REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/26685

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

....
DATE SIGNATURE

In the matter between:-

RONALD FRANZ SCHILLING N.O. Applicant

and

WEI GAO (AND ALL THOSE HOLDING UNDER HER) First Respondent
THE CITY OF JOHANNESBURG Second Respondent

JUDGMENT

Delivered on:

CORAM: CRUTCHFIELD AJ

[1] This matter came before me during the course of the opposed motion roll of the week of 25 January 2016. Prior to the hearing, I brought certain case law[1] to the attention of the parties' counsel, and requested that they address me in argument on the cases.

[2] This application is brought in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (as amended) (*"PIE"*), for the eviction of the first respondent and all those holding under her, from certain premises referred to below.

[3] The applicant is the duly appointed executor of the estate late Reinhold Dieter Schilling (estate No: 17036/2013, Master of the Western Cape High Court).

[4] The first respondent is the occupant, allegedly unlawful, ('the respondent'), of sectional title premises situated at [7….] [U…….], [1……] [D……] [L…….] Avenue, [R……..] [R……] [(Erf 3…….], [R……] [Ext 3…..], City of Johannesburg), ('the property').

[5] The second respondent did not participate in the proceedings.

[6] Reinhold Dieter Schilling, a major male, died on 26 August 2013, ('the deceased'). Prior to his death, the deceased and the respondent were involved in a life partnership but were never married to each other.

[7] The applicant seeks the following relief:

[1] Botha NO v Deetlefs 2008 (3) SA 419 (N); Sepheri v Scanlan 2008 (1) SA 322 (C)

7.1 The eviction of the respondent from the property together with all persons occupying the property by, through or under her ('the ancillary persons').

7.2 Failing compliance by the respondent with the relief sought immediately above, that the relevant sheriff of the High Court or his lawful deputy, be authorised to evict the respondent from the property.

7.3 In the event of the respondent, or any ancillary persons, re-occupying the property subsequent to the eviction referred to hereinabove, the relevant sheriff or his lawful deputy be authorised to re-evict the respondent and the ancillary persons occupying the property.

7.4 That the respondent pay the costs of the application.

[8] The respondent opposed the application, relying in the main on:

8.1 An alleged right to financial support subsequent to the death of the deceased; and hence, a right to occupy the premises;

8.2 An alleged agreement between the parties' attorneys' of record together with various of the deceased's family members, to the effect that:

8.2.1 The respondent would be permitted to remain in occupation of the property pending finalisation of the winding-up of the estate and payment to her of an alleged financial settlement from the estate; and

8.2.2 That the estate would carry the cost of the municipal imposts on the property in the interim.

("*the accommodation agreement*").

[9] Accordingly, the respondent denied that she was an unlawful occupant.

[10] Pursuant to counsel being referred to *Botha NO v Deetlefs,*[2] the respondent's counsel made various concessions, all of which were well founded.

[11] The property was purchased by the deceased and registered in his name on 30 January 2007.

[12] A life partnership agreement was executed by the deceased and the respondent before a notary public on 8 January 2009, ('the agreement'). In terms thereof, the deceased and the respondent:

12.1 Had a permanent heterosexual relationship with each other and had lived together in a spousal relationship since 2005 to the exclusion of all others.

12.2 Agreed to 'provide each other with mutual, financial and emotional support.'

12.3 Agreed that their 'estates would remain separate.'

12.4 Acknowledged and recorded that they entered into the agreement fully and with full appreciation of its consequences.

12.5 Agreed that notwithstanding anything to the contrary in any conflict of law rules contained and subject to the terms of the agreement, the construction and interpretation of the agreement would be governed by and regulated in accordance with the laws of the Republic of South Africa.

[13] The deceased's last will and testament dated 24 August 2013, (*"the will"*), provided *inter alia*, that:

13.1 The respondent was not a beneficiary under the will.

---

[2] 2008 (3) SA 419 (N)

13.2 The property comprised part of the residue of the estate.

13.3 The applicant, in terms of clause 6 read together with clause 6.1, would:

> "... have full power in (his) sole and absolute discretion to ... retain any asset or assets found in (the) estate and to sell, realise or dispose of or let all or any assets at such time and in such manner and on such conditions as (the applicant) may deem fit".

13.3.1 Thus, the applicant holds the necessary authority to grant permission to, or retract such permission from, a party to enter or reside upon the property.

13.3.2 Furthermore, the applicant is entitled to sell, realise, dispose of or let the property in any manner he deemed fit.

[14] Whilst the agreement provided unequivocally for financial support during the course of the life partnership, the respondent did not dispute at the hearing, that:

14.1 The agreement terminated upon the deceased's death;[3]

14.2 The respondent was not a beneficiary under the will;

14.3 The provision in the agreement to the effect that the deceased and the respondent's estates should remain separate precluded any inference that the respondent was entitled to maintenance subsequent to termination of the agreement.

[15] Pursuant to the above mentioned assertions, together with the fact that the cost or provision of reasonable accommodation comprises an element of maintenance, the respondent recognised that she could not rely upon the agreement to found a right to continued financial support as alleged in the respondent's opposing affidavit, after the deceased's death.

---

[3] Botha NO *supra* at [14]

[16] Hence, the respondent conceded in argument that absent a valid agreement permitting the respondent to remain in occupation of the property, the respondent was not entitled to do so.

[17] As a result, the respondent relied at the hearing, upon the accommodation agreement alone, (which the applicant denied), and argued that it raised a genuine dispute of fact, such that should be submitted to oral evidence.

[18] The respondent's counsel referred to Botha NO,[4] in support of the concessions made by her, in the following terms:

> "[18] In the absence of agreement:
>
> (a) a former, albeit anonymous, partner, cannot remain in exclusive possession and occupation of a partnership asset to the exclusion of the other partner (or his estate), and *a fortiori* where no contribution is being made by that partner towards the mortgage bond liability in respect thereof, especially where this was the case up to the date of death;
>
> (b) the option to buy in the other half share in the property, even after a full accounting (or, *in casu*, finalisation of the pending action) by one partner cannot be enforced. The other partner (or the heirs of the deceased partner's estate) might have a similar desire. That is all the more so where the only evidence of the state of the assets and liabilities of such a partnership indicates that the property will have to be sold to liquidate the debts of the disclosed partner primarily liable therefor. That is the very fate that will befall any partnership asset, whether in a disclosed or anonymous partnership.
>
> [19] A half owner of property is not *ex lege* entitled to occupation or to remain in occupation of property, but is only the owner of an undivided (in the absence of partition) half share. In the absence of agreement, the first respondent has no greater rights to exclusive occupation of the property than the other owner of the remaining half share. The first respondent's occupation of the property is unlawful. Her right to an undivided half share in the partnership (assuming it to have existed) is not necessarily co-extensive with the half share in the immovable property...."

[19] Paragraph [16] is also relevant, providing as it does, that:

---

[4] Botha NO *supra* at [18] and [19]

> "In the absence of some agreement, or a unilateral legal act making over such property to the first respondent, for example as a bequest (none of which is alleged, the deceased also having died intestate), no *actio pro socio* seems to be available, only the *actio communi dividundo*."

[20] The requirements of a real, genuine or *bona fide* dispute of fact have been the subject of attention in our courts for many years. They were restated in *Wightman t/a JW Construction v Head Four (Pty) Ltd,*[5] to the effect that it has long since been the rule that:

> '[12] ... an applicant who seeks final relief on motion must, in the event of conflict, accept the version set out by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: ...
>
> [13] A real, genuine and bona 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 unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[21] The respondent urged me to find that a real and genuine dispute of fact existed in respect of the accommodation agreement.

[22] The respondent pointed to the applicant's alleged bare denial of the accommodation agreement, relying upon *Standard Bank of SA LTD v Sewpersadh* 2005 (4) SA 148 (C) in this regard.

[23] The respondent averred that her version of the agreement was plausible to the extent that it should be remitted to oral evidence.

---

[5] 2008 (3) SA 371 (SCA) at [12]

[24] I was referred to various items of correspondence from the respondent's attorney of record, Mr Merry, as well as to a confirmatory affidavit of Mr Merry, (an officer of this court), and a confirmatory affidavit by one Frank Lakie, all of which allegedly supported the respondent's version that the accommodation agreement had been reached.

[25] On 18 February 2015, the applicant's attorneys of record, wrote the following *inter alia*, to Mr Merry:

> "3. … we understand that the Executor has been more than patient in trying to accommodate your client. Our client is however not prepared to enter into any more negotiations with your client and we have been instructed to give your client notice that she must vacate the property within 60 calendar days of the date hereof.
>
> 4. Should your client not have vacated by then, our client will be forced to seek the Court's assistance and all costs will be borne by your client. …"

[26] The respondent pointed to an alleged draft settlement agreement in terms of correspondence dated 24 February 2015, allegedly purporting to record the terms of an agreement previously concluded between the parties.

[27] However, the applicant annexed to the founding affidavit, certain correspondence dated 2 June 2015, the most recent of the correspondence, from the applicant's attorneys of record, Smiedt & Associates Attorneys, addressed to Mr Merry, stating:

> '2. With the greatest respect your client is changing the goal posts every time we have made a suggestion both in respect of the due date for payment and the due date for leaving.
>
> 3. Less there be any misunderstanding, the following is the position:
>
> 3.1 Your client will either vacate the premises on the 21st June 2015, failing which our client will have no hesitation in proceeding for her eviction.
>
> 3.2 Your client accepts the agreement forwarded to you "in toto", in which event your client can remain in occupation until the 30th June 2015.
>
> 3.3 Your client can either accept or reject the offer.

4. We do not intend to exchange any more letters on the subject.

5. Our client views your client's actions as simply a delaying tactic in order to gain more time and we will not tolerate that any longer.'

[28] The respondent's answer was to rely upon the prior stream of correspondence between the parties' attorneys, and the applicant's alleged noncompliance with the procedural requirements of PIE.

[29] In short, the respondent was not able to deal with the applicant's correspondence afore, either in the answering papers or in argument. Thus the respondent fell foul of the restatement of the requirements[6] for 'a real, genuine and bona dispute of fact ...', referred to afore.

[30] It speaks for itself that the respondent, as the disputing party, must have had knowledge of the applicant's averments and been able to provide an answer (or countervailing evidence)[7], if they were not true or accurate, which the respondent did not do.

[31] It was clear that the respondent engaged in attempting to negotiate a solution to her dilemma at being left out of the deceased's will. However, it was self-evident that there was no meeting of the minds between the respondent and the applicant, he being the executor of the estate, as to the terms of the alleged agreement.

[32] Given the content of the applicant's correspondence of 2 June 2015, and the absence of any cogent answer to it, I cannot find that the applicant has hidden behind a bare denial, and nor can I find that there is a real and genuine dispute of fact such that would justify the issue raised by the respondent, being referred to oral evidence.

[33] Accordingly, I cannot find that the respondent has a right to occupy the property, or that the respondent is anything other than an unlawful occupant.

---

[6] Wightman *supra* at [36]
[7] Wightman *supra* at [36]

[34] The respondent conceded at the hearing that the applicant had complied with the procedural requirements of Section 4(2) of PIE.

[35] It was common cause that the respondent had occupied the property for a period in excess of six (6) months. The respondent was alleged to earn a relatively modest income, of R6 000.00 per month, and to have been the deceased's life and business partner for a number of years. However, I cannot close my eyes to the fact that the respondent is not contributing to the costs of the property including the municipal charges and the mortgage bond registered over it, and that the estate has had to carry these costs whilst not earning any income from the property.

[36] In the circumstances, and given the provisions of the Act, I am obliged to find in favour of the applicant in respect of prayers 1, 2 and 4 of the notice of motion.

[37] As regards prayer 3 of the notice of motion, the applicant claims relief authorising the sheriff to evict the respondent or any ancillary persons, from the property in the event of a reoccupation of the premises by the respondent (or any ancillary persons), subsequent to the eviction in term of prayer 2 of the notice of motion.

[38] To my mind, a reoccupation of the property by the respondent or any ancillary persons on a subsequent date, would constitute a new cause of action, wholly separate from the instant cause, and stand to be determined on a consideration of its own merits, as, when and if it is appropriate to do so.

[39] The Applicant relied upon Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and another,[8]and averred that the statutory period of twenty-one days was sufficient notice to the respondent to vacate the premises.

[40] The respondent urged me, in the event of an eviction order, to allow a period of between four and six months for the respondent to vacate the premises prior to the order being of effect.

[8] 2012 (2) SA 104 (CC)

[41] However, I am obliged to consider not only the interests of the respondent but also those of the applicant, and to balance the interests of both in a manner which is just and equitable.

[42] In the circumstances, and in the light of the fact that it was approximately one year ago that the applicant first requested the respondent to vacate the premises, it appears to me that it would be appropriate for the respondent to be ordered to vacate the property on or before 30 April 2016.

[43] I make the following order:

43.1 The first respondent and all persons occupying the property by, through or under her, are to be evicted from the property being [7……] [U……], [1…….] [D…..] [L……] Avenue, [R……] [R……] ([Erf 3……], [R……..] [Ext 3…….], City of Johannesburg) ('the poroperty'), on or before 30 April 2016.

43.2 In the event of the first respondent failing to comply with prayer 1 immediately above, the Sheriff or his lawful deputy, of the High Court for the area within which the property is situated, is authorised to evict the first respondent and all persons occupying by, through or under her from the property.

43.3 The first respondent is ordered to pay the costs of this application.

43.4 The first respondent's counterclaim is dismissed with costs.

_____

A A CRUTCHFIELD

ACING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT

INSTRUCTED BY

COUNSEL FOR RESPONDENT

INSTRUCTED BY

DATE OF HEARING

DATE OF JUDGMENT