

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

CASE NO: 9757/2020

REPORTABLE: No

OF INTEREST TO OTHER JUDGE: No

REVISED:

26 April 2022

In the matter between:

ODETTE CHANTLE PILLAY

1ST Applicant

PANUMATHI PILLAY

In her capacity as the Executrix, duly appointed

By the Master of the High Court Johannesburg

Issued under letter of executorship Estate no:002513/2015

2nd Applicant

And

RUWAIDA RAMZAN

1ST Respondent

ALL UNLAWFUL OCCUPIERS OF ERF [....],

EXTENSION 4 LENASIA SOUTH

2nd Respondent

CITY OF JOHANNESBURG, METROPOLITAN

MUNICIPALITY

3RD Respondent

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14:00 on 26 April 2022.

JUDGMENT

LENYAI AJ:

- [1] This is an application wherein the applicant seeks an order declaring the first and second respondents as unlawful occupants of the property described as, Erf [...], Extension 4, Lenasia South, Gauteng Province (the property) and subsequently order their eviction from the property within a period to be determined by the court.
- [2] The applicants aver that the first applicant and the deceased duly represented in these proceedings by the second applicant, purchased the immovable property while they were still married to each other in community of property. Mr and Mrs Pillay subsequently divorced on 20 March 1998 and in terms of the divorce decree Mr Pillay forfeited the patrimonial benefits of the marriage. This property was registered in both their names at the Johannesburg Deeds Office on the 17 September 2010. The Title Deed number of this property is [...] and it reflects the date of sale as being the 21st June 1990.
- [3] The applicants aver that before the property was registered in their names, the first respondent challenged their ownership as she alleged to have bought the property from the second applicant (the deceased). The dispute was referred to the Housing Development Board (the Board) for adjudication and the decision of the board was that the property should be registered “ jointly in the names of Odette Chantle Duan and SS Pillay (ex.-husband) pending the production of written proof that Mr Pilay has ceded his rights to Ms Odette Chantle Duan in which case it should then be registered only in her name.” The first respondent appealed the board’s decision which appeal was subsequently dismissed.
- [4] The applicants further aver that after losing the appeal, the first respondent sent communication to the first applicant to the effect that she was reviewing the decision at the High Court, and to this day no review documents have been received by her.
- [5] The applicants contend that they have not given the respondents permission to remain on the property and despite written requests to them to vacate the property they have refused and continue to refuse to vacate the property.

- [6] The respondents on the other hand contend that they require the applicants to withdraw the eviction proceeding against them and for the court to grant an order declaring that the property she is currently residing in, be registered in her name.
- [7] The first respondent contends that she entered into an oral agreement with Mr Pillay to rent the property around December 1998. She then moved into the property during that time and has been staying there till to date. She avers that Mr Pillay offered to sell the property to her in the amount of R14 000, which amount she has paid to Mr Pillay. She states in the answering affidavit that Mr Pillay omitted to inform her that he had forfeited patrimonial benefits of the marriage to the first applicant.
- [8] The first respondent avers that she together with Mr Pillay signed for the application of Regularisation and Transfer for the same property which resulted in legal action which was heard at the Housing Department. There was a mediation where it was decided that the first applicant should pay R29 900 within 30 days failing which the first respondent's application would be considered. The first applicant failed to pay the required amount and sought a postponement as she could not pay the said amount.
- [9] The respondent contends that she is disputing the applicants ownership of the property in that there was a duplication of signatures for the same property and now the applicants are seeking to evict her an elderly woman whose only income is her Governmental pension.
- [10] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) provides procedures for the eviction of unlawful occupants and also prohibits unlawful evictions. The main aim of the PIE Act is to protect both occupiers and landowners. It is peremptory for a landowner or landlord to follow the provisions of the PIE Act in the event they want to evict an unlawful occupier or tenant.

[11] An unlawful occupier of the land or immovable property is defined as a person who occupies land or immovable property without the express or tacit permission of the owner or person in charge. Tacit permission is defined as when an owner is aware of the occupant being on the land or premises but does nothing to stop this.

[12] The applicants aver that they have complied with the procedural formal requirements of the PIE Act. For the applicants to succeed in being granted the eviction order, they have to satisfy the court of the following :

(a) That they are the owners of the land or immovable property;

(b) That the respondents are unlawful occupiers and

(c) That it is just and equitable to grant the eviction order.

[13] Section 7 of the PIE Act provides that :

“if an unlawful occupier has occupied the land in question for more than six months from 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 relevant circumstances, including, except where the land is sold on 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 person and households headed by women.”

[14] Section 8 of the PIE Act provides that :

“...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)."*

[15] The Supreme Court of Appeal in the matter of **Ndlovu v Ngcobo, Bakker and Another v Jika (1) (240/2001, 136/2002) [2002] ZASCA 87; [2002] 4 ALL SA 384 (SCA) (30 August 2002) at para 11, pg 123**, held that "... *PIE Act applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful.*"

[16] Turning to the matter before me the respondents are disputing that the applicants are the true owners of the immovable property. The first respondent is contending that the property should have actually been registered in her name. The applicants on the hand aver that another forum has already made a determination in this regard, and the first respondent's failure or neglect to pursue further or alternative remedies thereafter despite knowing her rights is inexcusable.

[17] The applicants have provided clear and consise evidential proof of their ownership to the immovable property in the form of a registered title deed. Relying on the Oudekraal principle developed in the matter of **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para [26]**, the Supreme Court of Appeal held that "*Until the Administrator's approval... is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.* In developing what is now known as the Oudekraal principle in administrative law parlance, the court reasoned **at para [31]** that "*if the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for as long as the initial act is not set aside by a competent court.*" This principle was endorsed by the Constitutional Court in the matters of **MEC for Health, Eastern Cape and**

Another v Kirkland Investments (Pty) Ltd (77/13) [2014] ZACC 6 at para [101] where the majority held that “*an invalid administrative action ...may be valid and effectual ... until set aside by proper process*” as well as in the matter of ***Merafong City Local Municipality v AngloGold Ashanti Limited (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016)***, the majority explained at para [41] that the import of the Oudekraal and Kirkland is that “*government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid*” and that the decision “*remains valid until legally effective until properly set aside*”.

- [18] In applying the Oudekraal principle to the matter before me, I am of the view that the decision of the Housing Development Appeal Board remains valid and binding for as long it has not been reviewed and set aside by a competent court. The first respondent cannot just ignore the administrative decision simply because she believes that the decision was incorrect. The decision remains valid and binding and it must be obeyed and complied with. The applicants proved that they are the owners of the property and have the legal standing to bring an application for eviction.
- [19] The applicants aver that the first respondent has been in unlawful occupation of the property for approximately thirteen years and she has always known that the day will come when she would have to vacate the property. The applicants contend that they have no agreement with the respondents to stay on the property and they have been asking the respondents to vacate the property. The respondent on the other hand contends that when she took possession of the property she had entered into an oral lease agreement with Mr Pillay.
- [20] It is my view that the respondents are unlawful occupiers of the immovable property as they are in occupation without the express or tacit permission of the registered owners. Despite repeated requests by the applicants that they should vacate the property, they have refused to move and continue to be in possession and occupation of the property.

[21] Section 26(3) of the Constitution of the Republic of South Africa , 1996, states that :

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.”

[23] In the matter of **Pheko and Others v Ekurhuleni Metropolitan Municipality (CCT19/11A) [2015] ZACC 10; 2015 (6) BCLR 711 (CC); 2015 (5) SA 600 (CC) (7 May 2015)**, the Constitutional Court affirmed that Section 26(3) does not permit legislation authorizing evictions without a court order. The PIE Act reinforced this by providing that a court may not grant an eviction order unless the eviction would be just and equitable in the circumstances. The court has to have regard to a number of factors including but not limited to :

(a) whether the occupants include vulnerable categories of persons (the elderly, children and female-headed households) ;

(b) the duration of occupation and

(c) the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternative accommodation for themselves.

[24] It is my view that it is the duty of the property owner to put as much information as he or she is able to before the court to demonstrate that an eviction if granted would be just and equitable. Another principle that has crystalised is that municipalities must be joined where the eviction is likely to result in homelessness. The reason is that in instances where the eviction may trigger constitutional obligations on the part of a municipality envisaged in section 26 of the Constitution, to provide alternative accommodation in the event the evictees are unable to obtain it themselves. The duty to provide alternative accommodation applies not only when an organ of state evicts people from their land but also when a private landowner applies for the

eviction of unlawful occupiers. It is not enough to only join the municipality. The land owner must ensure that there is a report before court from the municipality dealing with provision by the municipality for alternative accommodation as is required by the constitution. In the matter of **ABSA Bank v Murray and Another 2004(2) SA 14 (C)** at para [41] and [42] , the court held that :

“in (its) view, the failure by municipalities to discharge the role implicitly envisaged for them by statute, that is, to report to the Court in respect of any of the factors affecting land and accommodation availability and the basic health and amenities consequences of an eviction, especially on the most vulnerable such as children, the disabled and the elderly, not only renders the service of the (s 4(2) notice superfluous and unnecessarily costly exercise for the applicants, but more importantly, it frustrates an important objective of the legislation. It will often hamper the Court’s ability to make decisions which are truly just and equitable. If PIE is to be properly implemented and administered, reports by municipalities in the context of eviction proceedings instituted in terms of the old statute should be the norm and not the exception.”

- [25] Turning to the matter before me, there is no report before Court from the municipality providing information regarding their fulfilment of the statutory requirements for plans to provide access to adequate housing in terms of section 26 of the Constitution and the implementation thereof. This report from the municipality is fundamental and critical to a Court being able to determine whether or not the eviction is just and equitable. On the undisputed facts of this matter the first respondent is an elderly lady of considerable age and she is staying on the property together her children and grandchildren. Clearly the house-hold is headed by her and she and her grandchildren qualify to be declared as vulnerable people. The first respondent has also averred that she is a pensioner and has no other income and this point has not been disputed by the applicants. I am not convinced that it would be just and equitable to grant the eviction as to do so would cause great hardship to the respondents to render them homeless. Most glaring, to grant the eviction as requested by

the applicants without having considered all the circumstances would offend our Bill of Rights .

[26] In the premises , the following order is made :

(a) The first and second respondents are declared unlawful occupiers of the property described as, Erf [....], Extension 4, Lenasia South, Gauteng Province.

(b) The application for eviction dismissed.

(c) Each party to bear their costs.

M.M.D LENYAI
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

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| Counsel for the Applicant: | Adv V Mokoena |
| Instructed by: | Mncube Attorneys INC |

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| Counsel for the Respondents: | Adv L Quillam |
| Instructed by: | Ndumiso Voyi Incorporated Attorneys. |

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| Date of hearing: | 01 January 2022 |
| Date of judgment: | 26 April 2022 |