

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WITWATERSRAND LOCAL DIVISION)**

**Case No. 07/17136**

In the matter between:

**BALDUZZI, ORESTE**

Plaintiff/Excipient

and

**RAJAH, DEVI**

Defendant/Respondent

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**JUDGMENT**

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BERGER, AJ:

[1] The plaintiff instituted action against the defendant, seeking the eviction of the defendant from certain residential property (“the property”) situated in Orange Grove, Johannesburg. The plaintiff has now excepted to the defendant’s plea, contending that it fails to sustain a defence.

**The relevant facts and law**

[2] In his particulars of claim, the plaintiff alleges that he is the owner of the property, that the defendant is in occupation and that she refuses to vacate. In paragraph 6, the plaintiff states:

“The Defendant will be timeously notified, in terms of Section 4(1) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No. 19 of 1998 (“the PIE Act”), as amended, that the Plaintiff, as owner of the property, seeks the eviction of the Defendant from the property and that the matter will be heard in due course by the above Honourable Court, the property being a building or structure as contemplated in terms of Section 1 of the PIE Act”.

[3] In her plea, the defendant admits that the plaintiff’s name is reflected on the title deed as the owner of the property. However, she denies that the plaintiff is the “beneficial owner” of the property and pleads as follows to paragraph 6 of the particulars of claim:

“Defendant denies that she is in occupation of the property as a tenant or that her occupation is either wrongful or unlawful.”

[4] It is therefore common cause between the parties that the plaintiff’s action is to be determined in accordance with the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No. 19 of 1998 (“the PIE Act”).

[5] It is trite that the facts against which this exception must be judged are those alleged or admitted in the defendant’s plea. They are as follows:

- (a) During 1986 the plaintiff purchased the property. His ownership of the property was reflected in the relevant title deed.
- (b) In October 1990 the plaintiff and a certain Mr. Manogaram Rajah, the husband of the defendant, concluded an agreement in terms of which the plaintiff sold the property to Mr. Rajah.
- (c) However, because of certain racially-based legislation then in force, Mr. Rajah was precluded from registering ownership of the property in his name. It was therefore further agreed between the plaintiff and Mr. Rajah that the plaintiff would remain the registered owner of the property, as a nominee or “front” for Mr. Rajah.
- (d) From October 1990, with the full agreement, knowledge, consent and co-operation of the plaintiff, Mr. Rajah: maintained the property and paid for improvements, assumed liability for the payment of the mortgage bond registered over the property, paid all charges, taxes and levies due for the property and generally conducted himself as the owner of the property.

- (e) Within nine years, and by September 1999, Mr. Rajah had settled the mortgage bond over the property.
- (f) Mr. Rajah subsequently died. The defendant continued to live on the property and conducted herself as its owner, in the same way as her late husband had done. Mr. Rajah's will specifies that the defendant is to inherit the property.

### **The exception**

[6] The grounds for the plaintiff's exception, set out in his notice of exception, are as follows:

- "1. The Defendant pleads in paragraph 3 that in and during 1986 the Plaintiff purchased and became the owner of the property situated at 127, 17<sup>th</sup> Street, Orange Grove, Johannesburg and more fully described as Portion 1 of Erf 1979 Orange Grove Township ("the property").
- 2. The Defendant further pleads in paragraph 4.2 that "with effect from about October 1990, Manogaram Rajah (since deceased) is the beneficial owner of the property".

3. The Defendant accordingly concedes that the Plaintiff was initially the true and beneficial owner of the property and then effectively pleads that the property was thereafter alienated by the Plaintiff to Manogaram Rajah.
4. In terms of Section 2(1) of the Alienation of Land Act No. 68 of 1981 “no alienation of land after the commencement of this Section shall, subject to the provisions of Section 28, be of any force or effect unless it is contained in a Deed of Alienation signed by the parties thereto or by their agents acting on their authority”.
5. The Defendant has failed to allege any such required written Deed of Alienation, or to plead the terms of such Deed of Alienation, or to annex same to the Particulars of Claim and, accordingly, has failed to set out a defence based on ownership.”

[7] For the sake of accuracy, I note that in paragraph 3 of the plea, contrary to the positive assertion in the plaintiff’s notice of exception, the defendant simply admitted the facts alleged by the plaintiff. In addition, it is clear that the reference in paragraph 5 of the notice of exception to “the Particulars of Claim” was meant to be a reference to the plea.



[8] I note further that the plea does not state, despite Rule 18(6), whether the agreement between the plaintiff and Mr. Rajah was written or oral. However, that is not the basis of the plaintiff's objection. I shall nevertheless assume, in favour of the plaintiff and for the purposes of this exception, that the agreement relied upon by the defendant was oral.

[9] In my view, the essence of the plaintiff's exception is that, having failed to allege compliance with section 2(1) of the Alienation of Land Act, No. 68 of 1981, the defendant is unable to prove her ownership of the property and therefore that she is lawfully entitled to remain in occupation.

[10] Stressing the significance of section 2(1), Mr. Bitter, on behalf of the plaintiff, relied on the decision of this Court in *Just Names Properties 11 CC and Another v Fourie and Others* 2007 (3) SA 1 (W) at 13A-D (para [30]) and 16C (para [38]), where Jajbhay J stated:

“[30] ...Contracts for the sale of fixed property are, as a rule, transactions of considerable value and importance. The conditions attached are often intricate. The requirement that the alienation of land must be contained in a deed of alienation signed by the parties thereto would prevent litigation and remove a general temptation of being motivated by greed. ... The object of the section is to leave no doubt as to what the parties have agreed upon. ...”

“[38] ...The object of s 2(1) of the Act is clearly directed against uncertainty, disputes and possible malpractices. Therefore all the terms as are essential to the creation of a valid contract of sale, being the parties, the price, the land sold and the nature of the transaction, must be in writing. ...”

[11] The decision of Jajbhay J has been confirmed on appeal (*Just Names Properties 11 CC and Another v Fourie and Others* 2008 (1) SA 343 (SCA)). In doing so, the Supreme Court of Appeal held that the Court *a quo* was correct in holding that the contract in issue did not comply with the requirements of section 2(1), and was accordingly void. Invoking this approach, the plaintiff contends that since the agreement between himself and Mr. Rajah was void, the defendant has failed to disclose any defence to his action for her eviction.

[12] It seems to me that if the facts alleged by the defendant are true, as I must accept at this stage of the proceedings, it would be manifestly unjust for the defendant to be evicted from her home simply because her late husband did not reduce his agreement with the plaintiff to a written document, signed by him and the plaintiff. The injustice would be based on the historical fact that, when Mr. Rajah attempted to purchase the property, he was prohibited by the law of the time from acquiring it because of the colour of his skin. Can it be that our law sanctions such an injustice? To answer this question, further regard must be had to the PIE Act.

[13] Section 1 of the PIE Act 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 ...”

[14] Section 4(7) of the PIE Act provides:

“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.”

[15] In *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at 124B (para [18]), Harms JA, dealing with the discretion that is to be exercised by a Court called upon to sanction the eviction of an unlawful occupier in terms of the PIE Act, stated:

“The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable.” (My emphasis)

[16] Accordingly, procedural questions aside, the first question to be answered by a Court faced with a prayer for eviction is whether the occupier is indeed “unlawful”. Only if that question is answered positively will it be necessary for the Court to exercise its discretion based upon what is just and equitable, taking into account all the relevant circumstances.

[17] The defendant expressly “denies that she is in occupation of the property as a tenant or that her occupation is either wrongful or unlawful.” Although the defendant has not expressly invoked the provisions of the PIE Act in her plea, I am satisfied that her express denial of unlawful occupation is sufficient to place the plaintiff on notice that an issue to be determined at trial is whether the defendant is indeed an “unlawful occupier” as defined in the PIE Act. Also, the defendant’s denial of unlawful occupation is a response to the plaintiff’s averment of compliance with the PIE Act.

[18] Is the defendant an “unlawful occupier” as defined in the PIE Act? In other words, does she 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 land”? On the facts alleged in the defendant’s plea, I think not.

[19] When the plaintiff concluded his agreement with Mr. Rajah, he must have intended to alienate the property. The fact that ownership did not pass from the plaintiff to Mr. Rajah, because ownership of the property by Mr. Rajah was prohibited by law, does not detract from the fact that the plaintiff consented to Mr. Rajah conducting himself as the owner of the property. There is no suggestion that it was ever agreed between the plaintiff and Mr. Rajah that ownership of the property would revert to the plaintiff upon the death of Mr. Rajah. Rather, the defendant continued to occupy the property after the death of her husband, with the plaintiff's knowledge, conducting herself as the owner of the property.

[20] In my view therefore, it cannot be said that the defendant occupies the property without the express or tacit consent of the plaintiff. On that basis alone, the defendant's plea discloses a defence.

[21] Ms. Strydom, who appeared for the defendant, also referred me to the Abolition of Racially Based Land Measures Act 108 of 1991 (“the Abolition Act”) in support of her submission that the defendant’s defective claim of ownership of the property is capable of future legal recognition. The date of commencement of the Abolition Act was 30 June 1991. Section 48 of the Act expressly repealed a vast array of racially-based laws, including the Group Areas Act, No. 36 of 1966, the very statute that prohibited Mr. Rajah from acquiring ownership of the property in October 1990. Sections 48(2) and (3) of the Abolition Act read as follows:

“(2) Any transaction whereby a person (hereinafter referred to as a nominee owner) acquired property contrary to section 40 of the Group Areas Act, 1966, on behalf of another person (hereinafter referred to as the principal) shall, from the commencement of this section, be deemed not to be an illegal transaction or a transaction which constitutes an offence.

(3) The parties to a transaction referred to in subsection (2) may within thirty months after the commencement of this section in writing request the registrar of deeds concerned to transfer property which by virtue of the transaction is registered in the name of the nominee owner to the principal in accordance with this section.”

[22] In my view, it does not matter that the plaintiff initially purchased the property before selling it to Mr. Rajah. The clear intention of section 48 of the Abolition Act was to legitimate, and then regulate, all transactions with the object of negating the discriminatory provisions of the Group Areas Act. Accordingly, the illegal transaction between the plaintiff and Mr. Rajah has, since 30 June 1991, been deemed by section 48(2) of the Abolition Act not to be an illegal one, and not to be an offence.

[23] However, it is common cause that the period of thirty months referred to in section 48(3) of the Abolition Act has expired and that no request to the Registrar of Deeds is alleged to have been made. Ms. Strydom submitted that a Court could condone the failure of Mr. Rajah to approach the Registrar within the stipulated period and grant the defendant appropriate relief. It seems to me that a purposive interpretation of section 48 as a whole would support Ms. Strydom's submission. It is, however, not necessary for me to make a finding in this regard because of the conclusion to which I have come concerning the application of section 4(7) of the PIE Act to the facts of this matter.



[24] Mr. Bitter submitted that section 48(2) of the Abolition Act must be read subject to the provisions of section 2(1) of the Alienation of Land Act. The Abolition Act, however, contains no reference to the Alienation of Land Act and there is no definition of “transaction” in section 48 of the Act, which would limit its wide meaning. Having regard to the purpose of section 48 of the Abolition Act, I am inclined to think that it was not intended to be read subject to section 2(1) of the Alienation of Land Act. There must certainly have been many instances during the apartheid years where nominee owners, who acquired property on behalf of principals contrary to the provisions of the Group Areas Act, acted on the basis of an oral agreement between the nominee owner and the principal. A deliberate decision to circumvent the law would probably have been based on mutual trust between the parties and would probably not have been reduced to writing. Indeed, the written contract would have been between the nominee owner and the seller of the property. There would have been no need for a written contract between the nominee owner and the person for whom he or she was fronting.

[25] I find it unnecessary to express any final views in regard to the Abolition Act. What is important is that the transaction between the plaintiff and Mr. Rajah is no longer regarded by the legislature as illegal or criminal. The legislature has in fact provided machinery for its enforcement. All of this is relevant to the legal question whether it is just and equitable to order the defendant’s eviction.

[26] Having regard to the facts set out in the defendant's plea, I am satisfied that the trial Court could, if those facts are proved, quite properly dismiss the plaintiff's action on the ground that it would not be just and equitable in terms of section 4(7) of the PIE Act to evict the defendant from the property.

[27] I have therefore come to the conclusion that the defendant has pleaded a sustainable defence.

[28] In the result, the plaintiff's exception is dismissed with costs.

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On behalf of the plaintiff:

J. J. Bitter

Instructed by Biccari, Bollo & Mariano Inc

On behalf of the defendant:

M. Strydom

Instructed by Stanley Brasg & Associates

Date of hearing:

21 February 2008

Date of judgment:

23 April 2008

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