSHC 54 to the effect that only a legally valid Deed of Transfer confers

ownership in property A Deed of Transfer is a valid document indicating ownership in the immovable property mentioned therein, until such time as it is set aside by a High Court. The Deed of Transfer did in fact justify a finding that the Appellant was the owner of the property, contrary to the Court a quo's misdirection in this regard. That judgment is at best for the Respondent distinguishable on the facts, but from a legal point of view wrong in the doubt created pertaining to the Title Deed.

[22] The Magistrate did not have any jurisdiction to decide the validity of the Appellant's Deed of Transfer or even to raise questions as to whether it was defective or not. The Magistrate ought to have found that the Appellant was the registered owner of the property and therefore vested with the necessary *locus standi* to launch the application for eviction.

[23] Once a Magistrate's Court is provided with a Deed of Transfer or a Title Deed over property by an Appellant for eviction then ownership of the property has been established and the only alternative option in such circumstances! is for the Magistrate to stay the eviction proceedings upon request by the party challenging the validity of the Deed pending the final determination thereof by the High Court. In the Court a quo, an opportunity was indeed granted to the Respondent to approach the High Court for the setting aside of the Appellant's Title Deed, but he failed to do so despite being legally represented at the time. In such circumstances, the Magistrate should merely have

proceeded to the second stage of the enquiry, namely to decide whether the Respondent was an unlawful occupier of the property in terms of the Act.

[24] The Appellant testified that the Respondent was occupying the property without her permission or consent, and it was never the case of the Respondent that he had such permission or consent, in any event. In addition, it is important to note that the purported Deed of Sale between Dr. Mnyandu and Mr. Thomas Siska, obviously has no legal effect in view thereof that it was not signed by the purchaser. Because there never was any valid sale to Mr. Siska, the Respondent could not eventually have inherited the property from his predecessors. The Magistrate had therefore also erred by finding that the Respondent has shown a right to inheritance that made his occupation of the property lawful. The Magistrate ought to have found that the Respondent was an unlawful occupier that had to be evicted if it was considered just and equitable to make such an order.

(VII) **THE JUST AND EQUITABLE REQUIREMENT:**

[25] In order to establish what is just and equitable in the circumstances, a balanced approach must be adopted, that is by considering the interests of the land owner on the one hand, and the interests of the unlawful occupier on the other. See: Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at par. (37), and also the judgment of Davis J in Resnick v

Government of the RSA and Another 2014 (2) SA 337 (WCC)
at 344 D.

- [26] Considerations of what is just and equitable may not be allowed to trump the illegality of occupation. An unlawful occupier can never remain indefinitely on the property, and the question is merely how much time should he be given to vacate the property.
- [27] As already mentioned at the outset, the Respondent and his wife and two children, aged 5 and 15 years, have been occupying the property for some nine years prior to his testimony in the Court a quo. The Respondent's source of income is a tavern that he operates on the property. Although the application was initiated in the Court a quo during the course of 2013, the hearing thereof was delayed for a period of some three years, mainly in order to allow the Respondent the opportunity to approach the High Court for the setting aside of the Appellant's Deed of Transfer.
- [28] The Respondent was therefore aware, at least since 2013, that proceedings were under way to have him and his family evicted from the property. He had ample time to make provision for such an eventuality. Moreover, he chose not to partake in these proceedings, and informed through his legal representatives that he would abide by the decision of the Court.

[29] Having duly considered all the circumstances, I am of the opinion that it would be just and equitable to grant the Respondent a period of some two months to vacate the Appellant's property. The following order is therefore made:

1. The appeal is upheld with costs.
2. The dismissal of the application in the Court a quo is set aside and substituted with the following:

"2.1 The Respondent and all other persons occupying ERF [...], Thabong, district of Welkom, are ordered to vacate the property with all their belongings by 30 June 2017, failing which the Sheriff for the district of Welkom is authorised and directed to evict the Respondents from the property, duly assisted by the SAPS, if necessary.

2.2 The Respondents are ordered to pay the costs of the application"

I agree


P.J LOUBSER, AJ

t
J. 
P DAFFUE, J

Onbehalf of appellant:
Instructed by:

Adv. MC Louw
Honey Attorneys

Bloemfontein

No appearance for respondent