REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022/2305

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

ALBERT RAGOON MOODLEY	**FIRST APPLICANT**
ALBERT RAGOON MOODLEY N.O.	**SECOND APPLICANT**

and

LEZELL MELISSA SMITH	**FIRST RESPONDENT**
ABIGAL MARY KHAN	**SECOND RESPONDENT**
MASTER OF THE HIGH COURT	**THIRD RESPONDENT**
CITY OF JOHANNESBURG	**FOURTH RESPONDENT**

JUDGMENT

D MARAIS AJ:

[1] In this application, Mr Albert Ragoon Moodley, applies in his personal capacity and in his capacity as the executor of the estate of his late wife, Rabiya Moodley, for the eviction of the first and second respondents, and their respective families, from an immovable property situated at […], Eldorado Park. The first and second respondents are the adult daughters of the applicant, are married and both have sons in their late teens.

[2] I shall refer herein to the applicant, in both capacities, as "the applicant" and to the first and second respondents as "the respondents".

[3] The applicant's case is entirely predicated on the bald statement that the respondents were occupying the immovable property on a "month-to-month" basis. This statement presupposes the existence of an agreement to that effect, and it is clear from the applicant's own version that some agreement is in place between the parties regarding the respondents' occupation. The applicant has purported to cancel the agreement with 30 days' notice based on an agreement that the tenancy was a monthly one. The applicant's case is, therefore, based on an agreement and a contractual entitlement to cancel the agreement with 30 days' notice. Despite this, the applicant failed entirely to place any evidence before the court regarding the terms of the agreement. The bald statement regarding a monthly tenancy was a conclusion, unsupported by any evidence.

[4] It should also be noted that in the purported letter of cancellation, attached to the founding affidavit, the applicant's attorneys made the allegation on behalf of the applicant that the monthly tenancy agreement was in existence between the respondents and the applicant in his personal capacity and in his capacity as the executor of the estate, based on "*blood relations*".

[5] The second respondent did not give notice of intention to oppose, and only the relief sought against the first respondent was before this court.

[6] The first respondent is acting in person. She delivered an answering affidavit that was clearly not drawn by a legally trained person, and she appeared in person during the hearing of this matter. The result was that the presentation of her case was far from desirable, and even deficient.

[7] Under the circumstances, both parties having failed to adequately deal with the matter, this court is faced with a difficult task in a matter which may have a profound effect on the parties' personal lives (including the families of the respondents.

[8] The applicant and the deceased were married in community of property and, as such, was undivided joint owners of the immovable property.

[9] Upon the death of the deceased in 2014, the applicant was appointed as the executor of the deceased estate after the estate was, rather

belatedly, reported to the third respondent, the Master of the High Court, as an intestate estate.

[10] The applicant is entitled to an undivided half share of the estate, by virtue of the marriage in community of property to the deceased. Having regard to the value of the estate, the applicant falls to inherit the deceased's entire estate. Pending the finalisation of the estate, the applicant (in his various capacities) is the owner of the property. It is currently unclear what the outcome of the administration of the estate will be and whether the applicant will ultimately be the owner of the property, or whether he will only receive the balance of the free residue in the estate, after the assets have been realised to pay creditors (of which the City of Johannesburg is a major one).

[11] It is common cause that the first and second respondents are occupying portions of the main house situated on the property, with their respective families, in terms of an arrangement between them, the applicant and the deceased. The applicant is occupying a cottage on the property in terms of this arrangement.

[12] The applicant stated that the parties, including the deceased, occupied the premises "for the longest time". It was clear that the deceased was, on his version, also part of the arrangement. To the extent that it was suggested in the letter of cancellation that the arrangement was between the applicant in his personal capacity, and the applicant in his capacity as executor, this is clearly incorrect. The arrangement was also

with the deceased prior to her death, and the executor is bound by the agreement to which the deceased was party (as opposed to the executor directly being the counterparty to the agreement).

[13] The applicant also stated that the respondents have been residing at the property since their birth, a statement that seems to be untrue, having regard to the fact that the property was only transferred to the applicant and the deceased in 2011. The impression the applicant attempted to convey was that the respondents simply occupied the premises their entire lives, and that such occupation was precarious, which is clearly unfounded.

[14] According to evidence presented by the applicant, the first respondent launched an application in this court under a separate case number to remove him as an executor and for an order that a certain document be recognised as the deceased's will. It appears that prior to the death of the deceased, the applicant and the deceased took steps towards the execution of a will, by instructing PSG to draw a will. PSG proceeded to draw a joint will, in which the parties would have bequeathed their entire estate to the surviving spouse, coupled with a *fideicommissum* in favour of the first respondent, the second respondent and their brother, Jacques Moodley, in respect of the immovable property. In terms thereof, they would have become joint owners of the immovable property upon the demise of the surviving spouse.

[15] There is no evidence that this draft will was signed by the parties. To the contrary, the first respondent's evidence in her application in this court (referred to above), which the applicant attached to his founding affidavit, was that the deceased refused to sign the document because it was a joint will, and not a separate individual one. She repeated this statement during argument in court.

[16] Due to the strict requirements of section 2(3) of the Wills Act, it is evident that this document will not be accepted as a will under that section. *Inter alia* the fact that the document was drafted by a third party (PSG) and not the deceased herself, precludes an application of section 2(3).[1]

[17] The consequence is that the deceased indeed died intestate.

[18] Having said that, the applicant does not deny that the draft will did set out their common intention correctly. He merely states that in terms of the draft will, he would have been appointed the sole heir upon the death of the deceased and would have inherited the deceased share in the property. This does not deal with the issue of the occupation. The document the applicant and the deceased caused PSG to draw up gives a very clear picture of the arrangement between the parties. On the probabilities the agreement was that the first and second respondents would be entitled to occupy the property on a long-term

[1] *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA)

basis, with the aim that they would eventually become the joint owners of the property.

[19] The extent that the applicant alleges that the first and second respondents' occupation was a monthly tenancy, which could be terminated with 30 days' notice, this is evidently contrary to the facts and circumstances giving rise to the respondents' occupancy, and gives rise to grave scepticism regarding the applicant's approach.

[20] The first respondent seeks to rely on an alleged intention on the part of the deceased to give the house to her children. That this was the deceased's ultimate intention (to materialise after the death of the applicant), seems plausible.

[21] However, the deceased could only dispose of her portion of the joint estate and had to do so in terms of a valid will. There is no evidence that the deceased executed a valid will.

[22] There is also no evidence that the deceased donated her share in the property to her children prior to her death. Any such donation had to comply with the provisions of the Alienation of Land Act. There is no evidence that the provisions of this act had been complied with.

[23] The consequence of this is that the respondents cannot claim any right to the eventual transfer of the property.

[24] However, that does not mean that the respondents do not have the right to occupy the property. There are indications that the agreement between the parties was that the respondents would be entitled to occupy the property until the death of the surviving spouse and would thereafter become the owners of the property. In this regard the first and second respondents' occupation was not of a precarious nature, which could be terminated by the applicant with reasonable notice.

[25] The fact that the respondents, under the circumstances, cannot legally demand transfer of the property on the death of the applicant, does not detract from the possible right the respondents have to occupy the property. In my view the only effect of this impediment is that the respondents' tenancy may come to an end upon the death of the applicant when the property will have to be disposed of in accordance with the applicant's will, or otherwise in accordance with the law.

[26] This naturally presupposes that the applicant remains owner of the property upon the conclusion of the administration of the deceased's estate, and thereafter remains the owner until his death. In the absence of a legally binding *fideicommissum* there will be no limitation on the applicant's right to dispose of the property prior to his death.

[27] It is also clear that the respondents' possible right to occupy the immovable property vested in them prior to the deceased's death. As such, the occupation agreement was not an invalid *pactum successsorium.*

[28] In the premises, I hold that the applicant had failed to make out a case, as he set out to do, that he had the right to terminate the first and respondents' tenancy of the property. The bald assertions made by the applicant is contradicted by the facts and circumstances of the case.

[29] At the same time, the first respondent's defences in this application were ill-founded. She also failed to directly address the issue of the occupation agreement.

[30] The consequence is that both parties failed to properly ventilate the central issue, namely the basis for the respondents' occupation. Under the circumstances, I shall not grant the eviction order, nor shall I finally decide on the respondents' right to occupy. To do so may lead to an injustice.

[31] Under the circumstances set out above, it would be just and equitable that the matter be referred to trial to enable the parties to properly ventilate the issues by way of pleadings, and for the matter to go on trial. I am of the view that referral to evidence will be inappropriate, as the issues have not been defined properly in the papers before court.

[32] The applicant also claims an order declaring the first and respondents was liable to pay 50% of the municipal utilities (excluding rates and taxes) during the period they occupied the premises.

[33] There can be no doubt that, whatever the agreement was, it was an implied term of the agreement that the first and second respondents would be obliged to pay their proportionate share of the utilities. It is common cause that the first and second respondents failed to make their contributions. The first respondent candidly admitted this during argument. Consequently, I am of the view that the applicant is entitled to an order in this regard.

[34] The applicant conceded that the percentage for which the first respondent should be liable is 33%, and not 50%.

[35] The first respondent did not raise any defence of prescription to this claim.

[36] As far as the costs is concerned, it will be appropriate at this state to order that costs shall be costs in the cause.

ORDER

[37] Consequently, the following order is made:

[37.1] The matter is referred to trial;

[37.2] The applicant's notice of motion shall stand as a simple summons and the first respondent's notice of intention to oppose as the notice of intention to defend;

[37.3] The applicant(s) shall file a declaration within the period allowed in the rules, whereafter the normal rules of court applicable to actions shall apply;

[37.4] The first respondent is ordered to pay 33% of all the municipal utilities (excluding rates and taxes) which was incurred during the period of her occupancy of[…], Eldorado Park; and

[37.5] The costs shall be costs in the cause.

DAWID MARAIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG
13 June 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date of this judgment is deemed to be 13 June 2023.

Appearances:

Appearance for Applicants:	ADV JDR SINGH
Instructed by:	V DERROCKS INC ATTORNEYS
Appearance for first respondent:	IN PERSON
Instructed by:	NOT APPLICABLE
Date of hearing:	9 May 2023
Date of Judgment:	13 June 2023