IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

Case No: 67219/2019

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED : No

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Signature Date :

In the matter between:

ELMO-YORK STUART N.O. Applicant
(in his capacity as the executor in the deceased estate of the late Jan Johnathan Serfontein)

and

JAN GEORGE VAN DYK First Respondent
(ID No. 620[…])

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Second Respondent

JUDGMENT

GW Girdwood, AJ

1 The relief sought in Part B of the application, presently before me, is for an order *inter alia* evicting the first respondent from the property.

2 The applicant is the duly appointed executor in the estate of the late Jan Serfontein, who died on 16 May 2019.

3 It is common cause that the estate is the owner of the immovable property located at 726 Norman Street, Montana Park, Ext. 29, Pretoria ("the property").

4 On 17 September 2019 an order by consent was granted by the Court in relation to the relief sought in Part A of the application, in terms whereof interim relief was granted *inter alia* directing the first respondent to provide the applicant, his agents, auctioneers, prospective purchasers and third

parties with reasonable access to the property, with the costs of that part of the application to be costs in Part B of the application.

5 The second respondent was cited by virtue of its duty to consider, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE"), whether to provide the first respondent with alternative accommodation for relocation. The second respondent remained an inactive nominal party to the proceedings.

6 The applicant's claim is vindicatory. To succeed, the applicant must allege and prove ownership[1] of the property and that the first respondent was in possession of the property when the proceedings were instituted.[2] The first respondent, who relies on a right to possession of the property must allege and prove that right.[3]

7 The only dispute for determination is whether the first respondent has discharged the onus which he bore in proving the right to possession of the property. For this, the first respondent relies upon a draft covering mortgage bond which he alleges was signed by the deceased, buttressed by an

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[1] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82; *Concor Construction (Cape) (Pty) Ltd v SantamBank Ltd* 1993 (3) SA 930 (A).
[2] *Chetty v Naidoo* 1974 (3) SA 13 (A).
[3] *Woerman NO v Masondo* 2002 (1) SA 811 (SCA).

unsigned written offer to purchase the property. On the papers the first respondent contended for an improvement lien as an additional defence. This defence was, however, expressly abandoned, correctly in my view, in additional supplementary written argument.

8 The legal question implicated is thus whether the defence complies with the formalities prescribed by section 2(1) of the Alienation of Land Act, 68 of 1981 ("the Act"), which provides as follows:

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28,[4] 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 written authority".[5]

9 It is first necessary to deal with the relevant background facts.

THE FACTS

10 According to the applicant, during September 2018 the deceased and the first respondent were in the process of negotiating the purchase by the first respondent of the property.

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[4] This provision is not implicated on the facts and is therefore irrelevant.

[5] In section 1 of the Act, *"alienate"* is defined as meaning in relation to land, to *"sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition"* and *"deed of alienation"* is defined as meaning *"a document or documents under which land is alienated"*.

11 The contemplated sale appeared to be one payable by way of instalments – as appears from a draft covering mortgage bond relative to the property. This bond was neither registered nor signed, according to the applicant, the terms of which provided *inter alia* that the first respondent would be indebted towards the deceased in an amount of R1 600 000, *"wat voorspruit uit skuld wat ontstaan het of mag ontstaan uit die skriftelike koopooreenkoms tussen die verbandhouer en die verbandgewer gedateer […….]"*, which would be payable in instalments of R200 000 commencing on or before 31 January 2018, with a final instalment being due on or before 30 September 2019.[6] Clause 3 of the document records that the first respondent would be entitled to occupy the property on 1 November 2018 and that occupational rental of R10 000 would be paid for the months of November 2018 to January 2019.

12 The deceased committed suicide on 16 May 2019.

13 The first respondent took occupation of the property. In correspondence from the first respondent's attorney it is recorded that the first respondent had, at

[6] The dates referred to, namely 2018 and 2019 appear to be a typographical error and should read *"2019"* and *"2020"*, respectively. Nothing turns on this.

least by the date of such correspondence[7] paid an amount of *"R225 000 … ter gedeeltelike vereffening van die koopsom"*.

14 The position which the applicant had adopted was that in the absence of any signed sale agreement in respect of the property between the deceased and the first respondent, there was no valid sale. The applicant notified the first respondent that, in terms of a valuation conducted in respect of the property during July 2019, the open market value of the property was (as at 16 May 2019), R2 250 000 and that he would consider an offer from the first respondent of R2 000 000 for the property on ordinary commercial terms and with the delivery of guarantees within 45 days if finance was required. Particulars of the alleged improvements brought about to the property was requested, as was evidence reflecting payments in respect of the alleged improvements to the property brought about by the first respondent. The applicant's attorney recorded that in the event of no sale agreement being concluded in respect of the property within 10 days of 18 July 2019 that the applicant would proceed with a public auction of the property.

15 On 5 August 2019 the applicant notified the first respondent that he had not heard from the first respondent as regards any written offer to purchase the

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[7] ie 8 August 2019.

property and that an auction was scheduled to take place on 21 August 2019 and that his agent would be making arrangements together with the first respondent for the purposes of enabling a viewing of the property to take place. The applicant also gave notice to the first respondent that he was required to vacate the property by 31 August 2019.

16 By letter dated 8 August 2019 the first respondent's attorney responded, recording *inter alia* that:

16.1 the first respondent had indeed purchased the property from the deceased in October 2018;

16.2 an agreement of sale was prepared and signed by the first respondent, but that the first respondent did not have in his possession a copy of the contract which had been signed by the deceased;

16.3 bond documents were signed by both parties, reflecting the intention of the parties at the time;

16.4 the purchase price was R1 600 000 which would be payable in instalments of R200 000 each, as set out in the draft covering mortgage bond; and

16.5 the deceased had committed suicide prior to the registration of the bond and prior to the purchase price being paid.

17 In reply and by letter dated 12 August 2019 the applicant recorded *inter alia* that:

17.1 in the absence of a written agreement in relation to the property there was according to him no sale;

17.2 in any event, the first respondent had not complied with his obligations in terms of the draft covering mortgage bond referred to;

17.3 the first respondent had been occupying the property but had not paid any rental in respect of such occupation;

17.4 the offer made by the applicant was rejected;

17.5 the alleged improvements to the property constituted normal or usual day-to-day maintenance contributions;

17.6 if the respondent wanted to make an offer in respect of the property it would be entertained on the basis of ordinary commercial terms, subject to delivery of guarantees within a period of 45 days;

17.7 it was pointed out that the portion allegedly paid towards the purchase price would be repaid and, if there was indeed evidence of any

improvements brought about to the property that he would consider making a settlement proposal in that regard; and

17.8 he trusted that the first respondent would provide his full co-operation in respect of a viewing of the property by prospective purchasers and also requested an indication from him by when he intended to vacate the property.

18 By email dated 19 August 2019 the first respondent notified the agent on behalf of the applicant as follows, following various correspondence between the parties:

> "Goeie dag,
>
> Neem asb kennis van die volgende:
>
> 1. Daar sal geen toegang tot besigtiging wees nie.
> 2. Ek het reeds begin met litigasie teen die eksekuteur, om die eiendom to mag verkoop aan 'n derde party, aangesien daar 'n geldige koop in effek is, en daardie transaksie buite die bestek van die boedel af. Hierin verwys ek graag na Me Pienaar by Delport Van den Berg Prokureurs.
> 3. Ek dring verder daarop aan dat bogenoemde aan enige voornemende koper openbaar moet word voor die veiling.
> 4. Verder moet enige voornemende koper in kennis gestel word dat ek my retensiereg sal uitoefen om te bly okkupeer tot die bogenoemde litigasie afgehandel is (moontlik oor 2-3 jaar).
>
> Alle pogings van my kant af om 'n redelike komprie met die eksekuteur van die boedel te bereik, het op dowe ore geval."

19 By email dated 20 August 2019 an attorney on behalf of the first respondent communicated with the applicant's attorney, recording as follows:

> "Beste Mnr,
>
> U onderstaande epos verwys. Ons was nie bewus van die epos wat gestuur is deur ons klient nie. Ons hou geen instruksies op hierdie stadium om 'n dagvaarding uittereik nie.
>
> Skrywer hiervan het Mnr Van Dyk geadviseer om nie die afslaers toegang vir die perseel te weier nie.
>
> Ons berig eersdags aan u ten aansien van ons verdure betrokkenheid by hierdie aangeleentheid."

20 The auction proceeded on 21 August 2019. The applicant mentions that the first respondent refused to provide access to the property for the purposes of enabling prospective purchasers to view the property. This was done contrary to the advice received by the first respondent from his attorney, as recorded above. As a consequence, several prospective purchasers left the auction.

21 In the event, the property was knocked down at a price of R1 375 000 to a prospective purchaser with a condition *"subject to viewing of the property".* The applicant has agreed with the purchaser that access to the property for the purposes of viewing would be provided within a reasonable period. The applicant says he has not accepted the offer because it is far below the market value of the property but that the offeror is prepared to increase the offer once the property has been viewed.

22 On 23 August 2019 the applicant addressed a letter to the first respondent recording all of the material events and requested access to the property for

the purposes of considering the alleged improvements with a view to resolving the claim for improvements, culminating in the demand *inter alia* that the first respondent permit the applicant and the purchaser of the property with access thereto for the purposes of viewing and to consider any alleged improvements, by 26 August 2019.

23 On 27 August 2019 the first respondent replied, disputing that he was in unlawful occupation of the property. He alleged that the improvements brought about by him to the property had increased its value by R625 000 and that he had also obtained two valuations before he purchased the property from the deceased which would support this.

24 The applicant responded the same day, recording that the only remaining matters for negotiation pertained to the first respondent vacating the property and to this end made a proposal.

25 The first respondent then made a written offer to purchase the property for R1 400 000 on 30 August 2019, conditional upon him being repaid R225 000 already paid to the deceased. It was also a term of the offer that, upon the acceptance thereof, the first respondent would abandon his lien against the property in the sum of R200 000.

26 The applicant responded on 3 September 2019, recording that he would not accept an offer of less than R1 600 000 for the property and indicated that the

estate would formally tender substituted security *apropos* the alleged lien subject to the first respondent instituting proceedings for payment of such amount.

27 Evidently, there was no further response. Proceedings were instituted on 6 September 2019. As I have already indicated, an order by consent was made in respect of the relief sought in Part A of the application, on 17 September 2019.

28 On 20 January 2020 the first respondent delivered his answering affidavit together with an application for condonation for the late filing thereof. In the event the applicant filed a replying affidavit and the matter was argued on the basis of all of the affidavits before the Court. The late filing of the first respondent's answering affidavit is accordingly condoned.

29 The first respondent explains that he is a businessman and that he remains in occupation of the property as his primary residence, together with his wife and two children.

30 The first respondent explains that when negotiations between him and the applicant broke down, he requested his attorney to communicate with the transferring attorney contemplated to attend to the transfer of the property, namely Rolanda Lemmer *"to explain to the court the structure of the purchase agreement and the intention of the parties"*. Subsequent to the first

respondent getting hold of Ms Lemmer during the first week of December 2019, Ms Lemmer sent a memorandum to the first respondent's attorney.

31 Curiously, that memorandum was not revealed or disclosed to the Court. Whatever its contents, the inference is that it is likely to rebound to the detriment of the first respondent since it was not disclosed. Be that as it may, this issue plays no part in the determination of the matter as I explain below.

32 The first respondent explains that subsequent to him concluding a sale agreement in respect of the property with the deceased during September 2018 he instructed his erstwhile attorney (presumably Ms Lemmer) to prepare the *"necessary legal documents (offer to purchase and mortgage agreement), in order to give effect to the parties' intention"*. Attached to his affidavit are copies of the said offer to purchase and covering mortgage bond. The covering mortgage bond contains a signature above Ms Lemmer's printed name, as the conveyancer, indicating that it has been prepared by her. The document records that the first respondent granted a signed power of attorney in favour of Ms Lemmer dated 23 October 2018. The first respondent alleges that *"both parties duly signed the said agreement"* on that day. It is not evident where the deceased is alleged to have signed this document, although the document does indeed contain various initials. The first respondent's explanation is that Ms Lemmer prepared the *"agreements"* and scheduled a consultation together with him and the deceased for 23

October 2018. He explains that the parties could only sign the covering mortgage bond on that day *"due to the fact that my attorney could only print the mortgage agreement as a result of loadshedding. I do however confirm that the contents of the mortgage agreement embody exactly the same terms and conditions of that of the sale agreement. Both parties duly signed the said agreement on this day".*

33 Regarding the explanation, one is left to speculate as to:

33.1 what became of matters between 23 October 2018 and when the deceased died (on 16 May 2019). During this period, almost seven months had elapsed, without the deceased having signed the agreement of sale;

33.2 the failure to obtain a confirmatory affidavit from the first respondent's erstwhile attorney, Ms Lemmer, as to the first respondent's version as to what transpired;

33.3 the contents of Ms Lemmer's memorandum in relation to the matter which she sent to the respondent's attorney;

33.4 the contents of Ms Lemmer's file, which is likely to have contained correspondence which may have shed further light on matters;

33.5 declarations to SARS by both the first respondent and the deceased are likely to have been prepared as well.

34 The applicant disputes that the covering mortgage bond agreement put up by the first respondent was in fact signed by the deceased.

DISCUSSION

35 The matter boils down to a legal question which can be determined on the basis by accepting (without deciding) that the deceased did indeed sign the mortgage bond document as alleged and put up by the first respondent.

36 The issue for determination is thus whether the covering mortgage bond constitutes a deed of alienation, for the purposes of the Act. This is the basis contended for in the first respondent's answering affidavit, although in the written submissions and oral argument counsel sought to buttress this with the unsigned offer to purchase.

37 In *Legator McKenna,*[8] Brand JA answered a similar question when it was contended that the execution of conveyancing documents sufficed for the purposes of the Act, and said as follows :[9]

> "…It was contended in argument that the Erskines did so when they executed the conveyancing documents. Apart from the fact that it does not appear from the agreed facts what conveyancing documents, if any, the Erskines had executed, I have a more fundamental difficulty with this contention. It arises from the requirement in s 2(1) of the Alienation of Land Act 68 of 1981, namely that a sale of land can only be valid if contained in a written deed of alienation, signed by both parties or their agents acting on their authority. Although the execution of conveyancing documents could conceivably constitute an implied acceptance by conduct, such acceptance would not satisfy the requirements of this Act. That much was expressly held in *Jackson v Weilbach's Executrix* 1907 TS 212. In that case there was no written agreement of sale. Nonetheless it was argued that the declarations signed by both the purchaser and the seller for transfer duty purposes constituted a written agreement within the meaning of s 30 of Proc 8 of 1902, which was the predecessor to s 2(1). To this argument Innes CJ gave the following answer (at 216):

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[8] *Legator McKenna Inc. v Shea* 2010 (1) SA 35 (SCA). It was held that a binding contract could only be brought about by an acceptance which corresponded with the offer in all material aspects. Since the second respondents offered an unconditional agreement while the second appellant agreed to a conditional one, the second appellant did not accept the offer by the second respondents. As a matter of law his purported acceptance constituted no more than a counter-offer. (Paragraph [17] at 42G - I.) It was held, accordingly, that for a valid contract to have come into existence, the second respondents would have had to accept the second appellant's counter-offer, but that a more fundamental problem with the agreement was that it had not been reduced to writing and signed by both parties, as required by s 2(1) of the Act. The purported sale was never properly concluded.

[9] At para 18.

> 'But do these declarations of purchaser and seller constitute such a contract? In form they certainly do not; the declaration of the seller is not an offer, and the declaration of the purchaser is not an acceptance. Nor is there anything to show that the parties, when they signed these declarations, intended to enter into any contract. The declarations were signed for revenue purposes, and they purport not to embody a contract constituted in terms of the documents themselves, but to record that a prior contract had been entered into at a date therein mentioned.'
>
> (See also eg Van Zyl v Potgieter 1944 TPD 294 at 296; Meyer v Kirner 1974 (4) SA 90 (N) at 102D - H.)"

38 Counsel called in aid the decision in *Craib,*[10] where it was held that the requirements of section 2(1) of the Act could be met by two or more documents read together. In this regard the first respondent sought to place reliance upon the covering mortgage bond, together with the unsigned deed of sale (which is alleged to contain terms identical to those in the covering mortgage bond), which, so it is contended, shows that the parties had the requisite *animus contrahendi*. There are a number of difficulties with this proposition:

38.1 The first respondent has not explained how he came into possession of the unsigned deed of sale. Neither is it alleged anywhere in the papers that the deceased had, in fact, been presented with that

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[10] *Craib v Crisp* 1984 (3) SA 594 (T).

document before his untimely passing – at the lowest, at least some indication which might have provided some insight as to the deceased's *animus*.

38.2 The covering mortgage bond and the deed of sale relative to the property serve different purposes. While a mortgage bond, once registered, serves as a real right and affords security against the subject matter encumbered, in favour of the mortgagee, a deed of sale serves to record the parties' intentions to the sale of immovable property from one to the other whereby personal rights and obligations are created. The covering mortgage bond illustrates the distinction, recording an indebtedness for a principal sum *"wat voorspruit uit skuld wat ontstaan het of mag ontstaan uit die skriftelike koopooreenkoms tussen die verbandhouer en die verbandgewer gedateer 23ste Oktober 2018 …".* Its terms expressly contemplated the conclusion of the deed of sale between the parties.

38.3 The terms of the unsigned deed of sale are not identical to the terms of the covering mortgage bond, as alleged. In this regard, the following clauses of the deed of sale are absent from the covering mortgage bond:

38.3.1 Clause 6 ("*voordeel en risikos*");

38.3.2 Clause 7 ("*professionele fooie*");

38.3.3 Clause 8 ("*kontrakbreuk*");

38.3.4 Clause 9 ("*koper as regspersoon*");

38.3.5 Clause 10 (*"arbitrasie"*);

38.3.6 Clause 11 (*"oordrag"*);

38.3.7 Clause 12 ("*aanhegtings en verbeterings*");

38.3.8 Clause 14 (*"domicilium"*);

38.3.9 Clause 15 ("*sertifikate*"*);*

38.3.10 Clause 16 (*"vertragings"*);

38.3.11 Clause 17 (*"grootte en ligging"*);

38.3.12 Clause 18 (*"afkoelperiode"*).

39 *Craib* does not assist the first respondent. That case dealt with the position where the seller of immovable property who did not sign the offer to purchase thereby signifying her acceptance of the offer, nevertheless signed a telegram form (by way of a separate document and in respect whereof there was no dispute that she had indeed signed the telegram form) which was transmitted to the estate agent involved. It was held that this constituted a

valid sale for the purposes of the Act – the deed of alienation in that case constituted the deed of sale together with the signed telegram by *Craib*, accepting the terms of the offer. The present facts are, however, a far cry from those in *Craib.*

40 In the result, I find that the covering mortgage bond, whether read together with the unsigned deed of sale, or not, does not constitute a valid deed of alienation for the purposes of section 2(1) of the Act.

41 Counsel placed reliance upon the judgment in ***Gundwana*** [11] for the proposition that the fate of the application should await the outcome of the action instituted by the first respondent against the applicant for enforcement of the sale agreement between him and the deceased and for an order that the property be transferred to him. The underlined passage of *Gundwana* upon which reliance is placed is an *en passant* remark by Froneman J at paragraph 25 thereof where the following was said :

"[25] In similar vein the Bank argued that direct access in the rescission application should be refused because that application is still pending in the High Court, and it is not in the interests of justice for this court to hear the matter as a court of first and last instance. There are two aspects informing the interests of justice that militate against acceptance of this contention.

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[11] *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 CC

The first, narrower, one is that to separate the rescission application from the eviction order in this manner would have the inevitable result that the applicant will lose her home. The eviction order would become final, without any further possibility of setting it aside, even if the rescission application is eventually successful. The second aspect is of wider import, and I turn to it now." (emphasis added)

42 In *Gundwana* it was held that it is unconstitutional for a registrar to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules to the extent that this permits the sale in execution of a person's home.[12] Bearing in mind a court's powers in terms of section 172 of the Constitution, when deciding a constitutional matter within its power, including the power to make any order that is just and equitable, the Constitutional Court decided that the pending rescission application before the High Court should be referred back to the High Court, with the parties being granted leave to supplement their papers in the light of the Constitutional Court's judgment – with the High Court to then determine the rescission application, in accordance with the guidelines set out in the order made by the Constitutional Court. The issue for determination before this Court is whether the covering mortgage bond, read together with the

[12] Id, at par 65

unsigned deed of sale, or not, constitutes a valid deed of alienation for the purposes of section 2(1) of the Act. I have determined that it does not. The fact that the first respondent may have sought a determination by way of action for an order to the contrary matters not. This Court is already seized with the determination of that issue.[13] Were that not the case then the applicant must, without further ado, succeed in vindicating the property from the first respondent. However, the first respondent's defence is that he has a right to possession of the property – an onus which he must discharge.

43 During argument I was informed that the first respondent had instituted the foreshadowed action and I was provided with a copy of the unsigned particulars of claim without attachments. These events are off the papers and it is best they remain as such, suffice to state that they do appear to advance a claim for enforcement of the sale agreement as contended for by the first respondent. The fact that the action may engage on the same issue for determination in this application matters not – the question is whether this Court is able to determine the issue on the papers. I have found that it can, against the first respondent.

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[13] There can be no misapprehension – the first respondent alleges that his "*opposition of this application for eviction is thus based on the fact that a legal sale of the Property is in place and that my lawful right to ownership is protected*". (p206 par 6.1)

44 The reliance upon *Gundwana* does therefore not assist the first respondent.

45 The first respondent has accordingly failed to discharge the onus of proving a right to possession of the property.

46 The first respondent placed very little, if anything, as regards facts as might assist the Court insofar as PIE is concerned in determining whether or not to grant an order or in determining the date on which the property has to be vacated in the exercise of the Court's discretion as to what would be just and equitable.

47 Where an eviction application is opposed and a respondent is legally represented, the legal practitioners representing the respondent are under a positive duty, as officers of the court, to ascertain the relevant facts and place them before the court. As the Constitutional Court affirmed in *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) para 47, the obligation to provide the information relevant to the justice and equity enquiry envisaged in s 4 of PIE rests first and foremost on the parties to the proceedings, and attorneys and advocates, as officers of the court, must furnish the court with all relevant information in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction.

48 If the requirements of section 4 of PIE are satisfied and no valid defence[14] to an eviction order has been raised, the Court "must", in terms of section 4(8) of PIE, grant an eviction order. When granting such an order the court must, in terms of section 4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises.[15] The date that the court determines must be one that is just and equitable to all parties.[16]

49 The applicant's responsibilities are, as executor of the deceased's estate, to dispose of estate assets; to effect payment of claims to creditors; to lodge a liquidation and distribution account with the Master; and to distribute the inheritance to the heirs in terms of the last will of the deceased and estate account. The deceased's surviving spouse is the sole heir of the estate. The estate is, unquestionably, prejudiced by the continuing state of affairs.

50 I am satisfied that the first respondent and his wife will have immediate access to and be able to afford an alternative place of residence and basic services. It transpires that the first respondent's children do not, in fact,

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[14] This refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304H)

[15] *Changing Tides* at 304E; *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village* 2013 (1) SA 583 (GSJ) at 592E-F and 595D-F

[16] *Changing Tides* at 305B

occupy the property at present. The first respondent is not destitute (by his own admission he is a businessman) and there is, indubitably, an abundance of alternative accommodation available against the backdrop of the first respondent's financial means. He was able to make another offer to purchase the property from the applicant, *albeit* rejected. He has been able to afford the legal representation of both an attorney and counsel in these proceedings and the pending action. That, no doubt, has not come at an inconsiderable cost to the first respondent. I have also taken into account the age of the first respondent – he is currently 58 years old (having regard to his identity number stated in the mortgage bond and deed of sale documents).

51 Having considered all relevant circumstances, in my judgment it would be just and equitable that the first respondent and his wife be afforded until 31 October 2020 to vacate the property with a view to making alternative arrangements.

52 In the result, the continued occupation of the property is unlawful and an eviction is to follow. But that is not the end of the matter.

COVID-19

53 In the course of preparing this judgment the question arose, in circumstances where a court is called upon to determine whether an order for eviction

should be granted, what facts and circumstances are to be taken into account having regard to the regulations promulgated and applicable, from time to time, in terms of the Disaster Management Act, 2002 ("the DMA") pursuant to the COVID-19 pandemic being declared a national disaster in terms of that Act.

54 The affidavits did not contain any facts as might be relevant in the determination of such question due to the fact that the affidavits had all been prepared and exchanged prior to the pandemic being declared a national disaster. Accordingly, the parties were invited to place any facts as might be relevant to the question by affidavit and to file supplementary submissions. Both parties took the opportunity of doing so.

55 The first respondent was afforded a second bite at the cherry despite not having assisted the Court in the determination of what would be just and equitable in terms of PIE. Although it would seem that the evidential burden is on the unlawful occupier to demonstrate the existence of circumstances meriting the limitation of the owner's right to possession, it is inappropriate to fix the ultimate burden of proof on either side.

56 In terms of General Notice 891 of 2020 published in the Government Gazette GG43620 on 17 August 2020, in terms of the DMA, Alert Level 2 was

announced, which would apply from 18 August 2020. Regulations pertaining to Level 2 were published the same day. Regulation 53 provides as follows :

Eviction and demolition of places of residence

53. (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.

(2) A competent court may suspend or stay any order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to-

(a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;

(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these regulations;

(c) the impact of the disaster on the parties;

(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the person who will be subject to the order;

(e) whether any affected person has been prejudiced in his or her ability to access legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including, but not limited to, payment arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing any application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of any emergency accommodation or quarantine or isolation facilities pursuant to these regulations.

57 Regulation 53(1) makes it clear that that a person may not be evicted from his or her place of residence for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction.

58 Subregulation (2) provides that a court *may* suspend or stay any order for eviction contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just and equitable to suspend or stay the order, having regard "*in addition to any other relevant consideration*" the factors referred to in subregulation (2)(a)-(i).

59 A court is not obliged to suspend or stay an order granted in terms of subregulation (1). Whether or not a court, upon granting an order contemplated in subregulation (1), decides to suspend or stay any such order will depend upon what facts are put up by the parties relative to the factors referred to in subregulation (2)(a)-(i) "*in addition to any other relevant consideration*". Thus, where a respondent subject to any eviction order being granted puts up facts addressing such factors as referred to in subregulation (2)(a)-(i) in addition to such other relevant consideration, then a court may decide to suspend or stay the operation of any order for eviction until after the lapse or termination of the national state of disaster unless it is not just and equitable to suspend or stay the order. Likewise, this involves an assessment of facts put up by an applicant in favour of whom such an

order would operate. Notably, the suspension or stay of any contemplated order for eviction, as provided for by subregulation (2) is one which is contemplated for the entire duration of the national state of disaster. A court, if deciding to stay or suspend any such order, would do so until after the lapse or termination of the national state of disaster. When the national state of disaster is likely to be terminated is anyone's guess. It will lapse, unless it is extended each month, as contemplated by section 27(5) of the DMA. As matters stand, it is likely that the national state of disaster is likely to be with us for some time yet.

60 In terms of General Notice 998 of 2020 published in the Government Gazette GG43719 on 18 September 2020, in terms of the DMA, the determination of Alert Level 1 was announced, which would apply from 21 September 2020. Regulations pertaining to Alert Level 1 were published the same day.

61 Regulation 70 mirrors regulation 53 – they are identical in their terms.

62 The applicant points out that there is a pending sale in respect of the property; that the transaction is at peril of being lost to the estate which would result in the winding up of the estate being delayed. There is also a concern that the continued state of affairs may lead to insolvency of the estate; that the first respondent has never claimed to be impecunious and that there is no other residence available to him; given that the first respondent could afford

to purchase the property for the sum concerned, that there are numerous other properties available to the first respondent; and that the regulations promulgated under the DMA would not present difficulties as to the movement of persons and removal companies are fully functional. The applicant puts up tax invoice from the second respondent in relation to the property ostensibly for the period of July 2020, in an amount of R17,015.00 as being due to the second respondent. It is comprised of charges for electricity, water and sanitation. The balance brought forward in that invoice reflects an amount due of R14,404.78. The applicant points out that the first respondent has not paid anything to the deceased estate since June 2019 and has failed to effect payment of monthly service charges to the second respondent. The applicant points out further that in order to give transfer to a purchaser the estate will need to settle the arrears in order to receive a clearance certificate.

63 The first respondent puts up the following averments :

"a) I am a Type 1 Diabetic and as such has been forced to work from home from the onset of level 5. Currently it is only myself and my wife who occupies the home in order to minimalize contact with others as much as possible . It is well documented that this condition falls within the high-risk category of comorbidities. I have been taking tremendous care to protect my health. Nonetheless, my health has suffered as a consequence of all the stresses that I have been experiencing . My HBA 1 C blood sugar indicator has resultedly risen from 9.1 to 11.7, which is extremely high.

b) I have been restricted to work from home by my employers. Since I am a Financial Adviser, has this limitation impacted by work performance substantially. Under normal circumstances would I arrange and set up appointments with clients and travel to meet with them. My wife on the other hand is a free-lance piano teacher. Her ability to work and earn has equally been affected by the national state of disaster since her work involves giving and demonstrating practically to her students face to face.

c) This disaster has had an extremely negative impact on us. My ill health is a great cause of concern to us. My job security and that of the overall job security in the financial industry has suffered and has had to reshape to adjust to the utilisation of electronic media to get work done. This has proven especially since the onset, to very difficult and for the first 4 - 5 months to the extent that virtually no new business was concluded. Clients has equally been resistant to the adjustment. I am advised by management that the insurance industry has had an overall decline of 80% new business submissions over the period so far. I have had 5 months of very, very low income. My lost (sic) has equally lost about 75% of her income.

d) We do not have immediate access to alternative places of residence.

e) No adequate measures are in place to protect my health or any other person in the process of relocation.

f) We have made an advance payment of R 225 000. The applicant however has not taken any reasonable steps in good faith to make alternative arrangements with me."

64 These allegations is a study in bald assertion-making. It would be expected of a respondent, faced with an eviction application, when advancing

allegations of the sorts above, to provide adequate detail. A doctor's report in support of the first respondent's alleged medical condition was, evidently, not considered necessary. No details concerning first respondent's income and expenditure were furnished. Add to that the absence of a balance sheet. Then follows the bald assertion that he and his spouse "*do not have immediate access to alternative places of residence*" and then that "*no adequate measures are in place to protect my health or any other person in the process of relocation*".

65 Where the affidavits are silent on matters which the first respondent should be able to address with relative ease, a satisfactory explanation should be provided for the omission. In the absence thereof, a court may be justified in drawing the inference that a bald assertion of impecuniosity or homelessness is not genuine and credible.

66 Respondents in eviction proceedings who have the benefit of legal representation cannot be permitted to content themselves with bald, unsubstantiated averments of homelessness. They must be made to understand that if they do, they run the risk that the court may infer that the assertions regarding inability to afford alternative accommodation and the risk of homelessness are not genuine and bona fide, and may be rejected merely on the papers (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)*

Ltd 1984 (3) SA 623 (A) at 635C; cf *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) (paras 12 and 13)).

67 Despite having been afforded the opportunity of placing facts before the Court, the first respondent's allegations to do measure up to the requisite standards and must suffer the consequences.

68 The first respondent's conduct in not paying for any consumption charges in relation to the property, despite whatever claims he might have to the property, is appalling. This conduct is consistent with his threat of lawfare and tying the estate up in protracted litigation. The first respondent's conduct in making payment of the consumption charges relative to the property for July 2020 of R2,612.00 is made late in the day and opportunistic. There remains an absence of any accompanying payment for arrear consumption charges, evidently since taking occupation, and the first respondent has failed to tender payment of all consumption charges as and when they are payable to the second respondent, going forward. This presents an intolerable state of affairs.

69 In the circumstances, I conclude that it would not be just or equitable to suspend or stay the order until after the lapse or termination of the national state of disaster, as contemplated by regulation 70.

COSTS

70 The first respondent took advantage of matters. He has, for a considerable period, remained in occupation of the property without cost. The estate of the deceased is faced with considerable expenses, including the expenditure of utilities provided in respect of the property, and consumed by those in occupation of the property. Those expenses ought to have been tendered despite the litigation, but were not.

71 I do not lose sight of the fact that the first respondent disregarded the advice of his attorney – by preventing access to the property for the purposes of enabling it to be viewed. Those events precipitated the launching of the application and the need for the urgent relief in Part A.

72 The first respondent also sought to take advantage of matters, threatening a Stalingrad approach by tying-up the estate with litigation for 2-3 years. The action instituted by the first respondent, despite engaging on the same issue for determination in this application, is supportive of such an approach.

73 The first respondent's conduct has been dilatory and unreasonable.

74 Accordingly, a punitive costs order on the scale as between attorney and client is warranted.

In the result I make the following order :

1. The late filing of the first respondent's answering affidavit is condoned.

2. The first respondent, and all those who occupy the following property through the first respondent are ordered to vacate the following property by 31 October 2020 :

   Erf 1686 Montana Park
   Extension 29 Township
   Registration Division J.R.
   Province of Gauteng
   In extent: 1028 square meters
   Held by Deed of Transfer No.: T079381/1994
   also better known as 726 Norman Street, Montana Park, Pretoria
   ("*the property*")

3. In the event that the first respondent, and all those who occupy the property through the first respondent, failing to vacate the property by 31 October 2020, the Sheriff shall be authorised to take all steps reasonably necessary, including but not limited to obtaining the assistance of the South African Police Services, to evict the first respondent, and all those who occupy the property through the first respondent, from the property.

4. The first respondent is to pay the costs in relation to Parts A and B of the application on the scale as between attorney and client.

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GW GIRDWOOD
Acting Judge of the High Court

Appearances:

For Applicant:	Adv D Van den Bogert instructed by EY Stuart Inc, Pretoria (ref : EYS/MS/MAT54483); eys@eyslaw.co.za
For First Respondent:	Adv N Terblanche instructed by MJ Lombard Inc, Monument Park (ref : DAU0188); mlombard@live.co.za
Date heard:	5 May 2020
Date of judgment:	22 September 2020