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

CASE NO: A3014/2020

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

11 November 2020
DATE

_____
SIGNATURE

In the matter between:

WILLEM NICO BEZUIDENHOUT **First Appellant**

JOHENE ALICE BEZUIDENHOUT **Second Appellant**

and

SHANIN CINDY ELIZABETH DAVIDS **Respondent**

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JUDGMENT

VUMA, AJ

INTRODUCTION

[1] This an appeal against the decision handed down by the learned Magistrate V.I. Nkosi (hereinafter "the court *a quo*"), on 18 November 2019 in the Protea Magistrate's Court.

[2] This appeal follows an application that was launched by the respondent on 13 October 2017 for the eviction of the appellants from the property as described below, which application was granted by the court *a quo*, with reasons delivered on 6 December 2019. The court *a quo* made the following order:

> "*[1] That the 1st and 2nd respondent are ordered to vacate the property* ***Portion […] of ERF […] Mid-Ennerdale Township*** *on or before the* ***31st December 2019 not to return thereafter****.*
>
> *[2] That in the event the 1st and 2nd respondent do not vacate the property mentioned above by the* ***31st December 2019****, the applicant shall seek the assistance of the sheriff of the court or his/her duly designated deputy to the effect the eviction thereafter. The sheriff of the court or his/her deputy together with assistance as he/she deems appropriate is authorised and directed to evict the first respondent from the property thereafter. The sheriff or his/her deputy shall be present all the time during the eviction. The sheriff*

or his/her deputy of the court may seek the assistance of the South African Police Services to effect the eviction.

[3] The costs of this Application including the costs of section 4(2) notice and for the attorney of the 3rd respondent shall be paid by the 1st and 2nd respondent jointly and severally, if one pays, the other is absolved".

FACTUAL BACKGROUND

[3] The house in dispute is Erf […] Mid-Ennerdale, situated at […], Mid-Ennerdale, Gauteng (hereinafter "the property") and the appellants currently remain in occupation of the property.

[4] It is common cause that the respondent is the registered owner of the property as recorded in the Title Deed. She owns the property with one Grant Clifton Davids.

[5] It is further common cause that in 2014 the appellants and the respondent signed a deed of sale ("sale agreement") for the sale of the property to the appellants for the purchase price of R650 000-00. The sale agreement did not provide for special conditions relating to occupational rent.

[6] There is no dispute that on 23 July 2014 the first appellant deposited an amount of R600 000.00 (SIX HUNDRED THOUSAND RAND) into the respondent's personal bank account towards the purchase price. They took occupation of the property in April 2014.

[7] A further payment in the amount of R248 000.00 was made by the appellants to the respondent and her husband. However, at least R148 000 of this payment related to renovations to be effected by the respondent and her husband on the property.

[8] Some three years later, on 17 March 2017, the respondent sent a letter of demand to the appellants by registered mail demanding payment in the amount of R50 000.00, the said amount allegedly being the balance in respect of the purchase price. In the same letter, the appellants were further informed that they were in breach of the sale agreement which breach they must rectify by paying the demanded sum, otherwise the respondent will proceed to cancel the sale agreement. The respondent also demanded payment of back-dated occupational rental for the property.

[9] On 15 June 2017 the respondent sent a letter of cancellation of the agreement to the appellants by registered mail, citing the appellants' failure to pay the demanded R50 000.00 as the basis for the cancellation. The said letter was then followed by the respondent launching an eviction application against the appellants on 13 October 2017, which eviction the appellants now appeal against. In paragraph 9 of the respondent's eviction application, she submitted that all the requirements in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998, (hereinafter PIE) have been met.

COMMON CAUSE FACTS

[10] The following were the common cause facts before the court *a quo*:

1. That the respondent is the registered owner of the property and a holder of a title deed in respect thereof.

2. That the appellants have been in occupation of the property since 1 April 2014.

3. That the first appellant deposited an amount of R600 000.00 (SIX HUNDRED THOUSAND RAND) into the respondent's personal bank account towards the purchase price on 23 June 2014.

4. The deed of sale does not provide for special conditions relating to occupational rent.

5. That the appellants paid a further amount of R148 000-00 to the respondent and her husband for renovations on the property, which renovations remain incomplete.

APPLICATION IN THE COURT *A QUO*

[11] The respondent based her case for eviction in the court *a quo* on the appellants' alleged failure to pay the full purchase price for the property. The respondent averred that she had lawfully cancelled the deed of sale by virtue of this breach, and that she was entitled to the appellants' eviction. She asserted that it was just and equitable to order their eviction as they had no valid defence.

[12] The appellants disputed that they had not paid the full purchase price. They said that a further amount of R50 000 had been paid to the respondent in cash. As the full purchase price had been paid, the respondent could not lawfully cancel the sale agreement. In addition, they contended that the respondent had not established that it was just and equitable to evict them. They lived on the property with minor children, and had used their life savings to buy the property. In a supplementary affidavit, they asserted that they had an enrichment lien in respect of the renovations for which they had paid the respondent and her husband, but which had never been completed. In addition, the

respondent sought eviction without tendering return of the purchase price, and now sought to claim occupational rental from the appellants when this was not provided for in the agreement of sale. The appellants' case was that in these circumstances, it would not be just and equitable to evict them.

COURT *A QUO* JUDGMENT

[13] In its Statement in terms of Rule 51(8), the court *a quo* stated that after hearing the evidence in total, it found that the appellants did not have a defence and that in terms of section 8(a) and (b) it was just and equitable for the appellants to vacate the property on 31 December 2019.

[14] In its judgment, the court *a quo* held that although the cancellation of the sale agreement was not an issue for its consideration, it could not understand why, if the 1st and 2nd respondent felt that the termination of the sales agreement was unlawful, they had not approached a court for appropriate relief.

[15] Regarding the payment of the alleged outstanding amount of R50 000.00, in light of the appellants' failure to produce any proof of payment, the court *a quo* held that it found it incomprehensible that the appellants could make a payment of such large sums of money and not demand a receipt from the respondent as proof of payment thereof. It therefore rejected the appellants' version that they had paid the balance of the purchase price.

[16] The court *a quo* further found that the alleged unlawful termination of the sale agreement is not a valid defence against eviction. Although the court *a quo* stated in its judgment that this finding should not be construed as a finding on the legality of the

cancellation of the sales agreement, it nonetheless found further that the right to occupy the property previously granted by the respondent to the appellants was revoked by the respondent through the cancellation of the sale agreement. This effectively rendered the appellants' unlawful occupiers of the property. The court *a quo* then suggested that the appellants could initiate undue enrichment proceedings for their damages and that it was accordingly inclined to grant the eviction order given the absence of a defence by the appellants.

THE APPELLANTS' CASE ON APPEAL

[17] On appeal, the appellants contend that in order to be granted an order of eviction the respondent bore the onus of establishing that:

1. they (the appellants) are in unlawful occupation of the property;

2. the procedural requirements under section 4 of PIE have been met; and

3. it would be just and equitable for the court to make an order for eviction.

[18] The appellants submit that there is a factual dispute between the parties as to whether the balance of the purchase price had been paid, and hence, whether the respondent was lawfully entitled to cancel the agreement. The appellants submit that they paid the full purchase price for the property in the amount of R650 000.00 and that R50 000-00 balance thereof was paid in cash to the respondent. Thus, they deny that they are in unlawful occupation of the property. Further they contend that the cancellation of the sale agreement was unlawful, and thus that they have a valid defence against eviction.

[19] The appellants submit that this factual dispute ought properly to have been determined on the basis of the principles laid down in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** .[1] Had the court *a quo* done so, it could not have found that it was just and equitable to grant the order of eviction. Nor could it have found that the appellants had no defence. This is because the basis on which the appellants disputed the respondent's case that she was entitled to cancel the eviction order were sufficient, on an application of *Plascon-Evans*, to adduce a defence.

[20] In addition, the appellants take issue with the respondent's failure to address any facts in the founding affidavit to place this court in a position to adjudicate whether it is just and equitable to evict the appellants and their children from the property.

[21] The appellants point to the fact that they made a further payment for renovations on the property, which remain incomplete. Despite this fact, the respondent demanded back-dated occupational rent from the appellants, even though the sale agreement does not make any provision for occupational interest. Furthermore, say the appellants, although the respondent purported to cancel the agreement, and seek their eviction, the respondent made no offer to the appellants to pay back to the purchase price that had been paid for the property. They submit that this is not in keeping with the principles of equity and justice, and their eviction in those circumstances is unlawful.

[22] In respect of the above, the appellants submit that the respondent failed to adduce evidence to establish that she was entitled to an eviction order and that accordingly the court *a quo* erred in granting the eviction order. They further submit that the court *a quo* failed to take into consideration all the relevant circumstances.

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[1] 1984 (3) SA 623 (A).

[23] In light of the above they ask that this appeal succeeds with costs and that the court ***a quo'***s order be set aside.

THE RESPONDENT'S CASE ON APPEAL

[24] The respondent submits that the court *a quo* did consider the evidence in its totality and that it did apply the *Plascon-Evans* rule. They contend that the appellants are in unlawful occupation of the property, and that the court *a quo* correctly rejected the appellants' contentions, *inter alia*, that the sale agreement had been unlawfully terminated. The respondent further submits that the appellants' delay to challenge the cancellation of the sale agreement coupled with their inability to provide proof other than their say-so in support of the R50 000.00 payment, renders the eviction order just and equitable.

[25] They further submit that the court *a quo* correctly rejected the R50 000.00 payment version by the appellants and thus found that they had no defence. This rejection of the appellants' defence invariably led to the trial court accepting the respondent's version that the appellants are unlawful occupiers as defined in section 4(8) of PIE.

[26] The respondent submits that in the absence of a valid defence, which include factors rendering an eviction unjust and inequitable, the court *a quo* correctly granted an eviction. The respondent further submits that in the premises the appellants have failed to make out a case for the relief they seek and that their appeal be dismissed with costs.

STATUTORY FRAMEWORK

[27] Section 4(1) of PIE provides that "*Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by any owner or persons in charge of land for the eviction of an unlawful occupier"*.

[28] Section 4(xi) of PIE provides the definition of an unlawful occupier as follows:

"Unlawful occupier" means *a person who occupied land without any other right in law to occupy such land*…".

[29] Section 4(6) (7) and (8) of PIE respectively provide that:

"*(6) If an unlawful occupier has occupied the 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 women.*

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale in execution pursuant to a mortgage, whether the 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.

(8) If the court is satisfied that all the requirements of this section 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) 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) above".

[30] Section 25 of the Constitution provides that "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"*.

[31] Section 26(1) and (3) of the Constitution provides that everyone has a right to have access to adequate housing. No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances.

[32] In ***Machete v Mailula***[2]***,*** the Court emphasized that "*the application of PIE is not discretionary"*, meaning the court must consider PIE in all eviction cases.

[33] In ***Port Elizabeth Municipality v Various Occupiers***[3]*, the Constitutional Court ("the CC")* developed a new approach in eviction proceedings in line with the constitutional provisions*.* The CC stated that in eviction applications, the court is called upon to go beyond the normal function and engage in active judicial management, and that the Constitution and PIE require that an additional consideration be made in respect of the lawfulness of the occupation. The court must have regard to the interests and the circumstances of the occupier and pay due regard to the broader considerations of fairness and other constitutional values, so as to produce just and equitable results. The CC further stated that the court must balance the interests of the land owner and those of the occupiers. The rights on both sides of the scale enjoy protection under section 25 and 26 of the Constitution.

[34] In ***Occupiers of Erven 87 & 88 Berea v Christiaan Fredericks De Wet No****,* [4] the Court held that section 4 of PIE necessitates two separate enquiries. The first enquiry is whether it is just and equitable to grant the eviction order having regard to all the relevant factors. The factors mentioned under section 4(7) of PIE include the availability of alternative land or accommodation. Those factors must be assessed in the light of the property owner's protected rights under section 25 of the Constitution. Once decided that there is no valid defence to the claim for eviction and that it would be just and equitable to grant an eviction order, the court is obliged to grant the eviction order. The second

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[2] [2009] ZACC 7; 2010 (2) SCA 257 (CC) 2009 (8) BCLR 767 CC para 15

[3] [2004] ZACC (7) at para 36

[4] [2017] ZACC 18 at para 44 and 45

enquiry is what would be just and equitable in relation to the date of the eviction and/or the implementation of that order.

ANALYSIS

[35] It is common cause that the respondent bears the onus to prove that it is just and equitable to evict the appellants and that no defence exists against the eviction. The appellants submit that they paid the purchase price of R650 000.00 in full which then gives them a valid defence against eviction, and thus rendering the cancellation of the sale agreement by the respondent unlawful. The court *a quo* rejected the appellants' argument as a valid defence against eviction on the basis that the appellants have failed to produce proof of payment of same.

[36] In my view from the totality of the evidence, but for the disputed payment of R50 000.00, the respondent would not have cancelled the sale agreement nor initiated the eviction proceedings.

[37] Although the court *a quo* sought to downplay the relevance of the dispute about whether the sale agreement had been validly cancelled, it plainly based its rejection of the appellants' defence on this dispute. Being motion proceedings, the trite principles set out in *Plascon-Evans* applied, viz. when factual disputes arise, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, justify the order. It is also trite that if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably

implausible, far-fetched or so clearly untenable, that the court is justified in rejecting them merely on the papers.[5]

[38] On appeal, the respondent (applicant in the court *a quo*) submitted that the court *a quo* had correctly applied these principles, despite no reference having been made thereto in the judgment. Contrary to this submission, there is no indication in the judgment that the court *a quo's* approach was guided by these principles. It was not for the appellants to convince the court that they had paid the full purchase price. Provided that their version was that they had done so, and that version was not bald, uncreditworthy, palpably far-fetched or untenable, the court *a quo* could not properly reject it.

[39] The court *a quo* rejected the appellants' version on the basis that they could not produce a receipt, and on the basis that they had not launched an application earlier to challenge the cancellation letter that was sent to them. In my view, none of these factors are sufficient to render the appellants' version implausible and untenable. The appellants were entitled to challenge the cancellation in response to the eviction application. They were under no obligation to have instituted legal proceedings previously in order to do so. The appellants had paid the respondent an additional amount for renovations to be carried out on the property. The amount was in excess of the balance of R50 000. This fact supports, at least in some measure, the plausibility of the appellants claim that they had paid the full price for the property. In addition, the respondent does not explain why it waited three years before cancelling the contract and applying for the appellants' eviction. This, again, lends some credibility to the appellants' version.

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[5] *NDPP v Zuma* 2009(2) SA 277 (SCA)

[40] While the court *a quo* was correct in that it did not have to make a finding on the legality of the cancellation, this was a factor that it had to take into account. On the facts before it, and on a proper application of the *Plascon-Evans* principles, it ought not to have found that the appellants had no defence to the eviction application. In fact, and for the same reason, the court *a quo* ought to have found that the respondent had not established that the appellants were unlawful occupiers. Consequently, it ought to have dismissed the application on the basis that the respondent had not satisfied the statutory requirements for an eviction order under PIE.

[41] There is a further reason why the appeal must succeed. The onus was on the respondent to establish that it would be just and equitable to grant an eviction order. It was common cause that the appellants purchased the property from the respondent as their primary residence. The appellants used their pension monies to purchase the property. They paid a further substantial sum of money to the respondent to effect renovations on the property, which renovations were not completed. Even on the respondent's version, the appellants paid at least R600 000 to her. In seeking their eviction, she did not tender a return of the purchase price. Instead, she sought to claim an amount of occupation rental from the appellants, even though the sale agreement makes no provision for it. In other words, the respondent sought to keep the property in her name, keep the full purchase price paid, and evict the appellants from their home over a dispute about a relatively small proportion of the full purchase price. In addition, renovations that the respondent's husband undertook to do have not been completed. It is difficult to understand how an eviction in these circumstances can be just and equitable. The court *a quo* ought to have taking into account the glaring financial loss the

appellants stood to suffer in the event of their eviction, especially in light of the respondent' silence regarding any form of reimbursement offer for all their substantial loss.

[42] For the court *a quo* to hold that the appellants must be evicted and sue for damages is not in keeping with the broader approach formulated by the CC in ***Machete*** above. Anything less by the court *a quo* defeats the broader approach in ***Machete*** that in matters of this nature, every circumstance therein must be considered by the court for justice and equity to prevail.

[43] When one takes into account with regard to the actual test for an applicant to secure an eviction order, it is my view that the rest of the respondent's arguments in reply to the appellants' become irrelevant. Once it is found that the respondent has failed to discharge her onus in terms of section 4 of PIE, every other issue becomes moot and the respondent is thus not entitled to the relief he/she seeks.

[44] In the premises, I am satisfied that given the material factual dispute surrounding the payment of R50 000.00 as already stated above, the court *a quo* erred in finding that it would be just and equitable to grant the eviction order and in its further finding that the appellants had no valid defence against the eviction order.

[45] In the result I am satisfied that for the above stated reasons, this court is enjoined to interfere with the court *a quo*'s judgement and accordingly grant the relief sought by the appellants.

[46] In the result I make the following order:

ORDER

1. The appeal is upheld with costs.
2. The court *a quo's* judgement and order are set aside and substituted with the following Order:

"1. The application is dismissed with costs."

_____
L.B. Vuma
Acting Judge
Gauteng Local Division, Johannesburg

I agree

pp _____
R Keightley
Judge
Gauteng Local Division, Johannesburg

Heard on: 11 August 2020
Judgment delivered: 11 November 2020

Appearances
For Appellant: Adv. H.C Van Zyl
Instructed by: Saltzman Attorneys

For Respondent: Adv. J Scallan
Instructed by: A Le Roux Attorneys