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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 2314/2014

In the matter between:

KYLE KENNETH GREEN

APPLICANT

and

P PILLAY

FIRST RESPONDENT

SHARON ADIKRISHNA

SECOND RESPONDENT

ETHEKWINI MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

Date of Judgment delivered: 1 September 2014

CHETTY, J:

[1] The applicant, Mr Green, instituted proceedings against the first respondent, Mr Pillay, seeking his eviction and that of all other persons holding through him, from the immovable property situated at 17 P[...] Road, Unit 19, B[...], Durban, KwaZulu-Natal. The applicant is the registered owner of the immovable property in question, such properly having been purchased from the second respondent, Sharon Adikrishna and her late husband, Adikrishna Adikrishna. The second respondent is cited as she was a party to an agreement for the sale of the immovable property, in which she undertook to

give vacant possession thereof to the applicant upon registration of transfer. As will appear from what is set out below, the second respondent's support for this application follows upon two failed attempts by her to secure the first respondent's eviction.

[2] It is not in dispute that the applicant and the second respondent, together with her late husband, entered into an agreement of purchase and sale on 31 March 2012 in respect of the immovable property. Of particular importance to the present application are the following terms of the purchase and sale agreement:

- a. Clause 4 provides that 'ownership of the property shall pass to the purchaser upon registration of transfer'.
- b. Clause 5 provides that the
'tenants presently in occupation of the property shall remain in possession and occupation of the property to the date of registration of transfer of the property to the purchaser. The sole risk of loss or profit to the property shall pass to the purchaser from the date of registration.'

[3] At the time when the agreement was concluded, the property in question was already occupied by the first respondent, whose brother is the late husband of the second respondent. According to the first respondent, he had been allowed to live on the premises *in lieu* of him taking care for their ailing mother. Given this background, it is strange that the second respondent disavows any relationship to the first respondent, pausing only once to refer to the late Mr Adikrishna as his brother. Notwithstanding, the second respondent's affidavit in earlier eviction proceedings in this Court under case number 11086/2013 sheds more light on the circumstances under which the first respondent came to occupy the property. According to the second respondent, the first respondent and her late mother-in-law resided in one of the properties owned by herself and her late husband in Sherwood, Durban. As a result of the sale of that property, her mother-in-law and the first respondent relocated to the property currently occupied by the first respondent. The intention of the second respondent and her late husband at the time was for the first respondent to reside on the property, rent free, for as long as he

continued to care for his ailing mother. This arrangement, so the second respondent contends, came to an end with the death of her mother-in-law.

[4] The first respondent denies that his right to occupy the property terminated on the death of his mother. He contends that his late brother gave him a right to occupy his properties (without specification) for life, on account of the first respondent having taken care of their ailing mother. He understood at all times, as set out in his plea, that he “might have to move around”, presumably meaning from one property to another owned by his late brother. It is not disputed that even during his brother’s lifetime, eviction proceedings were instituted against the first respondent. According to the second respondent, the first respondent failed to honour repeated promises to leave the property. The first respondent annexed to his answering affidavit a letter he received from attorneys acting on behalf the second respondent in December 2010 giving him notice to vacate the property by 31 January 2011. An agreement was reached between the first and the second respondents in terms of which the former signed an undertaking to vacate the premises by 31 March 2011. According to the second respondent, he withdrew his undertaking attributing this to a ‘personal agenda’ which the second respondent had against him.

[5] In the intervening period, the second respondent and her late husband concluded an agreement of purchase and sale with the applicant in respect of the property on 31 March 2012. According to the applicant he used his savings and secured a bank loan in order to purchase the property, of which he took transfer upon registration at the Deeds Office, Pietermaritzburg on 14 March 2013. Shortly before taking transfer, the second respondent’s husband to whom she was married in community of property, passed away on 26 February 2013. The second respondent was named the sole heir to his estate and the nominated executor. She was issued with a Letter of Authority by the Master on 24 April 2013.

[6] The second respondent then called upon the first respondent to vacate the property, which he refused. The second respondent subsequently brought proceedings

for the eviction of the first respondent under case number 11086/2013. When the matter came before Kruger J on 27 November 2013 he dismissed the application on the grounds that the applicant (Sharon Adikrishna) had not satisfied the Court that she was either the owner or the person in charge of the property for the purposes of an order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (referred to as 'PIE'). A perusal of the transcript of the proceedings on 27 November 2013, annexed to the papers, confirms that Kruger J took the view that the second respondent lacked the necessary *locus standi* to seek the first respondent's eviction. It is clear that at the time when she sought to institute proceedings to evict the second respondent, transfer of the immovable property had already passed to the applicant (Green) on 14 March 2013. The only person competent to have instituted proceedings for eviction, in the circumstances, was the owner, Mr Green.

[7] The applicant then made various approaches to the first respondent to vacate the premises. All of these attempts came to naught, resulting in the present application for eviction. The crux of the applicant's case is that he is the registered and lawful owner of the property and that the first respondent is in unlawful occupation. In accordance with the principles set out in *Chetty v Naidoo* 1974 (3) SA 13 (A), once the plaintiff succeeds in proving ownership and that the defendant is in occupation, the onus shifts to the defendant to show that his occupation is lawful. The Court in *Chetty's* case expressed itself at 20A-E stating the following:

"The incidence of the burden of proof is a matter of substantive law (*Tregea and Another v. Godart and Another*, 1939 A.D. 16 at p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v. Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v. Gengemma*, 1954 (4) S.A. 468 (N) at pp. 470H-471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g.,

a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*—the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena v. Minister of Lands*, 1955 (2) S.A. 380 (A.D.) at pp. 382E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (*Krugersdorp Town Council v. Fortuin*, 1965 (2) S.A. 335 (T)).

[8] It is not in dispute that the applicant complied with the procedural safeguards contained under PIE in seeking the eviction of the first respondent. Mr Havemann, who appeared for the first respondent, accepted that his client's case rested on two defences: firstly, whether the first respondent had an unregistered usufruct or a right of habitation to remain on the property. The second ground of opposition is whether the registration of transfer of ownership to the applicant was lawfully effected on 14 March 2013. This ground of opposition is based on the contention that as the late Mr Adikrishna died on 26 February 2013, the property in question would immediately have to devolve into and form part of the deceased estate. As the late Mr Adikrishna and his wife (the second respondent) were both owners of the property and married in community of property, the registration of the transfer ought not to have gone ahead. As I understood Mr Havemann's argument, the applicant (despite the registration in the Deeds Office) did not become the owner because only the deceased estate would have been able to pass on ownership to the applicant.

[9] As to the first ground of opposition, Mr Naidoo who appeared for the applicant contended that the first respondent has advanced no valid basis in law to occupy the property against the will of the applicant. The first respondent's defence, as pleaded, is that his late brother granted him a 'life tenure' to reside on any of his brother's properties, on account of him having taken care of their mother. In furtherance of his contention that this right did not pertain to any particular property, or to the property which is the subject matter of this application, he states in his affidavit that 'at all material times I understood that I might have to move around.' This version is disputed by the second respondent who contends that the arrangement between her late

husband and the first respondent only permitted him to remain, rent free, on the immovable property which is the subject of this application. That limited right of occupation was made contingent on him caring for his mother. Upon her death, that right came to an end. The question which arises is whether on the defendant's own version, he had had a lawful basis to remain on the property, which right of occupation was terminable at his will alone.

[10] In terms of section 65 and 67 of the Deeds Registries Act 47 of 1937 any usufruct or right of *habitatio* must be registered against the title deeds of the property in question. The first respondent has made no mention whatsoever of the registration of such a right. Absent any registration against the title deeds, the reliance on a right of *habitatio* must accordingly fail. I now turn to the second ground of opposition where reliance is placed on the death of the late Mr Adikrishna, a co-owner of the immovable property, as constituting reason why transfer of the property could not validly pass to the applicant. Counsel for the applicant contends firstly that the first respondent has no *locus* to contest the validity of the sale or the registration of transfer of the property to the applicant in as much as he was not a party to either the sale or to the process that led to the applicant taking transfer. In this regard see *Rinaldo Investments (Pty) Ltd v Giant Concerts CC* [2012] 3 All SA 57 (SCA) ZASCA 34 para 14 where the Constitutional Court made the following remarks as to the interest of a party to litigation, albeit in the context of section 38 of the Constitution:

'How is the question as to whether a person has an interest in particular litigation for purposes of s 38(a) to be determined? Even though s 38 has, generally speaking, widened the scope of standing beyond the common law rules that applied in the pre-1994 era, that does not mean that everyone who alleges an infringement of a fundamental right has an unfettered right of access to court. In the words of Sir William Wade and Christopher Forsyth, (albeit in a different context) a successful challenge to administrative action is only possible, as a starting point, if 'the right remedy is sought by the right person in the right proceedings'. (This statement was approved by this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*) The "right person" is one who has what is regarded as a sufficient interest in the subject matter of the dispute.'

[11] It was contended further that the first respondent has not filed any counterclaim to set aside the transfer. In the absence thereof, it was submitted on behalf of the applicant that this Court is obliged to regard the registration of transfer as being legally binding irrespective of the value of the argument raised by the first respondent that upon the death of the late Mr. Adikrishna, only his estate could validly pass ownership of the property to the applicant. In this regard, see *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) where it was authoritatively held that until an administrative illegality is set aside by a Court, it exists in fact and in law, and has legally valid consequences. The Court went on to add the following:

‘[26] Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. *Until the Administrator’s approval (and thus also the consequences of the 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.* The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter: Administrative Law 355: “There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are ‘voidable’ because they have to be annulled.”

[12] A similar approach was adopted in *Motsiri v Sheriff of the High Court* 2013 JDR 1477(GSJ) where the applicant opposed the order for his eviction on the grounds that

the party seeking his eviction had improperly obtained transfer of the property. The party seeking the eviction had a Title Deed in its name and the applicant opposing the order was unable to refute the contention that the property in question was sold in execution to the respondent. Although the applicants implied that there could have been some impropriety in the transfer and the registration process, the Court was persuaded that the existence of the Title Deed in the name of the respondent was enough to prove that the respondent was indeed the registered owner. In arriving at its decision, the Court referred to the extract from *Oudekraal* referred to above. The application of the *Oudekraal* dictum is apposite only if a Court is satisfied that the conduct in question constitutes an 'administrative action'. As the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 141 held,

'What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. ... The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant public actor belongs, but on the nature of the power he or she is exercising.'

[13] Applying that test to the present matter, the enquiry must therefore be solely not whether the Registrar of Deeds is exercising a public power in effecting the transfer of ownership of property from one person or entity to another, but whether the task itself can be regarded as 'administrative' in substance. It would appear to me (this point not having been argued by either of the parties) that the act of issuing the Title Deeds pursuant to lodgement in the transfer process, is largely or exclusively dependent on whether certain prescribed formalities in the Registration of Deeds Act have been complied with. If all those documents are properly in order, transfer must follow. On the other hand, the issue of whether the issuing of the Title Deed by the Registrar of Deeds, although exercising a public power, is a mechanical or procedural act, is a debate that contemplates whether the action is procedural or formal, this enquiry is not essential to the outcome of the matter before me.

[14] The decision in *Nedbank Ltd v Mendelow and Another* NNO 2013 (6) SA 130 (SCA) is however authority for whether actions by the Registrar of Deeds or the Master can be regarded as administrative action. I set out at length the extract from the dictum of Lewis JA as it provides a definitive answer to the argument raised by the applicant's counsel:

'[22].....But I do wish to say something more about the finding of the high court that the conduct of the Master and of the Registrar of Deeds amounted to administrative action which was subject to review.

[23] The executors argued in the high court that the conduct of the Master and of the Registrar of Deeds amounted to administrative action reviewable under the PAJA. And the basis of the orders granted by the high court was indeed that because the action of the state officials was induced by the fraud of Riccardo, the Master's certificate, the transfer of the property to the company and the registration of the bond in favour of Nedbank should be set aside by virtue of ss 6 and 7 of the PAJA.

[24] As I said in *Kuzwayo v Representative of the Executor in the Estate of the late Masilela*, not 'every act of an official amounts to administrative action that is reviewable under PAJA or otherwise'. I found there that the act of signing a declaration by a director-general of the Department of Housing to the effect that a site permit be converted into the right of ownership, and the signing of the deed of transfer giving effect to that declaration, were simply clerical acts.

[25] Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal effect on an individual. A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of the PAJA or even under the common law. As Nugent JA said in *Grey's Marine*:

"Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. . . ."

[26] A distinction must thus be drawn between discretionary powers and mechanical powers. Professor Hoexter points out that a mechanical power involves no choice on the part of the holder of the power. A discretionary power, on the other hand, does impose

such a choice. Whether the Master or the Registrar exercises a mechanical power or one that is discretionary involves an enquiry as to what he or she is called upon to do. There may be situations where the functionary is required to make genuine decisions whether to perform a duty. But where the requirements for registration have been met no choice is given to the Registrar. Section 3(1) of the Deeds Registries Act 47 of 1937 imposes a duty on a Registrar of Deeds to, inter alia,

“(d) attest or execute and register deeds of transfer of land, and execute and register certificates of title to land;

. . .

(r) register any real right, not specifically referred to in this subsection, and any cession, modification or extinction of any such registered right; . . .”

[27] In *Cape of Good Hope Bank v Fischer* De Villiers CJ said:

“The Registrar of Deeds in this Colony is entrusted with the formal duties formerly performed by judicial officers, but *his chief duties are of a ministerial nature, and consist in registering deeds and bonds duly passed before him.* . . .”

[My emphasis.]

The Chief Justice also stated that if a properly executed mortgage bond were presented to the Registrar for registration 'it is his duty to register it in the manner required by law'.

[15] In light of the above authority, Mr Naidoo's reliance on the *Oudekraal* decision does not assist the applicant as I accept that the Registrar of Deeds, in registering the property into the name of the applicant, was not carrying out a function that amounted to administrative action.

[16] The next ground relied on by the applicant for the dismissal of the respondent's opposition to the eviction application is based on the abstract theory of transfer. The first respondent contends that as the second respondent's husband, Mr Adikrishna, died shortly before the date of the transfer and registration took place, the transfer was materially defective and a nullity because any powers granted to the late Mr Adikrishna's attorneys to effect transfer ceased to have any effect upon his death. His share in the joint estate should, as I understood the argument by Mr Havemann, have formed part of the deceased estate. The latter, it was contended, was unable to pass transfer to the applicant. As pointed out earlier, the second respondent was appointed

as the executor to her late husband's estate, and she was the sole heir. Mr Naidoo submitted that this argument falls short on the basis of the abstract theory of transfer which states that the validity of transfer of ownership is not dependent on the validity of the underlying legal transaction. The Supreme Court of Appeal in *Legator McKenna Inc v Shea and Others* [2009] 2 All SA 45 (SCA) approved of the application of the abstract theory of transfer to immovable property. Brand JA held that in order for ownership of immovable property to pass in terms of the abstract theory of transfer, two requirements had to be met:

'namely delivery (which in the case of immovable property, is effected by registration of transfer in the Deeds Office) coupled with a so-called real agreement or "saaklike ooreenkoms". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) at 922E–F; *Dreyer and another NNO v AXZS Industries (Pty) Ltd* (*supra*) at paragraph 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements.'

[17] Counsel for the applicant submitted that the transfer and registration of the property into the name of the applicant, despite the death of Mr Adikrishna prior thereto, survives any attack of invalidity by virtue of the abstract theory of transfer. It was pointed out that the second respondent and her late husband, who were the registered owners of the property entered into a valid and binding agreement of sale with the applicant on 31 March 2012. The intention of all parties was that ownership would pass upon the applicant (the purchaser) paying the agreed purchase price for the property. Ownership would pass on registration of transfer. On that basis, it was submitted that all the parties (including Mr Adikrishna until the time of his death) acted in accordance with the underlying contract between the parties.

[18] The procedure contemplated to secure an eviction in terms of PIE is set out in section 4 of the Act, the relevant sub-sections are set out below:

'(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 of execution pursuant to a mortgage, whether 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).
- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.’

[19] The Court in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) has set out the procedural threshold to be satisfied by an applicant for eviction. This is evident from what appears below:

‘[17]The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of section 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner’s full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in section 4 envisage.

[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (section 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf *Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd* (“*Perskor*”) 1992 (4) SA 791 (A) at 800, *Knox*

D'Arcy Ltd and others v Jamieson and others 1996 (4) SA 348 (A) at 360G–362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (*Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335E, *Administrators, Estate Richards v Nichol and another* 1999 (1) SA 551 (SCA) at 561C–F).

[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation.'

[20] After careful consideration of the grounds of opposition raised by the first respondent, and taking into account that he has been in unlawful occupation of the premises for a significant period, during which he has resisted two previous attempts through the Courts to secure his eviction, I am satisfied that he has raised no valid defence to the application. It is accordingly just and equitable that the first respondent be evicted from the property.

[21] The next enquiry in terms of PIE is for the Court to determine a just and equitable date on which the respondent must vacate the property. Counsel for the applicant submitted that the second respondent has attempted to give vacant possession of the property to the applicant, but these efforts have been stymied by the first respondent who continues to live on the property. Since the date of transfer, the applicant has been paying the bond on the property without any benefit accruing to him. Counsel further contended that the first respondent has not made out a case for him falling within a specific category of persons in terms of section 7 of the Act deserving of a higher level of consideration when considering a date for when an eviction should take place. At best, Mr Naidoo submitted that a month from the date of the Order of this Court would be fair to the first respondent. Mr Havemann submitted that a period of three (3) months would do justice in the circumstances.

[22] Taking into account the circumstances of the first respondent (such as have been placed before the Court, the length of his unlawful occupation and the prejudice facing the applicant who continues to pay a bond on the property without having its use, I am satisfied that the following order accords with the requirements of being just and equitable.

[23] I make the following Order:

- a. That the first respondent and all other persons holding through the first respondent, being in occupation of the immovable property situated at 17 P[...] Road, Unit 19, B[...], Durban, KwaZulu-Natal, shall vacate the said property not later than 30 September 2014.
- b. In the event of the First respondent and any person holding through him refusing to comply with the Order in (a) above, the Sheriff of this Honourable Court or his Deputy be and is hereby authorised and empowered to forthwith eject from the said property the first respondent and all other persons occupying the said property.
- c. The first respondent is to pay the costs of the application.

M R CHETTY

JUDGE OF THE HIGH COURT

DURBAN

Appearances:

For the Plaintiff:

Adv.DD Naidoo, Instructed by Tasneem Paruk, Durban.

For the Defendant: Mr C Havemann, Instructed by CW Havemann Attorneys,
Durban.

Date of hearing: 30 July 2014.

Date of judgment: 01 September 2014.